

**TESTIMONY OF FATIMA GOSS GRAVES,  
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**ON FEDERAL ENFORCEMENT OF CIVIL RIGHTS LAWS TO PROTECT STUDENTS  
AGAINST BULLYING, VIOLENCE, AND HARASSMENT**

**TO THE U.S. COMMISSION ON CIVIL RIGHTS  
MAY 13, 2011**

My name is Fatima Goss Graves, and I am the Vice President for Education and Employment at the National Women's Law Center. Since 1972, the Center has been involved in virtually every major effort to secure and defend the legal rights of women and girls, including work to establish and enforce safe learning environments for all students. I appreciate your invitation to testify before the Commission on the enforcement of federal civil rights laws to protect students from harassment, including bullying and violence, in schools, and I applaud the Commission's decision to address and issue a report on this profoundly important issue.

My remarks will focus on gender-based harassment in schools. I will begin by discussing briefly what we know about the scope of this problem and its effects on students. I will then discuss recent efforts by the Department of Education's Office for Civil Rights (OCR) to address harassment, including violence and bullying, and what these efforts mean for students. Next, I will address remaining gaps in Title IX of the Education Amendments of 1972, as that law has been interpreted by courts, and its implementing regulations. Finally, I will highlight promising legislation pending before Congress and other legislative and administrative steps that Congress and the Administration could take to address harassment in our nation's schools.

**I. GENDER-BASED HARASSMENT COMES IN MANY FORMS.**

As the Department of Education has made clear, harassment "may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating."<sup>1</sup> In particular, online harassment, including what is commonly termed "cyber-bullying," has increased exponentially in recent years, as students use internet, e-mail, text messages, social networking sites, or other electronic formats to harass or intimidate peers.<sup>2</sup>

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<sup>1</sup> U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter on Bullying, at 2 (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

<sup>2</sup> In one recent study, four percent of students aged 12 to 18 (five percent of girls and two percent of boys) reported experiencing cyber-bullying, including on school property, during the school year. SIMONE ROBERS ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2010, at 43 (2010), available at <http://nces.ed.gov/pubs2011/2011002.pdf>. Among those students who reported being victims of cyber-bullying, five

Gender-based harassment, including bullying and violence, also manifests itself in many ways. It includes sexual harassment, or “unwelcome conduct of a sexual nature.”<sup>3</sup> It also includes sexual violence, which “refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent.”<sup>4</sup> And gender-based harassment also covers conduct that is not sexual in nature, but is instead based on sex-stereotypes. So, for example, the conduct of a group of boys who harass and intimidate a female student to discourage her participation in a school’s wrestling team because they consider her athletic activity unfeminine constitutes gender-based harassment, even if the boys’ intimidation is not sexual in nature. Likewise, a girl who targets a female classmate for repeated humiliation and name-calling, including through electronic means such as blogs or Facebook, because the classmate is pregnant is engaged in gender-based harassment.

Gender-based harassment, including bullying and violence, need not be perpetrated by boys or targeted at girls. Rather, it may come in many forms, and affects both boys and girls. Students can be harassed by other students, teachers, coaches, other school employees, and third parties.<sup>5</sup> In addition, the harassing conduct need not be directed at a particular individual.<sup>6</sup> Images posted on walls and offensive gender-based comments heard by a group can create a hostile environment.<sup>7</sup> Finally, an individual need not intend to harm his victim through harassing conduct or engage in repeated harassing acts for his conduct to rise to the level of harassment.<sup>8</sup>

## **II. GENDER-BASED HARASSMENT IN SCHOOLS IS A SERIOUS PROBLEM WITH DEVASTATING EFFECTS FOR STUDENTS.**

Gender-based harassment, including bullying and violence, is a widespread problem in our nation’s schools, and girls are often, but certainly not exclusively, the victims of such conduct. For example, 32 percent of all students (33 percent of girls and 30 percent of boys) aged 12 to 18 reported being bullied at school in 2007.<sup>9</sup> Shockingly, seven percent of those who reported

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percent said the conduct occurred once or twice a week. *Id.* The study’s findings on cyber-bullying were based on the School Crime Supplement to the National Crime Victimization Survey. *Id.*

<sup>3</sup> U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter on Sexual Violence, at 3 n.9 (Apr. 4, 2011), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>4</sup> *Id.* at 1.

<sup>5</sup> *See, e.g.*, U.S. Department of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at 10-13 (2001), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>6</sup> Dear Colleague Letter on Bullying, *supra* n.1, at 2.

