



May 2, 2017

Candice Jackson
Acting Assistant Secretary
Office for Civil Rights
United States Department of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, D.C. 20202

Sent via U.S. Mail

Dear Assistant Secretary Jackson:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses. We write to you today to congratulate you on your appointment and to request an opportunity to meet with you at your convenience.

As explained to former Assistant Secretary Russlynn H. Ali and former Assistant Secretary Catherine Lhamon in previous correspondence (attached), FIRE is deeply concerned about recent actions by the Office for Civil Rights (OCR) and their consequences for student and faculty rights to due process and freedom of speech. Over the past few years, OCR's actions have prompted colleges and universities across the country to adopt unconstitutional speech codes and eliminate critical due process protections.

Indeed, FIRE is currently sponsoring litigation by two plaintiffs (one university and one individual student) that challenges OCR's imposition, through an April 4, 2011, "Dear Colleague" letter, of a requirement that colleges and universities receiving federal funds use the low "preponderance of the evidence" standard in sexual misconduct cases. *Doe v. Lhamon*, No. 1:16-cv-01158 (RC) (D.D.C. Aug. 15, 2016).

FIRE is also sponsoring litigation by former Louisiana State University (LSU) Professor Theresa Buchanan, who was fired from her tenured position over her alleged violation of an unconstitutional speech code. LSU's code mirrors the language recommended as "a blueprint for colleges and universities throughout the country" by OCR and the Department of Justice's

Civil Rights Division, Educational Opportunities Section. Buchanan's firing was such a severe attack on academic freedom that LSU was censured for it by the American Association of University Professors. *Buchanan v. Alexander, et al.*, No. 3:16-cv-00041-SDD-EWD (M.D. La. Jan. 20, 2016).

FIRE and many other individuals and organizations have repeatedly raised concerns about OCR's policies over the past few years. Disappointingly, however, the agency has been seemingly uninterested in seriously considering how its politics intersect with our nation's constitutional commitments to free speech, due process, and academic freedom. It remains FIRE's firm belief that OCR's laudable and necessary work to address the effects of discrimination in federally funded education programs can and must be accomplished within the bounds of the law and the Constitution. These two goals need not be in tension, and we stand ready to help reconcile them in a way that benefits all students and faculty members.

We at FIRE would like to take this opportunity to once again reach out to the Office for Civil Rights and help build a productive relationship between the agency and civil liberties organizations. To that end, we look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Shibley". The signature is fluid and cursive, with a large initial "R" and a stylized "Shibley".

Robert Shibley
Executive Director

Encl.



Foundation for Individual Rights in Education

601 Walnut Street, Suite 510 • Philadelphia, Pennsylvania 19106
T 215-717-3473 • F 215-717-3440 • fire@thefire.org • www.thefire.org

Greg Lukianoff
PRESIDENT

Robert L. Shibley
VICE PRESIDENT

William Creeley
DIRECTOR OF LEGAL AND
PUBLIC ADVOCACY

Alan Charles Kors
CO-FOUNDER AND
CHAIRMAN EMERITUS

BOARD OF DIRECTORS

Harvey A. Silverglate
CO-FOUNDER AND
CHAIRMAN

Barbara Bishop
James E. Ferguson II
William J. Hume
Richard Losick
Joseph M. Maline
Marlene Mieske
Daphne Patai
Virginia Postrel
Daniel Shuchman

BOARD OF ADVISORS

Lloyd Buchanan
T. Kenneth Cribb, Jr.
Candace de Russy
William A. Dunn
Benjamin F. Hammond
Nat Hentoff
Roy Innis
Wendy Kaminer
Woody Kaplan
Leonard Liggio
Herbert London
Peter L. Malkin
Muriel Morisey
Steven Pinker
Milton Rosenberg
John R. Searle
Christina Hoff Sommers

May 5, 2011

Russlynn Ali
Assistant Secretary for Civil Rights
Office for Civil Rights
United States Department of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, DC 20202-1100

Sent by U.S. Mail and Facsimile (202-453-6012)

Dear Assistant Secretary Ali:

As you can see from the list of our Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE) unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals from across the political and ideological spectrum on behalf of freedom of speech, due process, freedom of assembly, legal equality, freedom of conscience, and academic freedom on America's college campuses. Our website, thefire.org, will give you a greater sense of our mission and activities.

