

TESTIMONY OF
ROGER CLEGG,
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ON
THE FEDERAL GOVERNMENT'S ROLE
IN PREVENTING STUDENT HARASSMENT
ON ACCOUNT OF SEXUAL ORIENTATION
BEFORE
THE U.S. COMMISSION ON CIVIL RIGHTS
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Introduction and Overview

Thank you very much, Mr. Chairman, for the opportunity to testify today. My name is Roger Clegg, and I am president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Falls Church, Virginia. Our chairman is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. I should add that Ms. Chavez was once the staff director of the U.S. Commission on Civil Rights, and that I was once the Deputy Assistant Attorney General in the U.S. Justice Department's Civil Rights Division, and that one of my duties there was supervising the Educational Opportunities Section.

The question I will discuss today is: Should the federal government ensure that students are not harassed because of their sexual orientation?

Before I begin, though, let me offer a framework that might help organize the kinds of objections that have been made to such intervention, at least some of which you will hear today.

Sometimes kids tease, harass, or bully other kids on the basis of sexual orientation. Should the federal government intervene to make sure local schools are intervening against this student-on-student behavior? (Note that the only suggestion I'm aware of that the schools themselves are discriminating is, risibly, in their use of dress codes that treat boys and girls differently.) To decide whether there should be federal intervention, we normally ask three questions. First, is this within the federal government's enumerated powers? Second, would the kind of federal intervention being suggested violate some specific constraint on federal governmental power, like the First Amendment? And, third, is there any reason to suppose that this problem could not be handled at the local level? There are problems here with all three, but I will focus on the latter and then discuss the even easier issue of why the federal government not only *shouldn't* have this power, but that currently it clearly *doesn't*.¹

¹ There are still other problems with the antibullying/antiharassment policy being promulgated by the Obama administration. For example, it raises serious issues in the degree to which it would hold school districts liable for the actions of individual students, in the standard of proof it would use, and in its failure to follow federal rulemaking requirements. Hans Bader, who used to work at the Department of Education's Office for Civil Rights, has thoughtfully analyzed these as well as the First Amendment and other individual rights issues raised by the Obama administration's policies. See "Washington Invents an Anti-Bullying Law," available at <http://www.mindingthecampus.com/originals/2011/03/ by hans bader theres.html>; "Free speech is a casualty in Obama's campaign against bullying," available at <http://washingtonexaminer.com/blogs/opinion-zone/2011/03/free-speech-casualty-obamas-overzealous-campaign-against-bullying#ixzz1JcNDoH00>; "Obama Administration threatens free speech in letter on harassment and bullying," available at <http://www.examiner.com/scotus-in-washington-dc/obama-administration-threatens-free-speech-letter-on-harassment-and-bullying>; "Education Department 'Dear Colleague' Letter Shreds Presumption of Innocence in Harassment Cases, Ignoring Supreme Court," available at <http://www.openmarket.org/2011/04/08/education-department-dear-colleague-letter-shreds-presumption-of-innocence-in-harassment-cases-ignoring-supreme-court/>; and "Education Department undermines accuracy, due process in sexual harassment cases," available at <http://www.examiner.com/scotus-in-washington-dc/education-department-undermines-accuracy-due-process-sexual-harassment-cases>. See also [Letter from National School Boards Association's General Counsel re OCR](#)

What's Really Going on Here?

A lot of people have an instinct for believing that, if something is wrong, it should be unconstitutional or at least illegal, and that of course the federal government should step in to stop it.

But that is a dangerous instinct. Just because something is wrong, doesn't mean it is unconstitutional or even that it should be illegal. And even if something should be illegal, it doesn't mean that it should be illegal as a matter of federal law.

This is not something that gay-rights advocates, in particular, should have to be reminded of. It was not so long ago that they were the victims of those who reasoned that, if something is morally wrong, then it ought to be illegal, and that it didn't matter if someone's personal liberty would be limited by such a law. Making it illegal to "harass" someone because of his or her sexual orientation can be especially problematic here.

For an example, let's cut to the chase: Children and, especially, adolescents have teased, harassed, and bullied one another on the basis of real or perceived homosexuality for a long time, and maybe forever. No one until recently has suggested that this is a federal issue. The reason some would make it a federal issue now is not because suddenly the problem has gotten worse. After all, being gay is more accepted now than it used to be, certainly among those running our public schools and disciplining our students. In fact, the reason this is being made into a federal issue is because it is seen as part of a larger culture war that gay-rights advocates are winning and in which they are hoping to press their advantage.