<sup>7</sup> *See, e.g.*, *Jennings v. Univ. of N.C.*, 482 F.3d 686, 696-98 (4th Cir. 2007) (holding that a rational jury could conclude that a coach’s sexually-charged comments to women’s soccer team created a hostile environment in violation of Title IX); *Bryant v. Indep. Sch. Dist. No. 1-38*, 334 F.3d 928, 932-34 (10th Cir. 2003) (holding that Title IX standards applied to a Title VI case and remanding to a district court to determine whether a school was deliberately indifferent to racial slurs and epithets inscribed in school furniture, notes in lockers, and students wearing t-shirts with confederate flags, which created a hostile environment).

<sup>8</sup> Dear Colleague Letter on Bullying, *supra* n.1, at 2.

<sup>9</sup> ROBERS ET AL., *supra* n.2, at 43. This statistic is based on data from the School Crime Supplement to the National Crime Victimization Survey. Other students are affected not only by overt aggression manifested as bullying, but by “relational aggression,” which involves “behavior intended to harm someone’s social relationship with others, such as intentionally excluding or ignoring someone and spreading harmful lies or rumors.” VICKI NISHIOKA ET AL.,

being bullied said that the conduct occurred “almost every day.”<sup>10</sup> A 2001 study by the American Association of University Women (AAUW), which addressed sexual harassment,<sup>11</sup> found that 81 percent of students in grades 8 through 11 (83 percent of girls and 79 percent of boys) reported that they had experienced sexual harassment often, occasionally, or rarely during their schooling.<sup>12</sup> And, although less common, sexual violence remains a concerning problem. Public schools recorded 800 incidents of rape or attempted rape and 3,800 incidents of sexual battery not involving rape in 2007-2008, the most recent year for which data are available.<sup>13</sup> Those statistics may not provide a full picture of sexual violence, as they include only those incidents of which schools were aware. The AAUW study, which surveyed students, found that 12 percent of boys and 9 percent of girls in grades 8 to 11 reported being forced to do something sexual other than kissing at some time during their school careers.<sup>14</sup>

Given this data, there is simply no doubt that harassment, including gender-based harassment, affects both boys and girls. But it is worth noting the particular experience of girls with certain forms of harassment. For example, the AAUW study found that “[g]irls are more likely than boys to experience nonphysical or physical [sexual] harassment, and they are more likely than boys to experience it more frequently.”<sup>15</sup> Girls also were more likely to report certain forms of physical sexual harassment, including touching, grabbing, or pinching in a sexual way; being intentionally brushed up against in a sexual way; having their clothing pulled at in a sexual way; and being blocked or cornered in a sexual way.<sup>16</sup>

The emotional and physical effects of harassment, including bullying and violence, can be devastating for students, and this conduct may also affect girls and boys in somewhat different ways. For example, in the AAUW study of sexual harassment among students in grades 8 to 11, girls were more likely than boys to report feeling self-conscious, embarrassed, afraid, or less confident as a result of sexual harassment.<sup>17</sup> Harassment in school can also have a devastating impact on students’ educational success, leading victims of such conduct to avoid school altogether, to find it difficult to study, and to reduce participation in school or school activities.<sup>18</sup>

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STUDENT-REPORTED OVERT AND RELATIONAL AGGRESSION AND VICTIMIZATION IN GRADES 3-8, at 1 (2011), available at [http://educationnorthwest.org/webfm\\_send/1127](http://educationnorthwest.org/webfm_send/1127). For example, in a recent study using student survey data from a voluntary sample of Oregon schools, 48 percent of girls and 41 percent of boys in grades 3 to 8 reported that, at least once per month, children told lies about them so that other children would not like them. *Id.* at 6, 10-11.

<sup>10</sup> ROBERS ET AL., *supra* n.2, at 44.

<sup>11</sup> AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 46 (2001).

<sup>12</sup> *Id.* at 20-21.

<sup>13</sup> ROBERS ET AL., *supra* n.2, at 104, cited in Dear Colleague Letter on Sexual Violence, *supra* n.3, at 2.

<sup>14</sup> AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *supra* n.11, at 23.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 23.

<sup>17</sup> *Id.* at 32.

