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United States Department of Education
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Sent by U.S. Mail and Facsimile (202-453-6012)

Dear Assistant Secretary Ali:

For decades now, college administrators have struggled to define discriminatory harassment. Define harassment too broadly, and an institution might be on the losing end of a First Amendment lawsuit, the latest in a long line of courtroom defeats dating back more than twenty years. Define harassment too narrowly, and a student might sue for ignoring Title IX violations. As you know, a college that fails to maintain a sufficient harassment policy may be subject to investigation by the Office for Civil Rights, and a violation might mean loss of federal funding.

This confusion has led to the stubborn persistence of unconstitutional restrictions on student speech. A 2010 survey of policies at nearly 400 universities conducted by attorneys from the Foundation for Individual Rights in Education found that two-thirds of schools maintain policies that clearly and substantially restrict protected speech. Many of these restrictions are broad or vague harassment policies. For example, the University of Illinois at Urbana-Champaign defines sexual harassment to include any "statement that is offensive, humiliating, or an interference with required tasks or career opportunities." Jackson State University prohibits as harassment "verbally abusive language by any person on University-owned or controlled property." Marshall University's harassment policy bans expression that causes or was intended to cause "mental harm, injury, fear, stigma, disgrace, degradation, or embarrassment." Unconstitutional policies like these persist despite an overwhelming string of defeats for similarly broad or vague harassment codes dating back to 1989, when a federal district court found the University of Michigan's speech code unconstitutional. The continued

maintenance of such overreaching harassment policies benefits no one. Students risk punishment for protected speech; institutions risk losing lawsuits.

Fortunately, the Supreme Court has provided a clear standard for student-on-student harassment that simultaneously prohibits harassment and protects speech. In *Davis v. Monroe County Board of Education* (1999), the Supreme Court confronted the question of when a school could be held liable in a lawsuit for damages filed by a student victim of harassment. The Court held that a grade school properly faced liability after it demonstrated "deliberate indifference" to serious, ongoing student-on-student harassment. In reaching this conclusion, the Court formulated a definition of student-on-student harassment. The Court determined that to avoid liability, schools must respond to 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."

Twelve years later, the *Davis* standard is still the Supreme Court's only guidance regarding student-on-student harassment—and it remains the best definition of harassment for both students and colleges. *Davis*' central benefit is its precise balance between a school's dual responsibilities to prohibit harassment that denies a student equal access to an education and to honor freedom of expression. If merely "offensive" expression constituted harassment, then a student might be punished for telling a sensitive student a joke, reading a poem aloud, or simply voicing a dissenting political opinion. Instead, *Davis* requires the harassment not only to seem offensive, but to be *objectively* so. By incorporating this "reasonable person" element, the *Davis* standard frees campus discourse from the tyranny of the student body's most sensitive ears, as well as those feigning outrage to silence viewpoints they dislike. Furthermore, by including both "severity" and "pervasiveness" requirements, *Davis* protects the dialogue we expect universities to foster in the search for truth. Under the *Davis* standard, heated discussion is acceptable, but the truly harassing behavior that federal anti-discrimination laws are intended to prohibit is not.

We ask that OCR recognize *Davis* as the controlling standard for student-on-student harassment in the educational context. Further, in order to protect free speech and prevent harassment, we ask that OCR require that institutions adopt no more and no less than the *Davis* standard if they are to be deemed fully compliant with federal anti-discrimination laws. "No more and no less" is necessary because many colleges maintain conflicting harassment policies; a constitutional policy in the student handbook may be contradicted by an unconstitutional one posted online. Using the Supreme Court's definition would prohibit harassing behavior, safeguard student speech rights, and provide institutions with legal certainty. No court will find the *Davis* standard to be insufficiently protective of First Amendment rights or a student's ability to receive an education free from harassment. By insisting on *Davis*, OCR would not only eliminate a vast swath of campus speech restrictions, but would also confirm that the American campus remains what Supreme Court Justice William Brennan deemed "peculiarly the 'marketplace of ideas.'"