FIRE writes to voice our deep concerns regarding the Office for Civil Rights' (OCR's) "Dear Colleague" letter of April 4, 2011, and the deleterious impact the letter's guidance to colleges and universities will have on student rights. Specifically, FIRE is troubled by the letter's failure to explicitly instruct administrators that public universities may not violate the First Amendment rights of students and that private universities must honor their promises of freedom of expression to students. Given OCR's past sensitivity to the unequivocal importance of freedom of expression to higher education, this is a disappointing development.

FIRE is still more worried about the impact of OCR's guidance on students' right to due process. Indeed, the letter has already prompted several institutions to curtail the procedural due process rights afforded students accused of sexual harassment or sexual violence; given OCR's regulatory authority and influence, all institutions of higher education accepting federal funding are likely to follow. While it is of course necessary for colleges and universities to address allegations of sexual harassment and sexual violence with all requisite purpose, seriousness, and speed, the rights of those accused cannot be sacrificed simply as a function of the accusation itself.

I will detail each of FIRE's concerns in turn.

I. Freedom of Expression

In discussing the legal obligations borne by colleges and universities under Title IX to respond to both sexual harassment and sexual violence committed against students, OCR fails to explicitly recognize that public universities may not violate the First Amendment rights of their students and that private universities must honor their promises of freedom of expression to students. The April 4 letter fails to include any discussion of the free expression considerations involved when evaluating or investigating allegedly harassing behavior. Nor does the letter reference or cite for further guidance OCR's 2003 "Dear Colleague" letter regarding the intersection of freedom of expression and harassment policies.¹ The 2003 letter was necessitated by a steady stream of lawsuits and controversies regarding the punishment of offensive, unpopular, or "politically incorrect" (but protected) speech on campus as instances of harassment. In the letter, former Assistant Secretary Gerald A. Reynolds addressed confusion regarding the role of OCR regulation with regard to campus speech, noting that "some colleges and universities have interpreted OCR's prohibition of 'harassment' as encompassing all offensive speech regarding sex, disability, race or other classifications." Assistant Secretary Reynolds made clear that "OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment." Assistant Secretary Reynolds further noted that "OCR is committed to the full, fair and effective enforcement of these statutes *consistent with the requirements of the First Amendment.*" (Emphasis added.)

Worryingly, by failing to recognize the freedom of expression concerns implicated in investigating and punishing protected speech, the April 4 letter does not replicate the speech-protective understandings of hostile environment sexual harassment contained in previous OCR guidance letters, including both OCR's 2001 *Revised Sexual Harassment Guidance (2001 Guidance)* and the 2003 "Dear Colleague" letter. In the *2001 Guidance*, OCR emphasized that in determining whether a hostile environment has been created, the severity, pervasiveness, and both objective and subjective impact of the behavior in question must be considered.² OCR explicitly noted that its understanding of hostile

¹ The 2003 letter is available on OCR's website at <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

² The *2001 Guidance* noted:

OCR considers a variety of related factors to determine if a hostile environment has been created, i.e., if sexually harassing conduct by an employee, another student, or a third party is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the school's program based on sex.[] OCR considers the conduct from both a *subjective* and *objective* perspective. In evaluating the *severity* and *pervasiveness* of the conduct, OCR considers all relevant circumstances, i.e., "the constellation of surrounding circumstances, expectations, and relationships." (Emphasis added; internal citations omitted.)

Among other factors, the *2001 Guidance* highlighted the importance of the "type, frequency, and duration of the conduct"; whether the conduct was welcome; the age and sex of both the accuser and the accused; and the "degree to which the conduct affected one or more students[]" education." In sum, the *2001*

environment harassment was informed by and consistent with the Supreme Court of the United States' decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).³ In *Davis*, the Court found that behavior constitutes hostile environment sexual harassment when it is "so severe, pervasive, and objectively offensive, and . . . 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," and that institutions displaying deliberate indifference to actual knowledge of such behavior could be found liable for monetary damages.⁴ This exacting, speech-protective definition ensures an appropriate balance between freedom of expression on campus and the importance of establishing an educational environment free from harassment. Illustrating this balance, Assistant Secretary Reynolds made clear in the 2003 "Dear Colleague" letter that "OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR."

Given this well-established recognition of speech-related concerns, it is thus deeply troubling that the April 4 letter does not acknowledge OCR's previous statements on freedom of expression. While referring recipients to the *2001 Guidance* generally, the new letter does not itself reiterate or reaffirm these more speech-protective conceptions of hostile environment sexual harassment. As a result of this deficiency, FIRE worries that schools seeking to comply with OCR's increased emphasis on sexual harassment education and prevention will fail to promulgate and disseminate sexual harassment policies that provide sufficient protection for student speech. This result would contradict previous OCR guidance, longstanding legal precedent,⁵ and the normative conception of the primacy of freedom of expression in higher education.

