National Coalition Against Censorship

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aaup AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

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April 4, 2016

BY EMAIL – OCR@ed.gov

The Honorable John B. King, Jr., Acting Secretary
U.S. Department of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, DC 20202-1100

Assistant Secretary Catherine Lhamon
U.S. Department of Education
Office for Civil Rights
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, DC 20202-1100

Re: Request for Guidance Regarding Schools of Obligations under Title IX and Title VI to Address Sex- and Race-Based Harassment Occurring on Yik Yak and Other Anonymous Social Media Applications, and

First Amended Administrative Complaint, Feminists United, *et al.* against University of Mary Washington

Dear Acting Secretary King and Assistant Secretary Llamon:

We write with reference to the above-noted Request for Guidance and First Amended Administrative Complaint filed by Feminists United on Campus, et al., alleging that the University of Mary Washington ("UMW") has violated Title IX of the Education Amendments of 1972 and requesting certain remedies from the Department of Education's Office for Civil Rights ("OCR").

Introduction

The complaint was prompted by a series of troubling incidents at UMW.[1] We do not address the larger question of whether discrimination has occurred, but confine our comments to the claim that liability arises from speech that is protected under the First Amendment and to the request for remedies that would infringe upon the free speech rights of members of the university community, particularly the request to block access to social media sites if they contain offensive messages.

We strongly urge OCR to decline the invitation to interpret Title IX to require such a response. This interpretation would bring the department's approach to Title IX enforcement in conflict with the First Amendment and would potentially expose public institutions to liability if they do in fact penalize protected expression or restrict access to legal modes of communication. Perhaps even more important is the fact that restrictions on speech ultimately disserve the interests of those experiencing discrimination, who need robust speech protections to advocate successfully for the kind of social change that has been instrumental in protecting against discrimination.

Concerns about how students and others use social media sites have prompted complaints about Yik Yak in particular.[2] Yik Yak, which hosts anonymous messages, is popular on many campuses. Like other social media sites, it is home to messages of all kinds, including the innocuous (best pizza, best party), the informational (best professors, best dorms), self-reflection,[3] and commentary on current events,[4] as well as reprehensible messages of the sort alleged here.

Speech on social media sites enjoys the same level of constitutional protection as all other speech. *See Reno v. ACLU*, 521 U.S. 844 (1997). Like other forms of communication, social media can be used for many purposes, from laudable, to irritating, to unlawful. Public institutions may not restrict access to social media for an entire community simply because some users post unacceptable and even illegal messages; otherwise, the government could restrict use of the U.S. Mail and the telephone, both of which can be used in ways that are both permissible and not.

Feminists United's complaint relies on allegations about speech that is said to be "humiliating," "hostile," "insulting," "offensive," and "sexist" (Complaint, ¶¶85–95). While such speech may be deeply disturbing to recipients, it may also be protected by the Constitution. An exceedingly careful inquiry by OCR is essential to ensure that any finding of liability does not rely on or chill protected expression.

First Amendment Principles

[1] We express no opinion on the underlying claim that students at the University have experienced unlawful discrimination. If this allegation can be proven, based on evidence other than protected expression, the student-targets are entitled to relief under Title IX.

[2] Other social media sites such as Twitter and Facebook would also be implicated by OCR's response to this complaint.

[3] *See* Virginia Postrel, *Heard Bad Things About Yik Yak? Try Using It*, BLOOMBERG VIEW (Nov. 13, 2015, 10:00 AM), http://www.bloombergview.com/articles/2015-11-13/yik-yak-doesn-t-deserve-its-bad-reputation.

[4] *See* Amanda Hess, *The Upside of Yik Yak*, SLATE (Mar. 10, 2015, 3:51 PM), http://www.slate.com/articles/technology/users/2015/03/yik_yak_the_anonymous_messaging_app_with_a_terrible_rep_is_actually_pretty.html.