Sincerely,

Foundation for Individual Rights in Education

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American Booksellers Foundation for Free Expression
American Council of Trustees and Alumni
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The Heartland Institute
National Association of Scholars
National Coalition Against Censorship
The Tully Center for Free Speech at Syracuse University
Woodhull Sexual Freedom Alliance

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Comments by the National Coalition Against Censorship
on
Federal Enforcement of Civil Rights Laws Protecting Students Against Bullying, Violence and Harassment
United States Commission on Civil Rights
May 27, 2011

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's Youth Free Expression Project supports the rights of youth to access information, as well as their freedom to question, learn, and think for themselves. NCAC works with students, teachers, parents, and others confronting censorship in schools, and advocates for public policies and laws that respect the importance of free speech to young people. 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 school is the best place for young people to learn how to function in a pluralistic society. If schools fail to offer students an opportunity for discussion and debate on the challenging issues of their time, many will leave school unprepared to make the kind of informed decisions so necessary in a representative democracy.

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The problem of school bullying and harassment is a serious issue that deserves national attention. The question we raise in these comments regards the approach to be taken, not the mission itself. We understand and support efforts to prevent bullying and harassment in schools, especially when the targets are vulnerable, as many LGBTQ students are, and we fully support the efforts of schools officials to prevent such behavior through educational programs, counseling, parental involvement, and other means.

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

We are, however, concerned that use of civil rights laws prohibiting discrimination on the basis of race, sex, national origin, and disability may not be the most effective way to address the issue, and has the potential to undermine other rights that are essential to advance the cause of equality.

These comments primarily address the approach of the Department of Education Office of Civil Rights (OCR), reflected in the "Dear Colleague" letter dated October 26, 2010 (hereafter "the Letter"). By stretching the definition of harassment to encompass various kinds of verbal interactions in schools and colleges, the letter threatens the delicate balance the Supreme Court has struck between the right to equality at work and school and the right to free speech, an approach reflected in OCR pronouncements until recently. The change in OCR's approach is likely to create widespread confusion and avoidable litigation, with potentially deleterious effects for civil rights law, First Amendment jurisprudence, and the students it seeks to benefit.

Under controlling precedent, some of the activities described in the Letter would not qualify as harassment. The Letter's expansive and vague language lends itself to interpretation and implementation that may well infringe constitutional rights. Even if this were not the case, we submit the approach is unwise as a matter of policy. It undermines some critical rights in an effort - which may or not succeed - to achieve other important goals. Surely it is not necessary to jeopardize the constitutional rights of students, especially if other approaches that might be equally or more effective have not been fully explored.

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

The following comments briefly sketch out hostile environment/harassment law, the history of regulatory activity on the subject, as well as First Amendment principles and leading court opinions. As the discussion reveals, the approach adopted by OCR is highly problematic. We urge the Commission to steer a different course and recommend policies that unequivocally recognize students' right to free speech along with their right to an educational environment free of invidious discrimination.

1. Hostile environment harassment

The Supreme Court has addressed the issue of discrimination resulting from harassment or a hostile environment on numerous occasions. We focus in these comments on cases involving Title VII of the Civil Rights Act and Title IX of the Education Amendments of 1972, where the law is most fully developed.

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 on the issue. 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. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993), another Title VII case alleging repeated, targeted and egregious forms of verbal harassment, reaffirmed the Court's approach in *Meritor,* but noted that offensive language alone is ordinarily insufficient to make out 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).