This culture war is between those who think that being gay is an undesirable thing and that gay sex is a sin, and those who think that being gay is nothing to be ashamed of and that there is nothing wrong with gay sex (or cross-dressing or whatever). Those in both camps want to be able to instill their viewpoints among young people as well as adults. Today, however, the antihomosexuality folks are not asking the schools or the government affirmatively to do anything to advance their agenda, other than to leave them alone; it is the gay-rights folks who want schools and, if necessary, the federal government to intervene.

And I suspect that one reason for the Executive Branch's interest in this topic is political: It is a way to appease part of its base, it is easy to be against bullying, and it is less complicated for this administration than, say, figuring out what to do with the economy or in Libya.

["Dear Colleague" letter on bullying and harassment](http://www.nsba.org/SchoolLaw/COSA/Updates/NSBA-letter-to-Ed-12-07-10.pdf), available at <http://www.nsba.org/SchoolLaw/COSA/Updates/NSBA-letter-to-Ed-12-07-10.pdf>.

Difficult Lines to Draw

There are millions of Americans who believe that gay sex is a sin. If they say so to someone who is gay, should they be thrown in jail or fined or otherwise punished by the government on the grounds that this is harassment? Should the federal government demand that local schools discipline those Americans' children if a child makes such a statement in school?

I would hope not, and I would hope that at least some gay-rights advocates would agree with me, and would reassure me that they would draw a line between protected speech like that and what they would define as "harassment" because of sexual orientation. Many Christians and others believe strongly in a similar line, in a distinction between hating the sin and loving the sinner. I think that nearly everyone would agree that beating up someone in school on the basis of that victim's real or perceived sexual orientation is wrong.

But the question is where and how to draw the line and who should draw it. The line-drawing in this area will not always be easy – there are gray areas between argument and teasing and harassment, between threats and horseplay and assault – and certainly the lines, even if rightly drawn in theory, will often be crossed by politically correct government bureaucrats in Washington and the lawsuit-shy educators who are intimidated by them. For example, anything that smacks of sensitivity training or speech codes will immediately raise real problems.

After all, if federal bureaucrats can – as I will discuss in a moment – twist the meaning of "sex" into "sexual orientation," they are certainly capable of defining "harassment" to mean just about anything.²

Federal Involvement Won't Improve the Line-Drawing

To explore a bit further some of the tricky issues in this area (and even putting aside the way they are further complicated by the First Amendment and Equal Protection Clause and the judicial decisions interpreting them), suppose you have two 16-year-old students, and the first one says, "Homosexuality is not what God wants for you," and the other replies, "Believing in God is stupid." What, if anything, do we want a school official to do if she overhears that exchange? Suppose further that there are four schools. The teacher at the first, believing that both students are entitled to express their opinions, does nothing. The teacher at the second, believing that neither student should be harassed because of his beliefs, scolds each. A third teacher scolds the former but not the latter, for what it considers to be a good reason under the

² For other examples of the bureaucratic aggressiveness in this area, see the analyses by Hans Bader, *supra* note 1. I should add that legislation like the Safe Schools Improvement Act does not reassure me at all. The version introduced this year in the Senate (S. 506) defines "harassment" as "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" To call this definition open-ended is a gross understatement.

specific circumstances (perhaps the former had escalated the dispute in some way, by shouting or shaking his fist or recruiting other students); and the fourth scolds the latter but not the former, for the same reason (and perhaps because her school views religious harassment as more objectionable, for legal and/or policy reasons, than harassment on the basis of sexual orientation).

Are any of these teachers acting irrationally or unreasonably? More to the point, are they acting irrationally or unreasonably *and* will it help to call the bureaucrats under Thomas Perez and Russlynn Ali to the rescue?

And now suppose the students are six years old instead of sixteen: Do we begrudge a kindergarten teacher's decision that, really, no one is interested in these two children's views on theology and sexual orientation and the intersection between the two, and tells one or the other or both to be quiet and go back to their coloring books? What if the students are eight, or eleven, or thirteen?

And let's not forget the role of parents here – both in intervening on their children's behalf (with the school and with other parents) and in counseling their children (and reminding them that, alas, there will always be a lot of jerks in the world).

But, again and in any event, does it really make sense to insist that the federal government add its two cents to how best to handle the matter?

