FIRE
Foundation for Individual Rights in Education

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Committee on Judiciary
Montana House of Representatives
PO Box 200400
Helena, Montana

Chairman Usher, Vice Chair Reiger, Vice Chair Kelker, and distinguished Members of the Committee:

My name is Tyler Coward, and I am the Legislative Counsel at the Foundation for Individual Rights in Education (FIRE). FIRE is a national, nonpartisan, nonprofit organization dedicated to defending the free speech and due process rights of students and faculty at our nation's colleges and universities. FIRE writes today in support of HB 349.

Summary

- HB 349 will ensure that Montana's public institutions of higher education properly meet their dual obligations to address discriminatory student-on-student harassment and to protect students' First Amendment rights by closely tracking the U.S. Supreme Court's requirements as set forth in *Davis v. Monroe County Board of Education* (1999).
- Courts regularly cite the *Davis* standard to protect students from censorship while also ensuring that discriminatory harassment has no place on campus.
- Overly broad anti-harassment policies are regularly used to punish protected expression.
- Institutions throughout Montana, including Montana State University and Montana Technological University, currently maintain unconstitutional anti-harassment policies.
- HB 349 is consistent with federal Title IX regulations and would prevent the federal government from ever again requiring Montana institutions to violate student free speech rights.
- HB 349 would also protect freedom of association on Montana's campuses.

HB 349 tracks the Supreme Court's Definition of Discriminatory Harassment

Institutions of higher education are legally and morally responsible for addressing discriminatory student-on-student harassment. But they also have a constitutional obligation to do so without infringing on the free speech rights of students. To balance

these twin obligations, the Supreme Court of the United States carefully crafted a test to determine when speech crosses the line to unprotected discriminatory conduct. In *Davis v. Monroe County Board of Education*, the Court, in addressing when federal anti-discrimination law obligated institutions of higher education to intervene when students were harassing each other, defined student-on-student harassment as discriminatory conduct that is:

> so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities. [1]

If enacted, HB 349 will ensure that public institutions of higher education throughout Montana use this definition of student-on-student harassment.[2]

Enacting HB 349 is important because overbroad anti-harassment policies are one of the most common forms of speech codes that are used to punish and sometimes even expel students who have engaged in protected speech. [3]

Institutions of higher education are already required by the federal government to use the *Davis* definition, at least with respect to defining student-on-student sexual harassment.[4] In 2020, the Department of Education concluded a lengthy public notice-and-comment period and adopted legally binding regulations requiring institutions to use this definition to define student-on-student sexual harassment.[5] Because the Department's jurisdiction in this regulatory process was limited to addressing sexual

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[1] 526 U.S. 629, 651 (1999).
[2] There is some debate as to whether anti-harassment policies should be tethered to protected classes. Anti-harassment law allows the government to regulate some kinds of speech under the rationale that the government's interest in eliminating discrimination justifies the regulation of that speech. Without the anti-discrimination elements provided by regulating speech that targets its victims on the basis of protected classes, anti-harassment measures would no longer be anti-discrimination measures, but instead would be transformed into civility codes. The Committee should advance a version of the bill where the definition of student-on-student harassment requires the conduct in question to target its victims on the basis of any class protected under federal, state, or local law.
[3] Greg Lukianoff and Catherine Sevcenko, *Four Key Points About Free Speech and the Feds' 'Blueprint'*, FIRE, (July 15, 2013), https://www.thefire.org/four-key-points-about-free-speech-and-the-feds-blueprint/.
[4] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106), https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.
[5] *Id.* at 2014.

harassment, the regulations do not require that same test be used by schools when defining other forms of discriminatory harassment. Courts have repeatedly applied the Davis standard to racial and other forms of harassment outside of Title IX.[6] Enacting HB 349 would harmonize Montana's efforts to combat all forms of discriminatory student-on-student harassment.

Montana's institutions currently maintain unconstitutional definitions of student-on-student harassment

Every year, FIRE attorneys evaluate and grade campus speech policies at four year institutions across the country in our Spotlight on Speech Codes database. We currently assign ratings to four public institutions in Montana: Montana State University, the University of Montana, Montana Technological University, and University of Montana Western.[7] Unfortunately, not a single institution we rate consistently uses the Supreme Court's definition of student-on-student harassment.

