Civil Rights

Bullying as a Civil Rights Violation: The U.S. Department of Education's Approach to Harassment

*By Kenneth L. Marcus**

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 website, stopbullying.gov; and issuing new regulatory guidance ostensibly to combat this problem.[1] 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.[2] 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 case law. Instead, it provides OCR's distinctive and controversial interpretation of its civil rights statutes, deviating in significant ways from the courts' precedents.[3]

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,[4] and why some critics decried it for inventing a federal right against bullying that does not really exist.[5] 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.[6]

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]."[7] Having made this gesture toward the topic of bullying, Ali then does not discuss it for the remainder of her ten-page policy missive and focuses instead on harassment. The reason for this is that 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 an *harassment* policy, OCR's new guidance has been widely and correctly understood as providing an "expansive reading" of the applicable statutes.[8] 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."[9] This section will address the broad interpretation that 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 standard for establishing harassment under OCR's statutes that disregards the more restrictive standard previously adopted by the U.S. Supreme Court.[10] In fairness, it should be acknowledged that this deviation is not unique to the Obama Administration's approach, since the new policy merely reiterates a standard that OCR announced as early as 1994[11]

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and which OCR reiterated during the second George W. Bush administration.[12] Nevertheless, the conflict is a real one.

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. . . ."[13] This deviates from the 1999 "severe, pervasive, *and* objectively offensive" standard that the Supreme Court established in *Davis v Monroe County Bd. of Educ*. [14] 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."[15]

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,[16] 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."[17]

The continuing difference between OCR's regulations and Supreme Court standards renders OCR's 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 considerations apply in OCR's administrative proceedings.[18] 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."[19] On the other hand, this spokesperson reportedly argued,[20] "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."[21] In fairness to OCR, 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 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 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."[22] 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.[23]

The policy continues with another provision that 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."[24] 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."[25] 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.[26]

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.[27] The new OCR 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.[28]

Here again, the new OCR policy merely recycles the Clinton Administration policy.[29] 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 that 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.[30] 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.[31] 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, given the genocidal as well as pseudo-scientific connotations which these terms have historically had.[32]

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,"[33] siding with the position taken by the first George W. Bush Administration and against the position taken by the second.[34]

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 establishing that OCR's jurisdiction over anti-Jewish ethnic discrimination is not diminished by the fact that Judaism is also a religion.[35] 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.[36] 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.[37] 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 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.[38]

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.[39] 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.[40] 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."[41] For this reason, the scope of protection afforded under Title VI must be co-extensive with that of the Equal Protection Clause.[42] 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.[43] 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.[44] 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 commentators (including this author) 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.[45] 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."[46] 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.[47]

OCR's decision not 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 that 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.[48] The American Bar Association has taken a middle position, endorsing the new policy but admonishing that it "should not be used to compromise the protected First Amendment free speech rights of students."[49] 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.

Endnotes

1 *See* Nia-Malika Henderson, *Obama Speaks out Against Bullying, Says, 'I Wasn't Immune,'* Wash. 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.

2 Russylnn Ali, Assistant Secretary of Education for Civil Rights, Dear Colleague Letter (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html.

3 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).

4 *See* Dana Rudolph, *White House Hosts Anti-Bullying Forum*, Windy City Times, *available at* http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=30913 (syndicated column).

5 *See* Hans Bader, *Washington Invents an Anti-Bullying Law*, Minding the Campus (Mar. 21, 2011) [hereinafter Bader, *Anti-Bullying Law*], *available at* http://www.mindingthecampus.com/originals/2011/03/_by_hans_bader_theres.html.

6 *Id.* at 1.

7 *Id.*

8 *See, e.g.*, Letter from 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*, Atlantic, Mar. 23, 2011, *available at* http://www.theatlantic.com/politics/archive/2011/03/obama-administration-soft-on-bullying-hard-on-speech/72926/ (same).