Intellectual freedom and free expression are crucial to the mission of higher education, where the ability to discuss, debate, and disagree is paramount. In public colleges and universities, these rights are secured by the First Amendment:

> [T[he precedents of this Court leave no room for the view that… First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The college classroom with its surrounding environs is peculiarly the "'marketplace of ideas,'" and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.

Healy v. James, 408 U.S. 169, 180–81 (1972) (citations omitted). *See also Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967),

Even speech expressing "'bias-motivated' hatred" is protected unless it constitutes a true threat or intimidation. For example, 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 (citations omitted).

The holding in *R.A.V.* follows a consistent line of cases recognizing the critical importance of protecting speech, including controversial and offensive speech. For example, in *Terminiello v. Chicago*, 337 U. S. 1 (1949), the Court observed that

> it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is

> no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

337 U.S. 4–5 (citations omitted). *Terminiello* involved a speaker whose inflammatory anti-Semitic rhetoric attracted a large, angry crowd that ultimately erupted into violent confrontation. However, the same principle was held to protect the heated language of civil rights protestors in Mississippi, in a boycott against white merchants. Echoing *Terminiello*, the Court found the speech protected:

> Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens.
>
> […]
>
> The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech . . . . In the course of those pleas, strong language was used. . . . Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open."

NAACP v. Claiborne Hardware Co., 458 US 886, 912, 928 (1982).

Lower courts have applied the same logic in cases in which restrictions on speech have been adopted in the effort to combat unlawful discrimination. In *American Booksellers Association v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986), the court overturned a local ordinance banning material depicting "the graphic sexually explicit subordination of women." *Id.* at 331. The plaintiffs made arguments much like those pressed against UMW: that speech can be regulated if it reflects and promotes discriminatory attitudes and behaviors.

The U.S. Court of Appeals for the Seventh Circuit rejected that argument. Even accepting the premise that pornography "perpetuate[s] subordination" and "leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets," the court nonetheless struck down the statute on First Amendment grounds, holding that the First Amendment prohibits the government from asserting "control of all of the institutions of culture, the great censor and director of which thoughts are good for us." *Id.* at 330.

In concluding that the statute could not be constitutionally sustained, the Court also recognized that censoring speech or penalizing individuals for their thoughts would threaten the very type of social change sought by proponents of the ordinance. It wrote: "Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is." *Id*. at 332.

The Ninth Circuit expressed similar views in a case involving racially offensive speech on campus:

> [I]t is axiomatic that the government may not silence speech because the ideas it promotes are thought to be offensive. [These] words sparked intense debate: Colleagues emailed responses . . . ; some voiced opinions in the editorial pages of the local paper; the administration issued a press release; and, in the best tradition of higher learning, students protested. The Constitution embraces such a heated exchange of views, even (perhaps especially) when they concern sensitive topics like race, where the risk of conflict and insult is high. Without the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched. The right to provoke, offend and shock lies at the core of the First Amendment.

Rodriguez v. Maricopa Cty. Cmty. Coll. Dist., 605 F.3d 703, 708 (9th Cir. 2010) (citations omitted).

Virtually all appellate courts to consider the issue concur, and as a result, numerous courts have struck down campus speech codes that were designed to eliminate offensive speech that targets women and minorities. *See McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *Coll. Republicans at S.F. St. Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. N. Ky. Univ. Bd. of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wisc. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

These cases reflect the idea that a deep commitment to eliminating discrimination and the attitudes that cause and accompany it can be accomplished only through persuasion, not coercion. To take an alternative view would be to sacrifice values that are themselves fundamental to any effort to promote both equality and education. The First Amendment gives people the right to their own beliefs, but not the right to act on them in ways that infringe the rights of others. *Healy,* 408 U.S. at 192 ("the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not.") This is a crucial distinction for enforcement of anti-discrimination law.

Accommodating First Amendment Principles in the Enforcement of Anti-Discrimination Laws

This is not to say that the expression of noxious views is irrelevant in discrimination cases, only that verbal harassment claims must be evaluated within limits set by the First Amendment. In a series of decisions addressing verbal harassment under Title VII of the Civil Rights Act and Title IX, the Supreme Court has set out clear guidelines for interpreting those laws within constitutional boundaries.