<sup>18</sup> See, e.g., *id.* at 37 (noting that girls who experienced sexual harassment were more likely than boys to report that, as a result of the harassment, they did not want to go to school, stopped talking as much in class, changed their seat in class to get away from someone, stayed home from school or cut class, found it hard to study, or avoided the

There is also significant reason to believe that we can do more to discourage harassment and improve school officials' awareness of and response to it. For example, many students may be unaware of their schools' policies on issues like bullying or sexual harassment. In 2001, one-fifth of students were uncertain whether their school had a sexual harassment policy, and just over one-third reported that their schools handed out booklets or other materials on sexual harassment.<sup>19</sup> And even students who are aware that the harassment they are experiencing is wrong may not report it to school authorities. For example, a recent study found that among students aged 12 to 18 who reported being bullied at school in 2007, the most recent year for which data are available, only 36 percent told a teacher or other adult at school.<sup>20</sup>

### **III. WEAKNESSES IN CURRENT LAW REGARDING GENDER-BASED HARASSMENT ARE OF GREAT CONCERN.**

Existing federal civil rights statutes offer at least one tool—albeit imperfect—to address these concerning levels of harassment, including bullying and violence, in schools. Because I have been asked to focus my remarks on gender-based harassment, I will correspondingly discuss the role of Title IX of the Education Amendments of 1972 and its implementing regulations and guidance in combating these problems.<sup>21</sup>

Title IX bans discrimination based on sex by recipients of federal financial assistance. Courts have long held that Title IX's broad prohibition against sex discrimination sweeps within its coverage gender-based harassment and violence in schools.<sup>22</sup> These court decisions recognized that such conduct may take many forms: It may be sexual in nature, or focus instead on sex-stereotyping, or in other words, be based at least in part on a victim's failure to conform to norms deemed appropriate for his or her sex or perceived gender.<sup>23</sup> The Supreme Court has also recognized that Title IX provides a private right of action, under which students may pursue claims for damages and injunctive relief to address harassment.<sup>24</sup>

Unfortunately, the Supreme Court has severely limited the circumstances in which students and their families may recover damages for gender-based harassment in school. In *Gebser v. Lago Vista Independent School District*,<sup>25</sup> the Court held that to recover damages for sexual harassment by a teacher or other employee, a student must show that a school official with authority to take corrective measures had "actual knowledge" of the harassment, to which the official responded with "deliberate indifference." Subsequently, in *Davis v. Monroe County*

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person who bothered or harassed them); NISHIOKA ET AL., *supra* n.9, at 1 (discussing existing research regarding the effects of bullying on educational participation more generally).

<sup>19</sup> AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *supra* n.11, at 15.

<sup>20</sup> ROBERS ET AL., *supra* n.2, at 44. Data are from the School Crime Supplement to the National Crime Victimization Survey from 2007, the most recent year for which data are available. *Id.*

<sup>21</sup> 20 U.S.C. § 1681(a); 34 C.F.R. § 106.31.

<sup>22</sup> *See, e.g., Lipsett v. Univ. of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988).

<sup>23</sup> *See, e.g., Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 222-24, 226 (D. Conn. 2006); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1306-07 (D. Kan. 2005).

<sup>24</sup> *See, e.g., Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60, 65-66, 75-76 (1992).

<sup>25</sup> 524 U.S. 274, 290 (1998).

*Board of Education*,<sup>26</sup> the Supreme Court established that schools can also be liable for student-on-student harassment, but it adopted *Gebser*'s "actual knowledge" and "deliberate indifference" standards, and required a plaintiff to show that the peer harassment was so "severe, pervasive and objectively offensive" that it deprived the student of the educational opportunities or benefits provided by the school.

Courts around the country have interpreted the *Gebser* and *Davis* standards in ways that have condoned truly egregious patterns of harassment and offered no monetary relief for students' past injuries. I will briefly discuss three areas of the developing case law that are of concern.

First, the requirement that a Title IX plaintiff seeking to recover damages must show that an appropriate official at her school, i.e., one with power to take corrective action, received actual notice of harassment has been interpreted in an excessively stringent way. For example, the Fourth Circuit denied a student damages for a teacher's sexual abuse in part because it held that the school principal, who had supervisory powers and the power to recommend disciplinary action against employees, was not an "appropriate official" whose acts could be attributed to the district.<sup>27</sup> Likewise, in a peer harassment case, a district court held that a teacher was not an "appropriate person" whose response to harassment could be attributed to the school, even though the prior harassing acts had occurred in the teacher's classroom.<sup>28</sup> Stunningly, at least one court has concluded that under the *Gebser* standard a school superintendent is not an official whose response to harassment can be attributed to the school district.<sup>29</sup> These cases have created a "notice" hurdle so high as to foreclose justice for many students who are victims of gender-based harassment. They have also created perverse incentives for those individuals who are "appropriate officials" in schools to remain ignorant of unlawful harassment and discourage reporting, quite the opposite of Title IX's purpose.<sup>30</sup>

Second, the *Gebser* requirement that educational institutions must be "deliberate[ly] indifferen[t] to discrimination" for a plaintiff to recover damages for sexual harassment under Title IX presents another bar for students to address harassment, including bullying and violence, when it occurs.<sup>31</sup> Some courts have interpreted this standard to countenance wholly ineffective

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<sup>26</sup> 526 U.S. 629, 633, 650 (1999).