Guidance asked recipient institutions to consider "the totality of the circumstances in which the behavior occurs," noting that it is "always important to use common sense and reasonable judgement in determining whether a sexually hostile environment has been created."

³ Specifically, the *2001 Guidance* stated:

[T]he definition of hostile environment sexual harassment used by the Court in *Davis* is consistent with the definition found in the proposed guidance. Although the terms used by the Court in *Davis* are in some ways different from the words used to define hostile environment harassment in the 1997 guidance (see, e.g., 62 FR 12041, "conduct of a sexual nature is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment"), the definitions are consistent.

⁴ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

⁵ That the First Amendment's protections fully extend to public universities is settled law. See *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) ("[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment"); see also *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities"); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" (citation omitted)).

While concerns about free speech may seem unrelated to the thorough discussion of sexual violence emphasized in the April 4 letter, overly broad or vaguely constructed definitions of sexual harassment have served as a consistent justification for abuses of student free speech rights for more than two decades. FIRE's experience over the past dozen years shows that unless hostile environment harassment is properly defined, overly broad or vague regulations are all too often used to justify the punishment of protected speech. For example, a Muslim student at William Paterson University in New Jersey was charged with sexual harassment for privately replying to an email from a professor that promoted a film about a lesbian relationship.⁶ In another case, a student-employee at Indiana University–Purdue University Indianapolis was found guilty of harassment merely for publicly reading the book *Notre Dame vs. the Klan: How the Fighting Irish Defeated the Ku Klux Klan*, an account of the Klan's defeat in a 1924 street fight with University of Notre Dame students.⁷ Elsewhere, a student at the University of New Hampshire was found guilty of "harassment" for posting flyers in his dormitory jokingly suggesting that women could lose the "freshman 15" by taking the stairs instead of the elevators when going only one or two floors.⁸ Further, overbroad and vague harassment policies have consistently been invalidated by federal courts on constitutional grounds;⁹ indeed, the United States Court of Appeals for the Third Circuit has twice in the span of three years found university harassment policies to be in violation of students' First Amendment rights.

⁶ See "William Paterson University: Punishment on Harassment Charges for Response to Mass E-Mail," <http://thefire.org/case/682.html>; see also Wayne Parry, 'Harassment' reprimand dropped against college worker, ASSOC. PRESS, Dec. 7, 2005, available at <http://thefire.org/article/6555.html>.

⁷ See "Indiana University - Purdue University Indianapolis: Student Employee Found Guilty of 'Racial Harassment' for Reading a Book," <http://thefire.org/case/760>; see also Deanna Martin, *IUPUI says sorry to janitor scolded over KKK book*, ASSOC. PRESS, July 14, 2008, available at <http://www.huffingtonpost.com/huff-wires/20080714/kkk-book-apology>.

⁸ See "University of New Hampshire: Eviction of Student for Posting Flier," <http://thefire.org/case/651.html>; see also Scot Lehigh, *Humor vs. Free Speech at UNH*, BOSTON GLOBE, Nov. 17, 2004, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/11/17/humor_vs_free_speech_at_unh; *UNH Student Back – in New Dorm*, UNION LEADER, Nov. 16, 2004, at B1.

⁹ *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 former sexual harassment policy on First Amendment grounds and holding that because policy failed to require that speech in question "objectively" created 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); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Booher v. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring "harassment by personal vilification" policy unconstitutional); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy due to unconstitutionality).

Colleges and universities are both legally and morally obligated to address sexual harassment and sexual violence on campus. The vast majority are also legally and morally obligated to protect freedom of expression. As OCR's previous guidance has made clear, these responsibilities need not be in tension. FIRE asks that OCR again make clear to college and university administrators that their obligation to respond to student-on-student sexual harassment does not obviate or lessen their obligation to respect freedom of expression. We further ask that OCR clarify that while sexual harassment may include "sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature," expression protected by the First Amendment becomes actionable sexual harassment only if it is (1) unwelcome; (2) of a sexual nature or (3) discriminatory on the basis of gender; (4) directed at an individual; and (5) "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."¹⁰ Were OCR to mandate that colleges and universities implement no more and no less than the above standard, OCR would considerably lessen confusion with regard to the applicable legal standard as well as with regard to recipient institutions' obligations both to address hostile environment harassment and to protect student speech. The resulting clarity and certainty would allow institutions to comply with OCR regulations intended to protect students from sexual assault and harassment while protecting student speech and insulating themselves against the possibility of First Amendment litigation.