Keep It Local

I would rather have the lines drawn at the most local level possible. No doubt this will sometimes result in line-drawing that this or that group will complain about, but that will also be the case if the line-drawing is done by the feds. The presumption should be for only a limited federal role in matters of local schools and local school discipline. Sometimes – as with racial discrimination – that presumption can rightly be overcome. But I cannot imagine that this is the case here. Note again that this is nothing remotely like the desegregation situation where local schools had themselves been unapologetically engaging in discrimination against African Americans; here, rather, any mistreatment is by students against students, there is no entrenched antigay policy in the public schools, and the issue is whether the federal government nonetheless needs to police the local schools in their reaction to the alleged mistreatment.

As noted earlier, I have little doubt that part of the agenda here is symbolic: To use the full power of the federal government to vilify and marginalize those who think that gay sex is a sin.

Now, a gay-rights advocate may say that, just because there are people who think that something is immoral, doesn't mean that a person who disagrees shouldn't be allowed to behave differently. And my answer to this person would be: Exactly. And who are the ones here who are trying to use the law to penalize private behavior? *You* are.

We can all be against bullying and harassment, and it really doesn't matter whether the motives are politically incorrect or not. Children should not be mistreated because for their religious beliefs, or sexual orientation, or hair color, or whatever. But it is a big leap from this to saying that there ought to be a federal role, and a special federal role for some kinds of politically incorrect bullying and harassment.

Accordingly, I do not think there should be a federal law that makes it illegal for one student to harass another on account of sexual orientation – either directly, or indirectly by using the power of the federal government to press local schools into handling these matters one way rather than another. I don't view that as a particularly close question.³

Current Law: "Sex" Is Not "Sexual Orientation"

But an even easier question is whether there already exists such a law. The answer is no, and it is very disturbing that the federal government is behaving as if there is.

The only applicable legal authority enforced by and cited by the Department of Education's Office for Civil Rights in its October 26, 2010 letter (page 1) is Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., which forbids discrimination "on the basis of *sex*." This letter (footnote 7) also notes that the Justice Department "has jurisdiction over Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c (Title IV), which prohibits discrimination on the basis of race, color, *sex*, religion, or national origin by public elementary and secondary schools and public institutions of higher learning." The Justice Department has also cited 42 U.S.C. 2000h-2 in this context, which gives it authority to intervene in cases involving discrimination "on account of race, color, religion, *sex* or national origin."⁴

I have to submit this statement before reading the statements of the officials from the Obama administration here today. But, based on what they have said in the past, my understanding is

³ By the way, I wonder if this kind of antibullying discipline will have a disparate impact on the basis of sex, or sexual orientation, or race or national origin. Since challenging disciplinary policies that have a disparate impact is another (misguided, in my view) administration policy, I thought I would ask.

⁴ It is possible to have an equal protection violation of the Fourteenth Amendment as a result of discrimination on the basis of sexual orientation rather than sex. See *Lawrence v. Texas*, 539 U.S. 558 (2003). But in this case it would require the state's action to be irrational. Having a dress code that allows girls to wear makeup and high heels and forbids boys from doing so is not irrational. Disciplining children more sternly for calling someone a "nigger" than for calling someone a "queer" is not irrational either; in addition, in situations like this it is not clear that the state is discriminating at all – it is only failing to intervene against private discrimination, which generally does not raise any constitutional problem. Note that the lack of any likely equal protection violations here would call into question the constitutionality of any statute in this area were one to be enacted. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). The need for an underlying constitutional violation should be borne in mind when considering any proposals for legislation in the bullying area generally.

that they do not themselves believe that there is a federal statute that actually bans discrimination on the basis of sexual orientation. They might even concede as much.⁵ After all, “sex” does not mean “sexual orientation,” and it certainly did not mean that in 1972. That’s all there is to it.

Instead (see also the appendix to my testimony) they have concocted a legal argument that says the use of “sexual stereotypes” is banned by the laws that ban discrimination on the basis of sex, and they are using this argument to bootstrap in a ban on sexual orientation. (The EEOC is doing the same thing, by the way, under Title VII:

<http://www.eeoc.gov/eeoc/newsroom/release/3-29-11.cfm> .)