<sup>27</sup> See, e.g., *Baynard v. Malone*, 268 F.3d 228, 238-39 (4th Cir. 2001) (holding that school principals under Virginia law are not appropriate district officials to measure actual knowledge of harassment under Title IX initiated by employees because principals can only make recommendations as to employee discipline or termination); cf. *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 362 (3d Cir. 2005) (recognizing that a school principal and assistant principal would normally be appropriate persons under Title IX but that they were not so "as a matter of law, by virtue of their positions").

<sup>28</sup> *Snethen v. Bd. of Public Educ.*, No. 406CV259, 2008 WL 766569, at \*7-\*8 (S.D. Ga. Mar. 24, 2008).

<sup>29</sup> *Rasnick v. Dickenson County Sch. Bd.*, 333 F. Supp. 2d 560, 566 (W.D. Va. 2004) (holding that a local superintendent was not an appropriate official with respect to a claim alleging sexual abuse by a teacher and that only a school board member could have filled that role).

<sup>30</sup> See, e.g., *Warren v. Reading Sch. Dist.*, 278 F.3d 163, 173-74 (3d Cir. 2002) (holding in a teacher-student sexual abuse case that a school guidance counselor was not an "appropriate person," despite the fact that the school principal, whom the court recognized could be an "appropriate person," said that she "was too busy to listen" to a victim's parents complain about potential abuse, and had instead referred the parents to the counselor (internal quotation marks omitted)).

<sup>31</sup> *Gebser*, 524 U.S. at 290.

school responses to harassment.<sup>32</sup> For example, one court concluded that a school could not be held liable under Title IX for sexual harassment, despite officials' knowledge on multiple occasions of sexual abuse, because the school temporarily separated the students and sent them to a guidance counselor only after a third incident.<sup>33</sup>

Finally, the Supreme Court's standard in *Davis* that peer-to-peer harassment must be "so severe, pervasive *and* objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school," stands in stark contrast to OCR's interpretation of Title IX and the analogous area of Title VII law.<sup>34</sup> OCR has long maintained that the appropriate standard to determine liability for sexual harassment under Title IX is whether the harassment is sufficiently severe or pervasive.<sup>35</sup> OCR's standard is also in accord with Title VII's prohibition on peer sexual harassment in the workplace, under which sexual harassment is actionable if it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."<sup>36</sup>

Interpretations of the *Davis* standard by lower courts have had a dramatically negative effect on student plaintiffs. For example, in *Hawkins v. Sarasota County School Board*,<sup>37</sup> the Eleventh Circuit held that persistent harassment by an eight-year-old, which included "sexually explicit and vulgar language and acts of objectively offensive touching," did not violate Title IX, even though two girls "faked being sick four or five times in order not to go to school" and the students' "parents testified that the[ ] [students] cried more frequently, appeared anxious, and were reluctant to go to school." The court held that such effects of harassment "fall[ ] short of demonstrating a systemic effect of denying equal access to an educational program or activity."<sup>38</sup> Of particular concern, it stressed that the harassment must have a "systemic" effect, which it interpreted to mean "that gender discrimination must be more widespread than a single instance of one-on-one peer harassment" and "the effects of the harassment [must] touch the whole or entirety of an educational program or activity."<sup>39</sup>

The good news for students is that the Supreme Court made clear in *Gebser* and *Davis* that the standards it created for damages do not implicate Title IX's administrative enforcement scheme.<sup>40</sup> Instead, with respect to administrative enforcement, OCR can take action if school officials *should have known* about the harassment; actual notice of the harassing conduct is not

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<sup>32</sup> See, e.g., *Gabrielle M. v. Park Forest-Chi. Heights Sch. Dist. 163*, 315 F.3d 817, 825 (7th Cir. 2003) (stating that *Davis* does not require funding recipients to remedy peer harassment" but instead to "not act *clearly unreasonably* in response to known instances of harassment").

<sup>33</sup> *Porto v. Tewksbury*, 488 F.3d 67, 74, 76 (1st Cir. 2007) (holding that a school district "acted reasonably in responding to . . . [peer-on-peer] inappropriate touching by separating [the two boys]" and, after three instances of such touching, "sending them to the guidance counselor").

<sup>34</sup> *Davis*, 526 U.S. at 650 (emphasis added).

<sup>35</sup> See Revised Sexual Harassment Guidance, *supra* n.5, at 3; see also Dear Colleague Letter on Bullying, *supra* n.1, at 2.

<sup>36</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (internal quotation marks and alterations omitted).

<sup>37</sup> 322 F.3d 1279, 1281, 1288-89 (11th Cir. 2003).

<sup>38</sup> *Id.* at 1289.