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), a Title VII case involving unwanted sexual advances of a supervisor toward a female employee, 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, quoting *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). 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* and 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 Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (holding that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to" harassment).

Rulings in cases under Title IX have adopted a similar approach. In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), a case alleging student-on-student 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's insistence on drawing a distinction between offensive speech and unlawful harassment is motivated by the need to avoid a potential conflict between civil rights laws and the First Amendment. Protecting freedom of expression is a uniquely central concern in the educational context, as "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian*, 385 U.S. at 603. This is apparent from the cautionary note in Justice Kennedy's dissenting opinion in *Davis*:

> 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 a 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 . . . '"); *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) . . . .

Davis, 526 U.S. at 667 (Kennedy, J., dissenting).

The Court's careful definition of verbal harassment is completely absent from recent pronouncements from OCR. For example, a "Dear Colleague" letter dated October 26, 2010, defined "sexual harassment prohibited by Title IX" to extend to "making sexual comments,

jokes, or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating e-mails or Web sites of a sexual nature." This grossly overbroad definition conflicts directly with the Supreme Court's admonitions in *Davis* and other judicial opinions. The same is true of other aspects of OCR's guidance expressed in the 2010 letter:

> 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.

This definition also departs in significant ways from Supreme Court rulings. While the definition of harassment in *Davis* requires that the conduct be "severe, pervasive, *and* objectively offensive," this letter merely requires the conduct to be "severe, pervasive, *or* persistent," suggesting that any one of these will suffice to make a claim. Further, OCR omits in this letter the "objectively offensive" requirement altogether, indicating that a violation may be based on the subjective response of the hearer rather than an objective evaluation of the speech. *Davis* also requires that the conduct must "undermine[] and detract[] from the victims' educational experience, [such] that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis*, 526 U.S. at 651. The OCR letter, in contrast, requires only that the conduct "interfere with *or* limit a student's ability to participate in or benefit from" the educational program (emphasis added). The terms "interfere with" and "limit" are vague and subjective, falling far short of the requirement in *Davis* that the harassment "effectively bars the victim's access to an educational opportunity or benefit."[5]

Notably, in other contexts, OCR has acknowledged the First Amendment's limits on its ability to combat discrimination by restricting speech. For example, OCR rejected a claim that students and faculty at the University of California created a hostile environment for Jewish students by engaging in political speech harshly critical of the state of Israel, observing:

> OCR has consistently maintained that the statutes and regulations that it enforces protect students from prohibited discrimination, and do not restrict the exercise of expressive activities or speech that are protected under the First Amendment of the U.S. Constitution. This is particularly relevant in the university environment where academic free fosters the robust exchange of ideas.[6]

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[5] The 2010 letter contains a footnote stating that "some conduct alleged to be harassment may implicate the First Amendment right to free speech or expression," but this hardly blunts the clear message that OCR will treat as discriminatory virtually any speech of a sexual nature that is "unwanted" and that a student says "interferes with" her "ability to participate." The unfounded claims against Laura Kipnis, detailed *infra*, demonstrate the dangers of such an expansive approach.

[6] Letter from Zachary Pelchat, Department of Education Office for Civil Rights to Robert J. Birgeneau (Aug. 19, 2013), p. 2, *available at* http://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR_.pdf.

OCR concluded that "[i]n the university environment, exposure to such robust and discordant expression, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience." *Id.*at 3.