Cases asserting hostile environment harassment in education modified the approach taken in Title VII cases in significant ways. In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), a case alleging peer-to-peer harassment, the Court held that the school must have *actual knowledge* of harassment to which it is *deliberately indifferent*, and that the harassment must be so "severe, pervasive, *and objectively offensive,* that it effectively bars the victims's access to an educational opportunity or benefit." *Id.* at 633 (emphasis added). The opinion thus requires stronger evidence of the deleterious effects on individuals and explicitly requires that the harassment be judged by an objective standard that meets all three criteria ("severe, pervasive, *and* objectively offensive").[2]

The Court further held that the "harassment must occur 'under' 'the operations of'" the school and "must take place in a context subject to the school district's control." *Id.* at 645. In observing that "harassment depends on a constellation of surrounding circumstances, expectations, and relationships," the Court noted that "schoolchildren may regularly interact in ways that would be unacceptable among adults." *Id.* at 675, 651. See also *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998). [3]

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[2] The Department of Education has the power under Title IX only to deny or withdraw federal funding from institutions that fail to comply with its non-discrimination mandates. *Fitzgerald v. Barnstable School Committee,* 555 U.S. 246 (2009). A private right of action is implied under Title IX and court decisions interpreting the statute thus arise as actions for damages and other relief by aggrieved individuals.

[3] In these and other cases, decisions have been carefully drawn to avoid potential conflicts with First Amendment rights. "There is of course no question that non-expressive, physically harassing *conduct* is entirely outside the ambit of the free speech clause…..When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications. 'Where pure expression is involved,' anti-discrimination law 'steers into the territory of the First Amendment.'" *Saxe v. State College Area School District*, 240 F.3d 200, 206(3d Cir. 2001)(citation omitted).

2. Regulatory actions

OCR has issued a series of statements on the meaning of hostile environment sexual harassment. Its 1997 Guidance, issued after the *Meritor* and *Harris* decisions but prior to the Supreme Court decision in *Davis,* defines it as: "Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors and other verbal, nonverbal or physical conduct of a sexual nature) … that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile of abusive educational environment." 62 Fed. Reg, 12033, 12038 (3/13/1997).

The Guidance goes on to state 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." *Id.* This point is emphasized later in the Guidance: "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." *Id.* at 12045-46. The Revised Sexual Harassment Guidance issued on Jan. 19, 2001, contains precisely the same language, and adds that 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.

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.[4]

This definition, developed well after the decision in *Davis,* 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[s] and detract[s] 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."

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.

The Letter also states that a "school is responsible for addressing allegedly harassing incidents about which it knows or *reasonably should have known*." (Footnote omitted, emphasis added.) This is inconsistent with Title IX, which requires actual knowledge of harassment prior to any enforcement action by OCR. OCR may only limit or deny federal funding "to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement" or by other means "provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by

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[4] 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.

voluntary means." 20 U.S.C. §1682. [5] The Supreme Court has likewise made it clear that a Title IX action for damages requires proof that the school was "deliberately indifferent to sexual harassment, of which [it had] actual knowledge." *Davis*, 526 U.S. at 650.

The suggestion in the letter that schools have an obligation to prevent harassing conduct through use of cell phones and the Internet introduces other obvious First Amendment speech and privacy problems and is arguably beyond the scope of OCR's authority. The Court in *Davis* held that "the harassment must take place in a context subject to the school district's control." *Id.* at 660. Similarly, the statement that such harassment (as defined in the letter) "violates the civil rights laws that OCR enforces," suggests that OCR's standards and definitions are indistinguishable from those adopted by courts of law, suggesting that schools might be liable for damages for failure to comply with the terms of the Dear Colleague Letter. Supreme Court decisions indicate otherwise.

The examples provided in the Letter demonstrate how these issues are likely to play out in practice. For example, the Letter refers to "overtly racist behavior (*e.g.* racial slurs)" as a component of racial harassment. However, students routinely use racially charged language, and even call each other by words that in another context might be construed as a "racial slurs." Some students might consider this evidence of a "racially hostile environment," but many would see it as an idiom widely accepted in certain situations.

