PUBLIC COMMENTS OF JOAN BERTIN

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to the

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

in response to the June 2, 2015 Hearing on

First Amendment Protections on Public College and University Campuses

June 11, 2015

Chairman Franks, Vice-Chairman DeSantis and Members of the Subcommittee:

The National Coalition Against Censorship ("NCAC"), founded in 1974, is an alliance of more than 50 national non-profit organizations, including literary, artistic, religious, educational, professional, labor, and civil liberties groups united in support of freedom of thought, inquiry, and expression.[1] NCAC supports the right of access to information and the freedom of the individual to question, learn, and think independently. Academic freedom is essential to these goals and to education. Suppression of discussion and debate on sensitive topics deprives students of the resources to address issues they will inevitably encounter as adults. It is NCAC's position that educational institutions are the best places for young people to learn how to function in a pluralistic society, and that limiting the ability of students and faculty to discuss and debate the challenging issues of their time will leave them unprepared to make the kind of informed decisions required of participants in a representative democracy.

These comments address the threat to free speech and academic freedom on college campuses from certain policies of the Department of Education Office of Civil Rights (OCR). In our view, in an otherwise laudable effort to eliminate discrimination in education, OCR has adopted an expansive and vague definition of harassment that encompasses speech that is clearly protected under the First Amendment. Given its enforcement powers, and the threat of charges, investigations, and possible disciplinary action, this effort to prevent discrimination has reached well beyond what the enabling statutes -- as interpreted by the Supreme Court -- envisioned and has instead created a climate of fear on college and university campuses that not only threatens free speech and academic freedom but also undermines the educational environment and the cause of equality.

Recent events at Northwestern University illustrate the problem. In February 2015, Laura Kipnis, a professor of Radio, TV and Film at Northwestern University, published an article entitled "Sexual Paranoia Strikes Academe," commenting on "the layers of prohibition and sexual terror surrounding the unequal-power dilemmas of today," along with other observations on contemporary attitudes about feminism and sexuality. In her essay, she referred to highly publicized charges of sexual assault that had been made by students against one professor. In response, two students involved in that incident, who were not named by Kipnis, claimed that her essay, and particularly the reference to the assault case, constituted retaliation; the students filed a Title IX complaint and Northwestern initiated an investigation, as it claims it was required to do, for which it retained outside counsel. While the matter was pending, Kipnis asked a fellow faculty member, the leader of the faculty senate, to accompany her to a meeting with investigators, and the university president defended free speech rights in an essay in the Wall Street Journal. According to published reports, the students then filed Title IX complaints against both Kipnis's colleague and the university president.

Even though the charges against Kipnis were ultimately dismissed, these events dramatically illustrate how an expansive definition of harassment that includes clearly protected speech invites complaints against the expression of unpopular or controversial ideas, resulting in an extensive, expensive, and disruptive investigation. This was never the intent of Title IX.

[1] The views presented in these comments are those of the NCAC alone and do not necessarily represent the views of its individual members.

How did this happen? In our view, it started publicly with a widely-distributed "Dear Colleague" letter from OCR on October 26, 2010, in which the agency defined harassment as follows:

> Harassing conduct 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. Harassment does not have to be directed at a specific target, or involve repeated incidents. Harassment 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.

http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html

OCR's approach here represents a significant departure from its own previous interpretations of the statue, and from Supreme Court rulings in cases alleging discrimination based on harassment or hostile environment under federal civil rights laws prohibiting discrimination in education and employment, some of which OCR is charged with enforcing.

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), a case involving unwanted sexual advances of a supervisor toward a female employee, was the Court's first major pronouncement. The Court held that for "sexual harassment to be actionable [under Title VII of the Civil Rights Act] it must be sufficiently severe or pervasive 'to alter the conditions of the [the victim's] employment and create an abusive working environment.'" *Id.* at 67. In *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993), another Title VII case, the plaintiff alleged repeated, targeted and egregious forms of verbal harassment; the Court reaffirmed the approach in *Meritor,* but noted that offensive language alone is ordinarily insufficient to make a hostile environment claim. Rather, "whether an environment is 'hostile' or 'abusive' can be determined only by looking at …the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id*. at 23. *See also Clark County School District v. Breeden*, 532 U.S. 268, 271 (2001) ("simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to" harassment), and *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

Rulings in cases in the education context have adopted a similar analysis. In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), a case alleging peer-to-peer harassment, the Court held that harassment must be so "severe, pervasive, and objectively offensive, that it effectively bars the victim's access to an educational opportunity or benefit." *Id*. at 633. The Court further noted that "harassment depends on a constellation of surrounding circumstances, expectations, and relationships." *Id*. at 651. The cautious approach to regulating speech -- even speech that allegedly causes discrimination -- reflects an effort by the Court to respect rights under the First Amendment as well as those granted by civil rights laws.