OCR's approach to hostile environment claims based on sex, however, has been markedly different, generating considerable comment and concern. Earlier this year, Senator James Lankford expressed concern about both the substance of OCR's guidance and the process by which it has been issued.[7] The many others who have challenged OCR's expansive interpretation include professors at Harvard Law School,[8] the Foundation for Individual Rights in Education,[9] the Electronic Freedom Foundation,[10] and numerous commentators.[11]

Most recently, the American Association of University Professors undertook an extensive review of OCR's enforcement of Title IX. The draft report, *The History, Uses and Abuses of Title IX*,[12] concludes that "OCR has broadened its description of sexual harassment in ways that limit the scope of permissible speech," and observes that "OCR's heightened scrutiny … of speech that includes sexual references of any kind" has resulted in "a frenzy of cases in which administrators' apparent fears of being targeted by OCR have overridden faculty academic freedom and student free speech rights." AAUP Report at 16, 23.

The complaint against UMW asks OCR to expand its focus even further, by targeting speech on social media platforms. However, institutions of higher education have no control over what students say on social media and cannot be held legally responsible for their private speech. Moreover, because the vast majority of speech on such platforms is not even arguably discriminatory or harassing, any attempt to restrict access to social media would be overbroad, sweeping up vast amounts of protected speech. *See DeJohn v. Temple Univ.,* 537 F.3d 301; *McCauley v. Univ. of the V.I.*, (3d Cir. 2010). Equally important, a ban on social media sites

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[7] Letter from Sen. James Lankford to John B. King, Jr., Acting Sec'y, U.S. Dep't of Educ. (Jan. 7, 2016), *available at* http://www.lankford.senate.gov/imo/media/doc/Sen.%20Lankford%20letter%20to%20Dept.%20of%20Education%201.7.16.pdf.

[8] Elizabeth Bartholet, et. al., *Rethink Harvard's sexual harassment policy*, BOSTON GLOBE, Oct. 14, 2015, *available at* http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html.

[9] *First Amendment Protections on Public College and University Campuses: Hearing Before the H. Comm. on the Judiciary, S. Comm. on the Constitution and Civil Justice*, 114th Cong. (2015) (written testimony of Greg Lukianoff, President and CEO, Found. for Individual Rights in Educ.), *available at* https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2015/06/03143340/Lukianoff-Written-Testimony-6-2-15.pdf.

[10] Letter from Corynne McSherry, Legal Director, Elec. Frontier Found., to Arne Duncan, Sec'y, U.S. Dep't of Educ., and Catherine Lhamon, Assistant Sec'y, Office for Civil Rights (Jan. 13, 2016), *available at* https://www.eff.org/files/2016/01/13/efflettertoocrfinal.pdf.

[11] *See, e.g.*, Michelle Goldberg, *This Professor Was Fired for Saying 'Fuck No' in Class*, NATION, July 2, 2015, http://www.thenation.com/article/this-professor-was-fired-for-saying-fuck-no-in-class; Eugene Volokh, *National Coalition in Favor of Campus Censorship*, WASH. POST, Oct. 26, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/26/national-coalition-in-favor-of-campus-censorship; Jeannie Suk, *Shutting Down Conversations about Rape at Harvard Law*, NEW YORKER, Dec. 11, 2015, http://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school.

[12] American Association of University Professors, Mar. 24, 2016, *available at* http://www.aaup.org/file/TitleIX-Report.pdf (hereafter "AAUP Report.")

would fail to specifically target or penalize those individuals who actually post material that might qualify as unlawful harassment or intimidation. Last, such an approach would plainly be ineffectual; students can easily access the site using cellular service on their phones.[13]

Implications of OCR's Overbroad Definition of Harassment

OCR's expansive definition of harassment to include protected speech has consequences far beyond the complaint against UMW and the concerns of legislators and legal experts. OCR's Dear Colleague letters, which OCR concedes do not carry the force of law, have nonetheless generated widespread confusion.[14] They have also encouraged complaints about speech that is unquestionably protected. These unfounded complaints upend the lives of affected individuals and generate extensive, expensive, disruptive, and unnecessary investigations.