<sup>39</sup> *Id.*

<sup>40</sup> *Gebser*, 524 U.S. at 290.

required.<sup>41</sup> The “should have known” standard also applies when an individual files a lawsuit seeking injunctive relief, as opposed to damages.<sup>42</sup> Likewise, private litigants seeking injunctive relief, and the Department of Education in administrative enforcement actions, need not show deliberate indifference, but show that a school failed “to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”<sup>43</sup>

Moreover, even in a suit for damages, the *Gebser* and *Davis* standards only apply when the harassment does “not involve official policy of the recipient entity,” as the purpose of the standard is to ensure that the school is held liable for its own acts in not responding to harassment, not for a third party’s acts.<sup>44</sup> For example, in *Simpson v. University of Colorado*,<sup>45</sup> the Tenth Circuit held that the university had an official policy of deliberate indifference to sexual harassment in its football recruiting program, so the plaintiffs did not have to show “actual notice” of particular incidents of harassment.<sup>46</sup>

That said, the effect of the Supreme Court’s decisions in *Gebser* and *Davis* cannot be overstated. Simply put, these decisions have substantially hampered the ability of private litigants to receive full compensation under Title IX for their injuries resulting from past sexual harassment. Schools that ignore harassment can increasingly act with impunity.

#### **IV. RECENT ADMINISTRATIVE GUIDANCE HAS HELPED CLARIFY TITLE IX’S APPLICATION TO HARASSMENT.**

Seeking, at least in part, to clarify what constituted unlawful gender-based harassment in the wake of *Gebser* and *Davis*, OCR issued in 2001 detailed, revised guidance regarding sexual harassment (“Revised Sexual Harassment Guidance”).<sup>47</sup> It recognized that conduct that is “sufficiently severe, persistent, *or* pervasive” remains actionable under Title IX.<sup>48</sup> OCR also emphasized, consistent with the Title IX case law, that “gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility 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, if it rises to a level that denies or limits a student’s ability to participate in or benefit from the educational program.”<sup>49</sup> And it clarified that schools run afoul of Title IX by failing to respond to harassment of “a student on the basis of the victim’s failure to conform to stereotyped notions of masculinity and femininity.”<sup>50</sup>

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<sup>41</sup> Revised Sexual Harassment Guidance, *supra* n.5, at 13; Dear Colleague Letter on Bullying, *supra* n.1, at 2.

<sup>42</sup> Revised Sexual Harassment Guidance, *supra* n.5, at ii-iv.

<sup>43</sup> Dear Colleague Letter on Sexual Violence, *supra* n.3, at 4 & n.12.

<sup>44</sup> *Gebser*, 524 U.S. at 290.

<sup>45</sup> 500 F.3d 1170, 1177-79 (10th Cir. 2007).

<sup>46</sup> See also *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 967 & n.14 (9th Cir. 2010) (discussing *Simpson* in the context of a Title IX athletics case and noting the limits to the applicability of *Gebser*’s “actual notice” standard).

<sup>47</sup> See Revised Sexual Harassment Guidance, *supra* n.5.

<sup>48</sup> *Id.* at vi (emphasis added).

<sup>49</sup> *Id.* at 3 (internal footnote omitted).

<sup>50</sup> *Id.* at v.

Despite OCR’s Revised Sexual Harassment Guidance, gender-based harassment continued to pervade our nation’s schools. In some cases, such conduct led to particularly tragic consequences, including the suicide of students who endured repeated and severe gender-based abuse by their peers at school. For example, Phoebe Prince, a student who committed suicide in South Hadley, Massachusetts, was repeatedly called offensive names such as “Irish slut,” in addition to enduring a barrage of other verbal and physical harassment, conduct that implicated both Title IX and Title VI.<sup>51</sup>

These high profile tragedies, often stemming from conduct that the media described as “bullying,” called out for OCR’s attention and made plain the need for additional guidance reiterating existing law under Title IX and other federal anti-discrimination statutes and regulations. OCR recently responded by issuing two sets of guidance in the form of “Dear Colleague” letters.