It is clear from Justice Kennedy's dissenting opinion in *Davis* that First Amendment concerns had a prominent place in the Court's deliberations:

> A university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment. A number of federal courts have already confronted difficult problems raised by university speech codes designed to deal with peer

> sexual and racial harassment. See, *e. g.*, *Dambrot* v. *Central Mich. Univ.,* 55 F. 3d 1177 (CA6 1995) (striking down university discriminatory harassment policy because it was overbroad, vague, and not a valid prohibition on fighting words); *UWM Post, Inc.* v. *Board of Regents of Univ. of Wis. System,* 774 F. Supp. 1163 (ED Wis. 1991) (striking down university speech code that prohibited, *inter alia,* "`discriminatory comments' " directed at an individual that "`intentionally . . . demean' " the "`sex . . . of the individual'" and "`[c]reate an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity' "); *Doe* v. *University of Mich.,* 721 F. Supp. 852 (ED Mich. 1989) (similar); *Iota XI Chapter of Sigma Chi Fraternity* v. *George Mason Univ.,* 993 F. 2d 386 (CA4 1993) (overturning on First Amendment grounds university's sanctions on a fraternity for conducting an "ugly woman contest" with "racist and sexist" overtones).

Id. at 667 (Kennedy, J., dissenting). Indeed, the four dissenting justices considered even the narrow definition of cognizable harassment adopted by the majority insufficient to address potential First Amendment claims. It is highly unlikely that the Court would countenance expanding those boundaries even further, as OCR has done.

The caution reflected in the majority opinion, and the reservations expressed in the dissent, are consistent with Supreme Court jurisprudence involving other government efforts to deter and penalize speech that reflects or perpetuates discriminatory attitudes. In *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992), the Court struck down a law targeting bias-motivated crimes, which it characterized as "a prohibition of fighting words that contain… messages of 'bias motivated' hatred…." While acknowledging that "'[i]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear,'" the Court held that

> the manner of that confrontation cannot consist of selective limitations upon speech. St. Paul's brief asserts that a general "fighting words" law would not meet the city's needs because only a content-specific measure can communicate to minority groups that the "group hatred" aspect of such speech "is not condoned by the majority." …. The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.

Id. at 392 (references omitted).

Prior to 2010, OCR's pronouncements reflected the careful balancing of speech and equality interests expressed in these and other Supreme Court opinions. Its 1997 Guidance advises that harassment must be "sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity…" and cautions that "if the alleged harassment involves issue of speech or expression, a school's obligations may be affected by the application of First Amendment principles."

> Title IX is intended to protect students from sex discrimination, not to regulate the content of speech….[T]he offensiveness of a particular expression …is not a legally sufficient basis to establish a sexually hostile environment ….[W]hile the First Amendment may prohibit the school from restricting the right of students to express opinions about one sex that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard.

62 Fed. Reg, 12033, 12038 and 12045-46 (3/13/1997). See also Revised Sexual Harassment Guidance, Jan. 19, 2001 (schools "must formulate, interpret, and apply its rules so as to protect academic freedom and free speech.") http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

A "Dear Colleague" letter dated July 28, 2003, is even more explicit:

> OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution. The OCR has consistently maintained that the statutes that it enforces are intended to protect students from invidious discrimination, not to regulate the content of speech….[Harassment] must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program…. OCR interprets its regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles.

http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

In contrast, the October 2010 Dear Colleague Letter takes a markedly different approach. In place of the previous language, this letter defines harassment as follows:

> Harassing conduct 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. Harassment does not have to be directed at a specific target, or involve repeated incidents. Harassment 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.[2]

This definition departs in significant ways from both Supreme Court language and prior statements issued by OCR. First, the definition of harassment in *Davis* requires that the conduct is "severe, pervasive, *and* objectively offensive," and that it "so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities."