For example, Laura Kipnis, a professor of Radio, Television, and Film at Northwestern University, published an article in February 2015 in the *Chronicle of Higher Education* entitled "Sexual Paranoia Strikes Academe," in which she discussed lawsuits involving students who charged a professor with sexual assault. The students objected to her characterization of the facts and filed a Title IX complaint against her, alleging that the article created a hostile environment. The resulting investigation is described in a follow-up piece in *The Chronicle* titled "My Title IX Inquisition."[15] While the matter was pending, one of Kipnis' colleagues, the leader of the faculty senate, accompanied her to a meeting with investigators as an advocate and spoke of the proceedings in general terms at a senate meeting. The university president also defended free speech in an essay in *The Wall Street Journal*.[16] According to published reports, Title IX complaints were then filed against both Kipnis' colleague and the university president.

The Kipnis situation is not an isolated incident. University of Colorado professor Patricia Adler taught a popular course, "Deviance in U.S. Society," which routinely attracted upwards of 500 students. It included a role-play exercise in one session, in which students and teaching assistants assumed roles as prostitutes and procurers. The class had been conducted without incident for years and was a highlight of the course for many students. In December 2013, however, the course was summarily cancelled after questions were raised about whether it constituted sexual harassment. Adler was given an ultimatum: She could return but not teach the course, or she could take early retirement. She returned briefly, and then resigned. Similarly, Professor Teresa Buchanan was terminated in June 2015 from Louisiana State University – Baton Rouge for exposing her adult students to occasional profanity and sexual references. Again, the university claimed that her speech violated its policy against sexual harassment. That policy tracks OCR's overbroad language regarding verbal harassment. Buchanan has since filed a lawsuit against LSU claiming that her termination violated her First Amendment rights.

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[13] In the Electronic Frontier Foundation's 2016 letter, n.10 *supra*, EFF detailed these and a number of other problems with government attempts to regulate Yik Yak, with which we fully concur.
[14] Jake New, *Must vs. Should*, INSIDE HIGHER ED, Feb. 25, 2016, https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance.
[15] Laura Kipnis, *My Title IX Inquisition*, CHRONICLE OF HIGHER EDUC., May 29, 2015, http://chronicle.com/article/My-Title-IX-Inquisition/230489.
[16] Morton Schapiro, *The New Face of Campus Unrest*, WALL STREET J., Mar. 18, 2015, *available at* http://www.wsj.com/articles/morton-schapiro-the-new-face-of-campus-unrest-1426720308.

We highlight these instances in which complaints under Title IX targeted speech that was clearly protected to demonstrate the potentially destructive consequences of the overbroad interpretation of Title IX that OCR has embraced. In each of these instances, women faculty members who addressed issues of gender, sex, and/or sexuality were penalized for their speech because some who heard it found it offensive or objectionable. It was never the intent of Title IX to chill debate and discussion over controversial topics, much less to target women expressing controversial views on sensitive topics or violating social norms defining "ladylike" behavior.

An Alternative Approach

We take the allegations of discrimination at UMW very seriously, and we urge OCR to adopt an approach that will target unlawful conduct without casting a net so wide that it scoops up innocent students and constitutionally protected speech. We agree with the AAUP that "[t]here is no necessary contradiction between effectively addressing problems of sexual harassment (assault, inappropriate conduct and unprotected speech) and fully protecting academic freedom," and we endorse its recommendation that OCR should "interpret Title IX as protecting students from sex discrimination, while also protecting academic freedom and free speech…[and] should distinguish between allegations of sexual harassment based on conduct and allegations based on speech." AAUP Report at 42, 47. We submit that this approach will better protect students from unlawful discrimination, not least by preserving their ability to advocate for a more open, inclusive and equitable campus culture, including protecting the right to protest behavior that may be offensive, but not unlawful.

Any approach to enforcement of Title IX that does not produce fair and defensible results will ultimately "delegitimize the system."[17] To maintain the integrity of efforts to combat sexual harassment, therefore, fundamental constitutional principles must be honored. In addition to protecting First Amendment rights, other constitutional mandates must be followed as well: accusations of sexual harassment must be addressed through proceedings that conform to basic rules of due process to ensure that findings are supported and sustainable.[18] The rights of victims of sexual misconduct cannot be secured unless the system of enforcement is accorded respect and deference. Students are entitled to know that they and their peers will be judged fairly, according to the law.