9 Bader, *Anti-Bullying Law*, *supra* note 5. 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.

10 For representative criticisms, see, e.g., Negrón, *supra* note 8, at 2-3 (criticizing new policy's deviation from Davis); Kaminer, *supra* note 8 (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/, [hereinafter Bader, *Harassment and Bullying*] (same).

11 *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), *available at* http://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf [hereinafter "Sexual Harassment Guidance"] (same).

12 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), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html (reissuing Clinton-era Sexual Harassment Guidance with substantially same standard).

13 Ali, *supra* note 2, at 2 (emphasis added).

14 Davis v. Monroe County Bd. Of Educ., 526 U.S. 629, 653-54 (1999) (emphasis added).

15 *Id.*

16 Ali, *supra* note 2, at 2; Sexual Harassment Guidance, *supra* note 11.

17 *Davis*, 526 U.S. at 652-53.

18 *See, e.g.*, *Education Department Attorney Addresses NSBA's Objections to Bullying Letter*, SBN Conference Daily (Apr. 2011), *available at* http://schoolboardnews.nsba.org/2011/04/education-department-attorney-addresses-nsba%E2%80%99s-objections-to-bullying-letter/ (reporting on the justification that OCR Regional Counsel Paul Grossman, speaking on behalf of Assistant Secretary Ali, provided for this discrepancy).

19 *Id.*

20 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 Bill Rts. J. 886 n.292 (2007).

21 *Id.*

22 Ali, *supra* note 2, at 8.

23 *Cf.* Sexual Harassment Guidance, *supra* note 11, 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.").

24 *Id.*

25 *Id.*

26 *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).

27 Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion).

28 Ali, *supra* note 2, at 7-8.

29 Sexual Harassment Guidance, *supra* note 11, 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).

30 Ali, *supra* note 2, at 5-6.

31 *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 (2006).

32 *See* Kenneth L. Marcus, Jewish Identity and Civil Rights in America 9-10, 23-24, 98-103 (2010).

33 Ali, *supra* note 2, at 5.

34 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 479 (2011), http://www.jsantisemitism.org/pdf/jsa_2-2.pdf.

35 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) , http://www2.ed.gov/about/offices/list/ocr/

religious-rights2004.html.

36 Marcus, Jewish Identity, *supra* note 32, at 81-97 [hereinafter 2004 policy].

37 481 U.S. 615 (1987).

38 St. Francis College v. Al-Khazraji, 481 U.S. 604, 613, n.5 (1987).

39 *See generally* Marcus, Jewish Identity, *supra* note 32, at 105-108.

40 *See, e.g.*, Gratz v. Bollinger, 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 Univ. of Cal. v. Bakke, 438 U.S. 265, 286 (1978) (Powell, J.); *id.* at 327 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part); Marcus, *Anti-Zionism*, *supra* note 20, at 866-67, 72-74.

41 110 Cong. Rec. at 5252. This sentiment, which the courts have treated as representative, is echoed throughout the legislative history of Title VI. *See* Marcus, *Anti-Zionism*, *supra* note 20, at 866-67 and sources cited therein.

42 *See generally* Marcus, Jewish Identity, supra note 32.

43 These three issues are discussed at greater length in Marcus, OCR Anti-Semitism Policy, *supra* note 34.

44 *See generally* Gary A. Tobin, Aryeh K. Weinberg & Jenna Ferer, The Uncivil University: Intolerance on College Campuses (2d ed. 2009).

45 *See, e.g.*, Kenneth L. Marcus, *Privileging and Protecting Schoolhouse Religion*, 37 J.L. & Educ. 505 (2008).

46 Kaminer, *supra* note 8.

47 *See, e.g.*, Gerald A. Reynolds, First Amendment Dear Colleague Letter (July 28, 2003), *available at* http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

48 Bader, *Harassment and Bullying*, *supra* note 5.

49 Am. Bar Ass'n Resolution 107A, adopted by the House of Delegates, Feb. 14, 2011, *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/house_of_delegates/107a_2011_my.authcheckdam.pdf.