### **A. OCR’s “Dear Colleague” Letter on Bullying and Harassment**

Nearly ten years after the Revised Sexual Harassment Guidance, OCR issued a “Dear Colleague” letter in 2010 to remind schools that conduct referred to as “bullying” may rise to the level of harassment long prohibited by Title IX and other federal statutes. The letter stressed that schools may, therefore, violate federal anti-discrimination statutes, including Title IX, “when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.”<sup>52</sup> Relying on well-established case law and the Revised Sexual Harassment Guidance, the Dear Colleague letter also reiterated that “[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>53</sup>

Drawing from the Revised Sexual Harassment Guidance and well-established case law, the letter used hypothetical examples to explain how basic principles of Title IX and other anti-discrimination laws apply in the context of bullying and harassment. So, for example, OCR included an example of gender-based harassment directed at a gay high school student “because he did not conform to stereotypical notions of how teenage boys are expected to act and appear,” and it recognized that such harassment would violate Title IX if a school failed “to take immediate and effective action to eliminate the hostile environment” for the student.<sup>54</sup> This example simply reiterated the Revised Sexual Harassment Guidance, which, as I discussed above, noted that Title IX prohibits gender-based harassment for a student’s failure to conform to traditional norms of masculinity or femininity.<sup>55</sup> The letter was not, as some critics have

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<sup>51</sup> See, e.g., Erik Eckholm & Katie Zezima, *Questions for School on Bullying and Suicide*, N.Y. TIMES, Apr. 1, 2010, at A1, available at <http://www.nytimes.com/2010/04/02/us/02bully.html?pagewanted=all>; Helen Kennedy, *Phoebe Prince, South Hadley High School’s ‘New Girl,’ Driven to Suicide by Teenage Cyber Bullies*, N.Y. DAILY NEWS, Mar. 29, 2010, available at [http://www.nydailynews.com/news/national/2010/03/29/2010-0329\\_phoebe\\_prince\\_south\\_hadley\\_high\\_schools\\_new\\_girl\\_driven\\_to\\_suicide\\_by\\_teenage\\_cy.html](http://www.nydailynews.com/news/national/2010/03/29/2010-0329_phoebe_prince_south_hadley_high_schools_new_girl_driven_to_suicide_by_teenage_cy.html).

<sup>52</sup> Dear Colleague Letter on Bullying, *supra* n.1, at 1.

<sup>53</sup> *Id.* at 2.

<sup>54</sup> *Id.* at 7.

<sup>55</sup> Revised Sexual Harassment Guidance, *supra* n.5, at v.

implied, a break with or an expansion of OCR’s previous interpretation of Title IX.<sup>56</sup> The Dear Colleague letter was also useful for its clarification that bullying and harassment prohibited by Title IX can take many forms, including electronic ones, such as the “use of cell phones or the Internet.”<sup>57</sup>

## **B. OCR’s “Dear Colleague” Letter on Peer-to-Peer Sexual Violence.**

In another “Dear Colleague” letter released in April 2011, OCR took a much-needed step to clarify schools’ responsibilities with regard to peer-to-peer sexual violence. In that letter, OCR made clear that sexual harassment includes acts of sexual violence, and that such conduct can violate Title IX.<sup>58</sup> It stressed that even a single incident of sexual harassment can be sufficiently severe to create a hostile environment, and that “a single instance of rape is sufficiently severe” to do so.<sup>59</sup> The letter supplemented the Revised Sexual Harassment Guidance by instructing institutions on the appropriate Title IX complaint procedure applicable to sexual violence, which must, among other things, assure prompt and equitable resolution of claims and apply a “preponderance of the evidence” standard to complaints.<sup>60</sup> It also identified a wide variety of potential remedies for a complainant alleging sexual violence.<sup>61</sup>

## **V. ADDITIONAL LEGISLATIVE AND REGULATORY EFFORTS ARE NEEDED TO PROTECT STUDENTS FROM GENDER-BASED HARASSMENT.**

As I noted above, Title IX provides an important tool to address gender-based harassment. But as my discussion of *Gebser* and *Davis* makes plain, there are critical steps that policymakers could take to ensure that students are safe at school and to prevent the kinds of tragic consequences of harassment that we have seen unfold in recent years at schools around the country. Below, I discuss multiple ways to strengthen Title IX and federal anti-discrimination law applicable to schools more generally.

### **A. Legislative Efforts**

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<sup>56</sup> See, e.g., Letter from Francisco M. Negrón, Jr., General Counsel, National School Boards Association, to Charlie Rose, General Counsel, U.S. Department of Education, at 7-8 (Dec. 7, 2010), available at <http://www.nsba.org/SchoolLaw/COSA/Updates/NSBA-letter-to-Ed-12-07-10.pdf> (arguing, without citing the discussion in the Revised Sexual Harassment Guidance on sex-stereotyping as a basis for harassment, that the OCR Dear Colleague Letter on Bullying’s recognition of overlapping forms of gender-based harassment and anti-LGBT comments was a “nuanced legal distinction[ ]” that “create[d] confusion that detracts from an understanding of the requirements of [Title IX]”).