We do not underestimate the distress experienced by students who find themselves on the receiving end of a barrage of hostile comments. Schools can and should offer supportive services to affected students, identify and condemn unacceptable behavior, provide educational programs

[17] Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement,* 128 HARVARD L. REV. FORUM 103, 114 (2015), *available at* http://cdn.harvardlawreview.org/wpcontent/uploads/2015/02/vol128_Halley_REVISED_2.17.pdf.

[18] Efforts to address sexual violence on campus have resulted in disciplinary action even in the absence of sufficient evidence or adequate procedural protections. As a result, there is a growing number of successful lawsuits against colleges and universities for violating the constitutional rights of the accused. *See* Jake New, *Court Wins for Accused*, INSIDE HIGHER ED, Nov. 5, 2015, https://www.insidehighered.com/news/2015/11/05/more-students-punished-over-sexual-assault-are-winning-lawsuits-against-colleges.

about discrimination, create speech-protective acceptable use policies for university sponsored services, and the like.[19]

Students may also take action to change the culture on campus and support their peers who are targets of abusive speech. For example, Yik Yak automatically removes a "yak" if five users "down vote" it. This practice empowers a form of community self-policing. Offensive speech on other social media sites can and should be countered by vigorous condemnation. Through these and other avenues, users can make these forums into places where discussion and debate prevail over insult and invective. This is no easy task, but there is no shortcut. Social media is a fact of life, and students must figure out how to use it well and wisely. The challenge for higher education is to help students learn skills to navigate the world they will inhabit, not to cloister them by insulating them from reality.

Moreover, higher education should promote an understanding of the fundamental structures and elements of our legal system, including the constitutional protection for freedom of speech and its central place in education, law, and culture. As Justice Louis Brandeis wrote in his concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927):

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . . . [T]hey knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law— the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Id. at 375–76 (Brandeis, J., concurring).

Conclusion

Government officials have an obligation to be cognizant of the constitutional mandates implicated by their enforcement of statutes and regulations. In enforcing the federal laws against discrimination, the Department of Education can and should interpret and apply them in a manner consistent with the rights and obligations that the First Amendment imposes on state-

[19] Campus administrators and others in the campus community have many means at their disposal to influence the campus environment in a positive and non-discriminatory direction. As the Fourth Circuit has noted:

> The University certainly has a substantial interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education. Yet it seems equally apparent that it has available numerous alternatives to imposing punishment on students based on the viewpoints they express.

Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 993 F.2d 386, 393 (4th Cir. 1993) (citations and footnote omitted).

sponsored educational institutions. It would be a pyrrhic victory if realization of anti-discrimination goals came at the cost of free speech rights—with the added irony that it was the exercise of First Amendment rights itself that enabled the movement for equality to advance.

In the present context, this means that OCR may not require institutions to punish or restrict protected expression unless it meets the criteria set out in *Davis,* that it may not penalize institutions on the basis of such expression, and that it may not order remedies that chill protected speech or limit access to legal means of communication. The agency thus has ample ability to address serious allegations of discrimination while respecting the right to engage in the sometimes contentious and challenging back-and-forth that is the hallmark of a free society.

Joan Bertin
Executive Director
National Coalition Against Censorship
19 Fulton Street, Suite 407
New York, NY 10038
bertin@ncac.org

Will Creeley
Vice President of Legal and Public Advocacy
510 Walnut Street, Suite 1250
Philadelphia, PA 19106
will@thefire.org

Julie Schmid
Executive Director
American Association of University Professors (AAUP)
1133 Nineteenth St., NW, Suite 200
Washington, DC 20036
jschmid@aaup.org

Frank D. LoMonte
Executive Director
Student Press Law Center
1608 Rhode Island Ave. NW, Suite 211
Washington, D.C. 20036
director@splc.org

Very truly yours,