In contrast, the Letter merely requires the conduct to be "severe, pervasive, *or* persistent," leaving out the "objectively offensive" requirement, and indicating that any one of these will suffice to make a claim of hostile environment. Second, *Davis* states that harassing conduct must "undermine[ ] and detract[ ] from the victims' education experience [effectively denying them] equal access…." The Letter only requires that the conduct "interfere with *or* limit a student's ability to participate in or benefit from" the educational program. (Emphasis added.) The term "interfere with" is so open-ended as to include innocuous comments that are clearly protected speech, and makes the response of the hearer the critical issue, ignoring the requirement in *Davis* that the speech be "objectively offensive."

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[2] This paragraph contains a footnote stating that "some conduct alleged to be harassment may implicate the First Amendment right to free speech or expression," and refers to the 2001 and 2003 documents quoted above. This is the only reference to the First Amendment in the Letter.

In addition, the statement that harassment may consist of "verbal acts and name-calling … that may be harmful or humiliating" could encompass precisely the kind of language that the Supreme Court has said is *not* harassment: "simple teasing, offhand comments, and isolated incidents (unless extremely serious)," *Clark*, 532 U.S. at 271 (citations omitted), or "mere utterance of an …epithet which engenders offensive feelings." *Meritor*, 477 U.S. at 67. Recent OCR pronouncements have adopted the same approach. See http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104_pg3.html

A settlement agreement with the University of Montana in 2013 confirms that First Amendment rights have been essentially disregarded in the effort to enforce civil rights laws. The testimony of Greg Lukianoff before this committee (http://judiciary.house.gov/index.cfm/hearings?Id=C256F82E-1F4E-4F60-B702-78A58B81E4F8&Statement_id=DCF30A73-930B-4C70-BBA7-C7C1D9BBCC83) details the defects in that agreement, which will not be repeated here. While OCR asserts that the settlement applies merely to that one situation, there is no indication that OCR has backed off its expansive definition of harassment or its aggressive approach to enforcement. Quite the opposite.[3]

Kipnis is hardly the only victim of this aggressive posture. Another recent example involves a University of Colorado professor of sociology, Patti Adler, who was charged with sexual harassment because of a classroom presentation on the subject of prostitution in a course on "Deviance in U.S. Society." http://www.dailycamera.com/cu-news/ci_24737023/cu-boulder-pulls-patti-adler-from-deviance-class The incident highlights the threat to academic freedom resulting from an overbroad definition of harassment, as revealed in a statement from the American Association of University Professors. http://www.aaup.org/file/ColoradoStatement.pdf In response to the charges and subsequent actions, Adler resigned from the university. For many years, her course on Deviance was among the most popular on campus. Future students will be deprived of the opportunity to take the course as a result. Much has been lost, little has been gained, by bringing charges that stretch the meaning of harassment and disregard the value of academic freedom.

Harvard's adoption of a similarly overbroad approach recently prompted a letter of protest from 28 law professors saying that the policy embraced "a definition of sexual harassment that goes significantly beyond Title IX and Title VII law." http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html.

The Harvard law professors' statement reflects increasing recognition of OCR's over-reaching with regard to verbal harassment and the implications for higher education. We urge the committee to consider these and other expressions of concern from individuals and organizations who are deeply sympathetic to efforts to eradicate discrimination in education but, like NCAC, submit that it can and must be achieved without a loss of First Amendment rights or the erosion of academic freedom.

Conclusion

By threatening free speech rights, OCR's approach endangers the cause of equality as much as free speech. The civil rights movement, and every other movement to expand equality rights, has succeeded

[3] In May 2014, the Department of Education released a list of more than fifty institutions of higher education that were being investigated by OCR for possible violations of law in their handling of harassment and sexual assault charges. http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations

precisely because advocates vigorously exercised their First Amendment rights to protest, demonstrate, petition government, and speak freely, even to those to whom their message was unpopular, controversial, and often deeply offensive. To undermine that critical right is to put at risk the very equality goals the Commission and OCR seek to promote.

OCR's apparent willingness to sacrifice free speech rights in the name of equality is not only short-sighted, it is in conflict with core constitutional principles:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and … inflict great pain…. [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Snyder v. Phelps, 582 U.S. 443, 460-61 (2011). We submit that even hateful speech can provide "teachable moments," and that students need all the instruction and guidance educational institutions can provide to deal with these most sensitive and challenging issues, which they will encounter both in and out of school.