II. Right to Due Process

OCR's April 4 letter mandates that recipient institutions implement certain procedures governing responses to allegations of sexual harassment and sexual violence. While some of these newly announced requirements are beyond the scope of FIRE's mission, others implicate due process rights and call into question the basic fairness of disciplinary proceedings against those students accused of sexual harassment and sexual violence. Given the extreme gravity of such accusations and the potential impact of a guilty finding, FIRE is deeply concerned that OCR's new requirements erode necessary due process protections.

A. Standard of Proof

OCR's April 4 letter mandates that colleges and universities receiving federal assistance must employ a "preponderance of the evidence" standard within their grievance procedures governing sexual harassment and sexual violence in order to satisfy their legal obligations under Title IX. Specifically, the April 4 letter dictates:

[I]n order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred),

¹⁰ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

The letter makes clear that schools maintaining a higher evidentiary standard—such as the “clear and convincing” standard—for disciplinary procedures involving allegations of sexual harassment and sexual violence will be subject to OCR review. As the letter states: “In addressing complaints filed with OCR under Title IX, OCR reviews a school’s procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints.”

In mandating that schools adopt a preponderance of the evidence standard in their grievance procedures governing sexual harassment and sexual violence allegations, OCR has broken significant—and troubling—new ground. In contrast to the April 4 mandate, the *2001 Guidance* is silent with regard to the standard of proof required of schools’ grievance procedures. While the *2001 Guidance* stated that recipient institutions must maintain “grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex,” it did not specify that a specific burden of proof must be employed in university grievance procedures. Indeed, the *2001 Guidance* granted schools considerable autonomy in determining the particular protocols to be utilized on their campuses, noting that “[p]rocedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience.” However, the April 4 letter’s mandate revokes this discretion—and with it, schools’ ability to grant students due process protections that are appropriate for the gravity of the offenses of which they are accused.

In support of lessening the burden of proof required during grievance procedures addressing sexual harassment and sexual violence, OCR invokes several arguments. None is convincing, and none supports OCR’s dramatic new erosion of due process protections for those students accused of committing sexual harassment or sexual violence.

First, OCR argues that the lower evidentiary standard is not just permissible, but in fact required because “[t]he Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* Like Title IX, Title VII prohibits discrimination on the basis of sex.” Of course, much civil litigation (including civil litigation concerning allegations of discrimination on the basis of protected class status) incorporates a preponderance of the evidence standard. As the Supreme Court has observed, however, the reliance on the preponderance of the evidence standard in civil litigation is due in significant part to the fact that “[t]he typical civil case involv[es] a monetary dispute between private parties. Since society has a minimal concern with the

outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion."¹¹

Indeed, the Supreme Court has recognized that "adopting a 'standard of proof is more than an empty semantic exercise.'"¹² That is, "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"¹³ "[M]indful that the function of legal process is to minimize the risk of erroneous decisions," the Court has noted that an intermediate standard of proof (e.g., the "clear and convincing" standard) may be employed "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant," because the "interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof."¹⁴ In cases where "the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight," the Court has held that use of the preponderance of the evidence standard is "inconsistent with due process."¹⁵ The Court itself has utilized the "'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests in various civil cases."¹⁶

In the educational context, the Supreme Court has further held that when "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process requires "precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school."¹⁷ The Court made these observations about due process protections at the elementary and secondary school level, finding at least minimal requirements of due process necessary because disciplinary action "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."¹⁸ Given the increased likelihood of much further-reaching negative consequences for a college student found guilty of sexual harassment or sexual violence in a campus judicial proceeding, greater protections are required, not lesser.¹⁹

¹¹ *Addington v. Texas*, 441 U.S. 418, 423 (1979).

¹² *Id.* at 425 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part), *cert. dismissed sub nom. Murel v. Balt. City Criminal Court*, 407 U.S. 355 (1972)).

¹³ *Id.* at 423 (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

¹⁴ *Id.* at 424, 425.

¹⁵ *Santosky v. Kramer*, 455 U.S. 745, 758 (1982).

¹⁶ *Addington*, 441 U.S. at 424.

¹⁷ *Goss v. Lopez*, 419 U.S. 565, 574, 580 (1975) (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

¹⁸ *Id.* at 575.