For example, Montana State University's policy on discrimination, harassment, and retaliation falls far short of "severe, pervasive, and objectively offensive" standard set forth by the Court. Its policy states that harassment is defined as "unwanted conduct . . . that has the purpose or effect of unreasonably interfering with a reasonable person's participation in a University Program or Activity."[8] Among other problems, this policy means that a student can be punished for "harassment" even for *unintentionally* offending a fellow student.

The University of Montana Western states that hostile environment harassment is conduct targeted against a member of a protected class "when such conduct has the

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[6] *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 n.10 (2d Cir. 2012) (applying *Davis* to Title VI claim and observing that "[a]lthough the harassment in *Davis*, and the "deliberate indifference" standard outlined by the Supreme Court, arose under Title IX, we have endorsed the *Davis* framework in cases of third-party harassment outside the scope of Title IX."); *Bryant v. Indep. Sch. Dist.* No. I-38, 334 F.3d 928, 934 (10th Cir. 2003) (applying *Davis* to Title VI claim); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 n.5 (3d Cir. 2001) (acknowledging that *Davis* "applies equally" to harassment under Title VI or other federal anti-discrimination statutes).

[7] FIRE's Spotlight Database, FIRE, *available at*, https://www.thefire.org/resources/spotlight/?x=&speech_code=&y=MT&institution_type=&speech_code_advanced=&y_advanced=MT#search-results (last visited Feb. 13, 2021).

[8] MSU Policies and Procedures: Discrimination, Harassment, and Retaliation Policy [INTERIM]-Discriminatory Harassment, *available at* https://www.thefire.org/fire_speech-codes/montstate-discrim-harass (last visited Feb. 13, 2021).

purpose or effect of unreasonably interfering with an individual's employment."[9] Not only does this not comply with the standard set forth by the Supreme Court, but similar language has been struck down as incompatible with the First Amendment by a federal appellate court.[10]

Montana Technological University's policy on "inappropriate behavior" states:

> Any behavior deemed to be inappropriate and thought to damage the community living model is strictly prohibited and will be documented and referred to the Director of Residence Life. Inappropriate behavior is subject to judicial action and a variety of sanctions.[11]

A policy that prohibits "inappropriate" behavior, undefined and untethered to constitutional guarantees of free speech, is unconstitutionally vague and overbroad. It is ripe for abuse by campus administrators, and creates a chilling effect on student expression.

Fixing the problem of overbroad anti-harassment problems would be particularly meaningful in Montana. Montana has been a flashpoint for problematic anti-harassment policies as a result of a 2013 settlement agreement between the University of Montana and the Department of Education's Office for Civil Rights (OCR). Pursuant to that agreement and its accompanying findings letter, which referred to the agreement as "a blueprint for colleges and universities throughout the country to protect students from sexual harassment," the University of Montana agreed to define sexual harassment as "any unwelcome conduct of a sexual nature and can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence."[12] This provision, which

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[9] Campus Policy Manual: 101.4 Discrimination, Harassment, Sexual Misconduct, Stalking, and Retaliation, *available at* https://www.thefire.org/fire_speech-codes/campus-policy-manual-discrimination-harassment-sexual-misconduct-stalking-retaliation (last visited Feb. 13, 2021).
[10] *DeJohn v. Temple Univ.,* 537 F.3d 301, 319 (3d Cir. 2008) (striking down sexual harassment policy reasoning that because the policy failed to require that speech in question "objectively" create a hostile environment, it provided "no shelter for core protected speech").
[11] Resident Handbook: Inappropriate Behavior, *available at*, https://www.thefire.org/fire_speech-codes/mtech-inappropriate-behavior/ (last visited Feb. 13, 2021).
[12] Letter from Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep't of Justice, and Gary Jackson, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Royce Engstrom, President, Univ. of Mont. and Lucy France, Univ. Counsel, Univ. of Mont. (May 9, 2013), available at http://www.justice.gov/opa/documents/um-ltrfindings.pdf.

is entirely subjective, meant that any speech related to sexuality that anyone found unwelcome was actionable as harassment.

This shockingly broad sexual harassment policy was in use from 2013 to 2020. It was only abandoned with the adoption of the Department of Education's new Title IX regulations last August. Had HB 349 been the law in Montana in 2013, OCR could never have required the University of Montana to violate its students rights so egregiously. This experience demonstrates that it is not sufficient to rely on the Department of Education to consistently employ constitutional definitions, and that the state would be wise to do so on its own.