Now, it is certainly possible that sexual stereotyping can lead to sex discrimination. For example, if an accounting firm won’t promote a woman to partner if she *is* aggressive since this is not considered to be ladylike, but also won’t promote a woman to partner if she *isn’t* aggressive since partners need to be aggressive, then women are being put in a double-bind (the real problem) and are being discriminated against because of their sex. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). But this doesn’t mean that all such “stereotyping” is sex discrimination. Let’s take the brass-tacks example: Saying that men should date women and not other men might be characterized as using stereotypes (“Men should go on dates with women, not with other men”), but it cannot fairly be characterized as a statement that is sexually discriminatory – rather, it is a statement about sexual orientation. Some sexual stereotyping can fairly be called sex discrimination but some cannot – and can really be fairly characterized as being about nothing more nor less than sexual orientation. If, for example, the stereotypes are used to decide if someone is gay, but the subsequent teasing or harassment is because the individual is thought to be gay, not because he is male, then that is not sex discrimination. Conversely, in the double-bind situation, no woman can make partner because of stereotypes.

So, as you think about the administration’s arguments, stop every now and then, even when the argument seems to be very plausible, and ask yourself: Now, really, is what students are doing here discrimination because of sex, or is it discrimination because of sexual orientation (and it is simply won’t do to say it is “both,” by the way, because it almost never will be)? Because if it is the latter, then even the administration is conceding that no federal statute has been implicated.

⁵ On the other hand, the settlement agreement for *J.L. v. Mohawk Central School District*, No. 09-CV-943 (N.D.N.Y. Mar. 29, 2010), which the Justice Department signed, included (page 3, para. 5) a provision for the school district’s staff to undergo “training and instruction ... with respect to the prohibition of discrimination and harassment based on sex, gender identity, gender expression, and sexual orientation.”

I would be curious to know, by the way, if the administration officials could describe the situations in which they would *not* view discrimination on the basis of sexual orientation as also discrimination on the basis of sexual stereotypes that is, they think, therefore illegal. If they have a hard time thinking of such situations, then that means they believe that Title IX essentially *does* ban discrimination based on sexual orientation – an untenable position and one that the administration has so far refused to admit it is taking.⁶

If the people on the other side of the aisle here truly believe in personal liberty, they should be very reluctant for the federal government to be making up laws that don't exist to punish those who are, in its view, behaving unacceptably. That is, assuredly, a sword that cuts both ways.

Conclusion

Let me conclude my testimony with some famous dialogue from Robert Bolt's play *A Man for All Seasons* (quoted by the Supreme Court in *TVA v. Hill*, 437 U.S. 153, 195 (1978)):

Alice: Arrest him!

More: Why, what has he done?

Margaret: He's bad!

More: There is no law against that.

Roper: There is! God's law!

More: Then God can arrest him.

Roper: Sophistication upon sophistication.

More: No, sheer simplicity. The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal.

Roper: Then you set man's law above God's!

More: No, far below; but let me draw your attention to a fact — I'm not God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester. I doubt if there's a man alive who could follow me there, thank God.

Alice: While you talk, he's gone!

More: And go he should, if he was the Devil himself, until he broke the law!

Roper: So now you'd give the Devil benefit of law!

More: Yes. What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

More: Oh? And when the last law was down, and the Devil turned round on you, where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast — man's laws, not God's — and if you cut them down — and you're just the man to do it — do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

Thank you very much, Mr. Chairman, for the opportunity to testify today. I would be happy to try to answer any questions the Commission has.

⁶ The only situations I can think of might be the atypical ones where the discrimination is impersonal (a student announces generally that no gays are welcome to sit at his table in the cafeteria) or where, say, the student being harassed has only characteristics that can be viewed as his or her sex's own, not counting the individual's desire to have sex with someone of his or her sex.

Appendix

Here is what I've written on specific matters in this area as they've arisen during the Obama administration; all three items were posted last year on *National Review Online's* "The Corner."

<http://www.nationalreview.com/corner/196822/your-tax-dollars-work/roger-clegg>

[Your Tax Dollars at Work](#) (March 23, 2010 5:13 P.M.)

Invoking its authority to "enforce[e] laws that prohibit discrimination against public school students on the basis of, among other things, sex," the Justice Department's civil-rights division in recent months launched investigations and requested information from one school regarding a male student there who wore a pink wig and makeup (as well as "skinny jeans" and "vintage" clothes, whatever those are) and from another school where a male student wore a wig and stiletto heels. The schools asserted that these were dress-code violations; the division wants to know, among other things, whether female students are allowed to wear wigs, makeup, and stiletto heels. Still, the division is reassuring: "We stress that the inquiry is preliminary in nature, and we do not suggest that any federal violation has occurred." Yet.