<sup>57</sup> Dear Colleague Letter on Bullying, *supra* n.1, at 2; see also *id.* at 7 (noting that students’ activities on social-networking sites may constitute harassment that violates Title IX); *id.* at 6 (noting, among other harassing behavior, “circulating, showing, or creating e-mails or Web sites of a sexual nature,” as examples of conduct that may constitute sexual harassment and thus violate Title IX).

<sup>58</sup> See Dear Colleague Letter on Sexual Violence, *supra* n.3, at 1. The letter defined “sexual violence” as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent,” and noted that sexual violence includes “rape, sexual assault, sexual battery, and sexual coercion.” *Id.* at 1-2.

<sup>59</sup> *Id.* at 3; see also Revised Sexual Harassment Guidance, *supra* n.5, at 5-6.

<sup>60</sup> See Dear Colleague Letter on Sexual Violence, *supra* n.3, at 6-14.

<sup>61</sup> See *id.* at 16-19.

*First*, legislative action to correct the Supreme Court’s decisions in *Gebser* and *Davis* is sorely needed. In particular, the Supreme Court’s use of the “severe, pervasive *and* objectively offensive” standard in a claim for damages cries out for attention. Congress should clarify that even when a student is seeking a damages remedy, the appropriate standard is whether harassment is sufficiently severe *or* pervasive, consistent with OCR’s longstanding interpretation of Title IX and with Title VII law. Moreover, Congress should correct the Supreme Court’s use of an “actual notice” standard for Title IX plaintiffs to recover damages. The Civil Rights Act of 2008,<sup>62</sup> introduced in the 110th Congress, provides a model. That bill would have corrected the *Gebser* standard to make clear that under Title IX, if a third party, such as a student, subjects another student to sexual harassment, the victim could recover damages from the school if the school “knew or should have known of the harassment” and cannot “demonstrate that it exercised reasonable care to prevent and correct promptly any harassment based on sex.”<sup>63</sup>

*Second*, although Title IX mandates that educational institutions adopt policies that ban sex discrimination, the pervasive nature of harassment coupled with educational institutions’ failure to adequately prevent and remedy the conduct suggests that there is a need for clear policies on harassment, including bullying, that define prohibited conduct and detail grievance procedures. The Successful, Safe, and Healthy Students Act of 2011 (SSHSA),<sup>64</sup> introduced in the Senate this month by Senator Harkin, would, among other things, require districts in states receiving funds under the Act to “establish policies that prevent and prohibit harassment (which includes bullying) in schools.”<sup>65</sup> SSHSA would also require these school districts to establish grievance procedures for students or parents to complain about conduct that violates school discipline policies, and to identify an official who would be responsible for handling such complaints.<sup>66</sup> Moreover, the bill would require states to collect and report data measuring a variety of conditions for learning, including “the incidence and prevalence . . . of . . . violence, including harassment (which includes bullying), by youth and school personnel in schools and

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<sup>62</sup> S. 2554, 110th Cong. (2008); H.R. 5129, 110th Cong (2008).

<sup>63</sup> S. 2554, § 112(b); H.R. 5129, § 112(b).

<sup>64</sup> S. \_\_\_\_, 112th Cong. (2011).

<sup>65</sup> *Id.* § 5(c)(2)(A). The bill defines “harassment” as “conduct, including bullying, that is sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from a program or activity of a public school or educational agency, or to create a hostile or abusive educational environment at a program or activity of a public school or educational agency, including acts of verbal, nonverbal, or physical aggression, intimidation, or hostility.” *Id.* § 3(6). The conduct must be based on one of a number of student characteristics or the characteristics of a person with whom the student is or was associated: “actual or perceived race, color, national origin, sex, disability, sexual orientation, gender identity, . . . religion” or “any other distinguishing characteristics that may be defined by” a state or school district. *Id.* A state applying for funds under the Act would have to ensure “that the policies used to prohibit harassment (which includes bullying) . . . emphasize alternatives to school suspension that minimize students’ removal from grade-level instruction, promote mental health, and only allow out-of-school punishments in severe or persistent cases.” *Id.* § 5(d)(2)(B).

<sup>66</sup> *Id.* § 5(c)(2)(B).

communities.”<sup>67</sup> The Safe Schools Improvement Act of 2011, introduced in both the House and Senate, would make similar changes.<sup>68</sup>

Finally, the Student Non-Discrimination Act of 2011 (SNDA),<sup>69</sup> currently pending in both the House and Senate, would address the fact that no federal law prohibits *per se* LGBT-based bullying or harassment. Although Title IX covers LGBT-related bullying and harassment when such conduct targets a student’s failure to conform to sex stereotypes, it does not prohibit LGBT bullying and harassment more generally.<sup>70</sup> SNDA would, therefore, prohibit discrimination in K-12 public schools on the basis of the actual or perceived sexual orientation or gender identity of a student or of an individual with whom the student associates.<sup>71</sup> Modeled after Title IX, SNDA would provide for administrative enforcement and grant students a private right of action to challenge LGBT discrimination in schools.<sup>72</sup>

These important legislative changes should be incorporated into any bill reauthorizing the Elementary and Secondary Education Act of 1965 and should be passed expeditiously by Congress to address harassment in our schools.