Courts regularly cite the *Davis* definition to protect students from censorship

Courts regularly protect students from censorship and punishment under university policies because the policies did not meet the requirements of *Davis*. *See, e.g., Nungesser v. Columbia Univ.*, 244 F. Supp. 3d 345, 366–67 (S.D.N.Y. 2017) (holding student accused of sexual assault could not invoke Title IX to "censor the use of the terms 'rapist' and 'rape'" by the alleged victim of the crime on the grounds that the accusation bred an environment of pervasive and severe sexual harassment for the accused student); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*,725 F.3d 293, 322–23 (3d Cir. 2013) (holding school district could not invoke Title IX to prohibit students from wearing "I <3 boobies" bracelets intended to increase breast cancer awareness).

Policies that fail to meet the elements of *Davis* have been consistently struck down on First Amendment grounds by federal courts for more than two decades, yet unconstitutional definitions of harassment remain widespread. *See, e.g., McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010) (upholding district court's invalidation of university harassment policy on First Amendment grounds); *DeJohn v. Temple Univ.*, 537 F.3d 301, 319 (3d Cir. 2008) (striking down sexual harassment policy reasoning that because the policy failed to require that speech in question "objectively" create a hostile environment, it provided "no shelter for core protected speech"); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional). While*Dambrot* was issued before *Davis*, the Sixth Circuit's analysis incorporated similar elements.).

The Davis standard successfully protects students from discriminatory harassment

Some argue that the *Davis* standard sets the bar too high, and posit that under this definition, students may harass each other with impunity. This isn't true. Courts

routinely rule against schools for being deliberately indifferent to harassment that met the *Davis* standard. *See, e.g., Niesen v. Iowa St. Univ.*, 2017 U.S. Dist. LEXIS 221061 (S.D. Iowa Nov. 3, 2017) (denying motion to dismiss student's Title IX claim for retaliation that she experienced after reporting an alleged sexual assault because the university did not respond to her complaints about the retaliation); *S.K. v. N. Allegheny Sch. Dist.*, 168 F. Supp. 3d 786, 797–98 (W.D. Pa. 2016) (holding plaintiff adequately pled Title IX claim where bullying of plaintiff had grown to the point where it "was its own sport" and principal never punished the harassers); *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 365 (S.D.N.Y. 2014)(denying school district's motion for summary judgment on students' Title VI claim for anti-Semitic harassment in part because a reasonable jury could find that a "handful of assemblies . . . could not have plausibly changed the anti-Semitic sentiments of the student harassers").

What these cases and many others like them demonstrate is that *Davis* has worked to protect students from harassment and to protect free speech rights. Montana should join Alabama,[13] Arizona,[14] Arkansas,[15] Ohio,[16] Oklahoma, [17]and Tennessee[18] in requiring its public institutions to use a definition of discriminatory student-on-student harassment consistent with the *Davis* standard.

HB 349 appropriately protects freedom of association

HB 349 protects students who are dedicated to a particular cause, ensuring that they can band together, combine resources, hold meetings, craft their shared vision, and thus more effectively reach their fellow students with their message. The freedom of expressive association also includes the freedom not to associate—that is, to exclude those who don't share the group's beliefs. Otherwise, a group might lose control of the message it wants to articulate. Simply put, while it would be unlawful for student groups that are not predicated on shared common beliefs to exclude students from membership or leadership roles, or for student groups to exclude individual students based on immutable characteristics such as race or sexual orientation, it should not be unlawful for belief based groups to require their members and leaders to share their values and beliefs.

[13] Ala. Code § 16-68-3.
[14] Ariz. Rev. Stat. §15-1866.
[15] Ark. Code Ann. §§ 6-60-1001-1010.
[16] Ohio HB 40 (2020).
[17] Okla. Stat. Ann. tit. 70, § 2120.
[18] Tenn. Code. Ann. §§ 49-7-2401-2408.

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Conclusion

Thank you for considering FIRE's support for HB 349. I'd be happy to answer any questions or concerns. I can be reached at 215-717-3473 or at tyler@thefire.org.

Respectfully,

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