Now, putting the law aside for a moment, one has to ask whether this is really a good use of the federal government's resources, and of course no one would say that it is — unless, of course, you think it is important that the federal government make a *kulturkampf* statement. As for the law, the statute that the division cited — 42 U.S.C. section 2000c-6 — requires there to be an "equal protection" violation, which is a reference to the Fourteenth Amendment. So, does the Obama administration really think that it is unconstitutional for high schools to have a dress code that makes distinctions between what is appropriate dress for males and what is appropriate dress for females?

<http://www.nationalreview.com/corner/197215/obama-administrations-jihad-against-gender-stereotypes/roger-clegg>

[The Obama Administration's Jihad against 'Gender Stereotypes'](#) (March 31, 2010 10:09 A.M.)

[Here](#) is the latest in the Justice Department's war on "gender stereotypes." The Department's civil-rights division announced yesterday the terms of its settlement with a New York school district that, in the division's opinion, was insufficiently aggressive in protecting a young man from "harassment based on sex" by other students. The harassment stemmed from the student's "fail[ure] to conform to gender stereotypes" — that is, he "exhibited feminine mannerisms, dyed his hair, wore makeup and nail polish, and maintained predominantly female friendships." The settlement will require the school district to, among other things, "retain an expert consultant in the area of harassment and discrimination based on sex, gender identity, gender expression, and sexual orientation" and for the consultant "to conduct annual training for faculty and staff, and students as deemed appropriate by the expert" on the same topics. Oh, and the aggrieved student — who now attends school elsewhere — will get \$50,000 and the New York Civil Liberties Union will get \$25,000 in attorney fees.

Now, let me first say that schools should not allow students to bully and beat up other students for any reason, including being gay or perceived as being gay. But it is quite a leap from that to saying that the federal government should police local school districts in this regard, with further leaps out of the real world if illegal harassment is defined to include name-calling in a high school when a male student dyes his hair and wears makeup and nail polish (in this case, the Justice Department "alleged that the harassment ... escalated from derogatory name-calling to physical threats and violence"). As for insisting that an "expert consultant" decide which students are "deemed"

to be in need of “training” with regard to appropriate attitudes on “sex, gender identity, gender expression, and sexual orientation” — well, this gets pretty scary pretty fast.

Not only is this a dubious priority for the federal government — wasting the taxpayers’ money and ignoring federalism’s comity — but it is a legal overreach. Title IX — one of the two laws relied on here — prohibits discrimination on the basis of sex, not sexual orientation. The other law cited by the Justice Department is the Fourteenth Amendment, but, as I noted [here](#) last week, it too has limits, and the Obama administration’s apparent position that, for example, high-school dress codes are unconstitutional if girls are allowed to wear makeup and boys aren’t is, well, silly.

<http://www.nationalreview.com/phi-beta-cons/251153/anti-gay-bullying-not-sex-discrimination-roger-clegg>

[Anti-Gay Bullying Is Not Sex Discrimination \(October 27, 2010 12:21 P.M.\)](#)

The *Washington Post* yesterday had a story headlined, “Obama administration takes on anti-gay bullying in school,” and there is likewise a story on “U.S. Hits Hard on Bullying” in *Inside Higher Ed* today. Bullying of any kind is bad, and sometimes it can be very bad indeed, but is the Obama administration correct in its claim that anti-gay bullying violates Title IX of the Education Amendments of 1972? No.

Title IX bans discrimination based on sex, not sexual orientation. Accordingly, the theory that the administration uses is that anti-gay bullying will frequently involve harassment for “failing to conform to stereotypical notions of masculinity and femininity.” That is, if bunch of jocks will harass a male student, but not female students, for wearing lipstick or a wig or stiletto heels, then this is sex discrimination rather than sexual-orientation discrimination, and schools have to step in to stop it. That’s just not a persuasive argument.

The administration has cited cases in which female executives are penalized for being aggressive and male executives are not, and one can certainly see how in such instances a woman can be caught in a double bind because of her sex: If she is *not* aggressive, then she doesn’t get promoted because executives need to be aggressive; but if she *is* aggressive, then she isn’t promoted because such behavior isn’t ladylike. In those circumstances, it is plausible to say that sex stereotyping is a form of sex discrimination. But, in its school-bullying policy, the administration is using the sex-stereotyping claim in a completely different context to define what is clearly no less, but also no more, than anti-gay harassment as sex discrimination.

Also, Hans von Spakovsky, who used to work in the Department of Justice’s Civil Rights Division, interviewed me in his column about “‘Civil Rights’ Gone Wild,” available at <http://www.nationalreview.com/articles/255994/civil-rights-gone-wild-hans-von-spakovsky> .