¹⁹ Even if the preponderance of the evidence standard is appropriate in some instances for the campus judiciary, accusations of sexual violence should be treated differently than sexual harassment when determining the appropriate standard of proof, at the very least, given the implication of criminal activity.

Further, OCR contends that the use of the preponderance of the evidence standard by schools adjudicating complaints of sexual harassment or sexual violence is required because of the standard's use by courts in adjudicating workplace sexual discrimination cases arising under Title VII. To support this argument, OCR cites the Supreme Court's approval of the preponderance of the evidence standard in the context of Title VII litigation in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252–55 (1989). However, both *Desert Palace* and *Price Waterhouse* involve claims for monetary damages brought by employees against their employers as a result of workplace sexual discrimination. As such, these cases concern precisely the type of “monetary dispute between private parties” that the Supreme Court has identified as properly the province of the preponderance of the evidence standard.²⁰ In contrast, OCR's April 4 letter mandates that this lesser standard of proof be used in hearings that will dictate a student's guilt or innocence with regard to allegations of potentially criminal misconduct.²¹

In an attempt to add further support to the claim that the use of the preponderance of the evidence standard in Title VII case law mandates its use by recipient institutions under Title IX, OCR also cites its *2001 Guidance*. In the *2001 Guidance*, OCR correctly noted that “the *Davis* Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX.” But while Title VII caselaw aided the *Davis* Court in identifying the contours of hostile environment sexual harassment in the educational context, the *Davis* Court was entirely silent as to whether evidentiary standards used to adjudicate claims for monetary damages arising under Title VII are thus mandated by Title IX for schools adjudicating claims of sexual harassment and sexual violence, as

²⁰ See *Addington v. Texas*, 441 U.S. 418, 423 (1979).

²¹ Moreover, in citing the use of the lower burden of proof approved by the Court in *Desert Palace* and *Price Waterhouse*, OCR disregards a fundamental difference between workplaces governed by Title VII and colleges and universities governed by Title IX: While a private employer is subject to Title VII liability for a private action for damages when a plaintiff proves that “discrimination based on sex has created a hostile or abusive work environment,” *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986), a college or university is only subject to a private action for damages under Title IX liability when its “deliberate indifference ‘subjects’ its students to harassment.” *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644 (1999) (noting that Title IX's “plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs.”). In other words, while an employee suing for damages under Title VII must demonstrate only that Title VII's protections were violated, a student seeking similar relief under Title IX must prove that Title IX's protections were violated *and* that the institution was “deliberately indifferent” to such violations. But, even given the more stringent liability attached to private employers with regard to hostile environment harassment, courts have held that employer investigations into harassing conduct need not be “perfect” to avoid liability, only that the employer response be “reasonably calculated to prevent further harassment.” *Knabe v. Boury Corp.*, 114 F.3d 407, 412 (3d Cir. 1997) (internal citations omitted); see also *Harris v. L & L Wings*, 132 F.3d 978, 984 (4th Cir. 1998) (“the legal standard of ‘prompt and adequate remedial action’ in no way requires an employer to dispense with fair procedures for those accused or to discharge every alleged harasser.”). Further, courts have noted that in the context of private actions for damages under Title IX, the “deliberate indifference standard is a high one.” *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 384 (5th Cir. 2000) (holding that even an “ineffective” investigation did not constitute “deliberate indifference”). Given these holdings and OCR's reliance on Title VII case law, OCR's contention that Title IX demands a lower standard of proof for all judicial hearings in order to be sufficiently “prompt and equitable” is without merit.

OCR now claims. Nor does OCR’s citation of the United States Court of Appeals for the Fourth Circuit’s observation in *Jennings v. University of North Carolina*, 482 F.3d 686, 695 (4th Cir. 2007) that the Fourth Circuit “look[s] to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX” provide significant support for OCR’s new mandate. Simply put, the fact that courts have reviewed Title VII caselaw to inform their analysis of Title IX claims does not justify—far less necessitate—OCR’s new determination that “equitable grievance procedures” under Title IX require colleges and universities to institute a lower burden of proof in hearings adjudicating allegations of sexual harassment and sexual violence.

Finally, OCR argues that the preponderance of the evidence standard is warranted because OCR itself “also uses a preponderance of the evidence standard when it resolves complaints against recipients.” The April 4 letter explains:

For instance, OCR’s Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX. OCR also uses a preponderance of the evidence standard in its fund termination administrative hearings. Thus, in order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred).