## **B. Regulatory Efforts**

Although some weaknesses in current law require legislative action, additional administrative guidance, data collection, and technical assistance would be helpful as well.

First, OCR should further clarify schools’ obligations to address cyber-bullying. In some cases, schools’ obligations to address electronic harassment are clear: A harassing text message sent to a student in class is no different from a handwritten note passed to the student. Likewise, a website that students view in school is the equivalent of a note or picture pasted in a school hallway. However, in other instances, whether and when school officials have the authority to address student conduct that involves new media is unclear. For example, in one recent case, a district court held that a school violated the First Amendment when it suspended a student who, outside of school, posted on YouTube a videotape of a friend calling another female student a “slut” and other names and contacted classmates to encourage them to view the video.<sup>73</sup> Although OCR’s Dear Colleague letter on bullying made a step in the right direction by

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<sup>67</sup> *Id.* § 3(3)(B)(ii)(V); *see also id.* § 3(3)(B)(iii) (requiring reporting of data in the aggregate and disaggregated by certain groups of students); *id.* § 5(g) (requiring state data collection at the state and school-building level and public reporting).

<sup>68</sup> S. 506, 112th Cong. (2011); H.R. 1648, 112th Cong. (2011).

<sup>69</sup> S. 555, 112th Cong. (2011); H.R. 998, 112th Cong. (2011).

<sup>70</sup> *See* Dear Colleague Letter on Bullying, *supra* n.1, at 8.

<sup>71</sup> S. 555 § 4; H.R. 998 § 4.

<sup>72</sup> S. 555 §§ 5, 6; H.R. 998 §§ 5, 6.

<sup>73</sup> *See J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1097-99 (C.D. Cal. 2010); *see also Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 251-52 (3d Cir. 2010) (addressing the question whether, consistent with the First Amendment, a school district can punish a student who used a private computer to create a “parody profile” of the student’s school principal on a social networking site, when that conduct “originated outside of the classroom”, . . . did not disturb the school environment[,] and was not related to any school sponsored event”), *reh’g en banc granted and opinion vacated* (3d Cir. Apr. 9, 2010).

indicating that student conduct through electronic means could constitute harassment,<sup>74</sup> the National Women’s Law Center has heard repeatedly from parent groups, school officials, and advocates for students that additional guidance from OCR is necessary. In addressing the issue of cyber-bullying or harassment through electronic means, OCR should be guided by not only the range of First Amendment concerns, but Title IX’s broad mandate against discrimination and the basic goal of providing a safe learning environment for students.

Second, the Department of Education should consider expanding its collection of data from local education agencies on harassment through the Civil Rights Data Collection (CRDC) dataset. Such data collection should include incidents involving a student’s gender identity or sexual orientation.<sup>75</sup> Additionally, the Department should further modify its definition of harassment for purposes of the CRDC to track separately incidents of cyber-bullying and where they occur. Educators, researchers, and advocates need more data to address adequately the increasing prevalence of this form of harassment.

Finally, OCR should also prioritize technical assistance to schools, districts, and states. Many schools and their officials would like to do the right thing, protecting students from bullying, harassment, and violence while ensuring compliance with Title IX and other federal anti-discrimination laws. With the help of technical assistance, those schools and leaders can better understand what is prohibited by federal statutes, address violations in the peer-to-peer context, and fashion effective remedies.

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Again, thank you very much for the opportunity to testify. I look forward to your questions.

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<sup>74</sup> Dear Colleague Letter on Bullying, *supra* n.1, at 2, 6-7.

<sup>75</sup> Such a change is within the Department’s power for two reasons. First, many students who are, or are perceived to be, LGBT are subjected to overlapping forms of discrimination, including harassment, bullying, intimidation, and violence based not only on their sexual orientation or gender identity, but also on their failure to conform to gender stereotypes, which is strictly prohibited by Title IX. *See, e.g., Riccio*, 467 F. Supp. 2d at 222-24, 226; *Theno*, 394 F. Supp. 2d at 1306-07. Furthermore, in October 2009, President Obama signed into law the Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act, legislation that, among other things, added acts of violence against LGBT individuals to the list of federal hate crimes. *See* Pub. L. No. 111-84, §§ 4707(a), 4711, 123 Stat. 2385, 2842 (2009) (codified as amended at 18 U.S.C. § 249).