The section on sexual harassment includes "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 email or Web sites of a sexual nature." It is common, and even normal, for teenagers to joke about sex, to share stories and images, and to report rumors. Some may find this offensive, hurtful, and objectionable, but that does not mean the expression loses First Amendment protection, or that the behavior amounts to bullying or harassment.[6]

3. Students' First Amendment rights.

While school officials have considerable authority to regulate student speech in school, they do not have license to disregard the free speech rights of students. Speech codes in the college and university setting have routinely been struck down. See, *e.g., DeJong v. Temple University*, 537 F.3d 301 (3d Cir. 2008). Even in the high school setting, efforts to proscribe the kind of speech outlined in the Letter have been subjected to searching inquiry, and frequently found violative of First Amendment rights.

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[5] The notice requirement applies to private actions as well: "individuals and agencies may not bring suit under the state unless the recipient has received 'actual notice' of the discrimination." *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 181 (2005).

[6] While the examples provided in the Letter involve complex fact patterns of which the quoted language is only part, singling out protected speech as a significant element of harassment is misleading without recognition of the role of the First Amendment in such situations.

The decision in *Saxe v. State College Area School District*, 240 F. 3d 200 (3d Cir., 2001), is particularly instructive. The case involved a First Amendment challenge to an anti-harassment code which read, in pertinent part:

> Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.
>
> Harassment can include any unwelcome verbal, written or physical conduct which offends, denigrates, or belittles an individual…. Such conduct includes but is not limited to unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures…or the display or circulation of written material or pictures.

Id. at 202-203. The school argued that harassment "as defined by federal and state anti-discrimination statutes, is not entitled to First Amendment protection." *Id.* at 204. Then-Judge Alito, writing for the court, rejected this argument: "There is no categorical 'harassment exception' to the First Amendment's free speech clause. Moreover, the … policy prohibits a substantial amount of speech that would not constitute actionable harassment under either federal or state law." *Id.* He went on to note that "there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs." *Id.* at 206. The test for limiting such speech is whether or not it is likely to substantially disrupt the educational program. The court concluded that although there is "a compelling interest in promoting an educational environment that is safe and conducive to learning, [the school] fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under the Policy." *Id.* at 217. The unmistakable message is that if a school were to adopt rules implicitly required by the Letter, it could well be subject to suit for infringing students' free speech rights.[7]

A more recent opinion, authored by Judge Posner of the Seventh Circuit, struck down a school policy prohibiting "negative comments" about homosexuality, stating that "a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality." *Zamecnik v. Indian Prairie School Dist. #204* (7th Cir., March 1, 2011), http://www.ca7.uscourts.gov/tmp/850VHDVL.pdf, at 4. Without evidence that the school had "a reasonable belief that it faced a threat of substantial disruption," *id.* at 11, the speech restriction could not be justified. Such disruption cannot result from the response of the listeners: "retaliatory conduct by persons offended" by the speech in question does not provide grounds for suppressing the speech; otherwise, "free speech could be stifled by the speaker's opponents…." *Id.* at 11 - 12.

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[7] The opinion also notes that a policy covering conduct outside school "would raise additional constitutional questions." *Id.* at 216, n.11.

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We embrace and support efforts to prevent bullying and to provide services and resources to the victims, but we submit that this goal can – and must – be achieved without infringing the very rights we teach our children are the basis of our democracy. OCR got it right in 1997: "while the First Amendment may prohibit the school from restricting the right of students to express opinions … that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard." The harm inflicted by bullying and harassment are matters that can and should be taught in school; school officials already have informal and formal means of enforcing appropriate codes of conduct in school. The approach in the Letter will do little other than to create confusion, instigate litigation, and generally interfere with the ability of educators to do their job.

We strongly urge the Commission on Civil Rights to steer the federal efforts to prevent bullying and harassment towards positive educational and support programs, which are likely to be more successful in the long run than punitive approaches and will not exact the high price of restricting students' other fundamental rights.

"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*, __ U.S. __ (No.09-751) (March 2, 2011), slip op. at 15. http://www.supremecourt.gov/opinions/10pdf/09-751.pdf. We submit that even hateful speech can provide "teachable moments," and that students need all the instruction and guidance schools can give them to deal with these most sensitive and challenging issues, which they encounter both in and out of school.