But the comparison between the standard OCR uses in determining whether recipient institutions are in compliance with Title IX requirements and the standard the recipient institution itself uses when determining whether a student has committed sexual harassment or sexual assault is inapposite. In determining compliance, OCR is engaged in a matter of administrative review; at stake is federal funding, not an individual’s continued matriculation, reputation, and employment prospects. As such, OCR’s own use of a lower standard of evidence may be justified. In contrast, when determining whether a student has in fact committed sexual harassment or sexual violence against another student, the college or university judicial body conducting the proceeding is engaged in precisely the “quasi-criminal” adjudication²² for which the Supreme Court has deemed the “clear and convincing” standard to be appropriate.²³ The stakes for the accused are extremely high; the permanent, severely negative consequences of a guilty finding will follow the student for the rest of his or her life. As a result, a campus judicial hearing charged with deciding between guilt or innocence much more closely resembles a criminal proceeding than OCR’s determinations of institutional compliance. Given the substantial differences between OCR’s own noncompliance and fund termination hearings and the campus judicial proceedings against a student accused of sexual harassment or sexual violence, the fact that OCR itself employs the preponderance of the

²² As described in the April 4 letter, schools “generally conduct investigations and hearings to determine whether sexual harassment or violence occurred.”

²³ *Addington*, 441 U.S. at 424 (discussing use of intermediate “clear and convincing” standard of proof in civil cases involving “quasi-criminal wrongdoing by the defendant”).

evidence standard in no way supports the conclusion that schools must also employ this standard in their own grievance procedures as a necessary condition of providing prompt and equitable resolutions as required by Title IX.

In cases involving allegations of criminal misconduct such as acts of sexual violence, the preponderance of the evidence standard fails to sufficiently protect the accused's rights and is thus inadequate and inappropriate. Given the unequivocal value of a college education to an individual's prospects for personal achievement and intellectual, professional, and social growth, OCR's insistence that schools reduce procedural protections for those students accused of sexual harassment and sexual violence is deeply troubling. Because of the seriousness of these charges, virtually all institutions will punish those students found guilty with lengthy suspensions, if not immediate expulsion. The interest held by both the accused student and society at large²⁴ in ensuring a correct and just result is therefore far greater than that implicated by a simple "monetary dispute," and a higher standard of proof is demanded. It is unconscionable, given the prospect of life-altering punishment, to require only that those accused of such serious violations be found merely "more likely than not" to have committed the offense in question.²⁵

Requiring a lower standard of proof does not provide for the "prompt and equitable" resolution of complaints regarding sexual harassment and sexual violence. Rather, the lower standard of proof serves to undermine the integrity, accuracy, reliability, and basic fairness of the judicial process. Insisting that the preponderance of the evidence standard be used in hearing sexual violence claims turns the fundamental tenet of due process on its head, requiring that those accused of society's vilest crimes be afforded the scant protection of our judiciary's least certain standard. Under the preponderance of the evidence standard, the burden of proof may be satisfied by little more than a hunch. Accordingly, no matter the result reached by the campus judiciary, both the accuser and

²⁴ The Supreme Court has recognized the crucial importance of higher education to the functioning of our modern liberal democracy. See *Gutter v. Bollinger*, 539 U.S. 306, 331 (2003) (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)) ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society."); see also *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.").

²⁵ The problems presented by mandating a lower standard of proof for complaints involving sexual harassment are further exacerbated by the fact that many recipient institutions maintain expansive definitions of sexual harassment, prohibiting protected speech that does not rise to the level of actionable sexual harassment. See FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, SPOTLIGHT ON SPEECH CODES 2011: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, available at <http://thefire.org/public/pdfs/312bde37d07b913b47b63e275a5713f4.pdf> (report detailing that of 286 public institutions of higher education surveyed, more than two-thirds maintain policies explicitly prohibiting protected speech). Additionally, some universities maintain inexact definitions of sexual assault, further compounding the problems introduced by requiring a lower standard of proof. See, e.g., Robert Shibley, *Unwitting rapists and their oblivious victims*, WASHINGTON TIMES, Apr. 15, 2010, available at <http://www.washingtontimes.com/news/2010/apr/15/unwitting-rapists-and-their-oblivious-victims>; Cathy Young, *Duke's sexist sexual misconduct policy*, BOSTON GLOBE, Apr. 14, 2010, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/04/14/dukes_sexist_sexual_misconduct_policy.

the accused are denied the necessary comfort of knowing that the verdict reached is accurate, trustworthy, and fair. The lack of faith in the judicial process that such uncertainty will likely engender should be of great concern to OCR and recipient institutions.

B. Due Process More Generally

The April 4 letter provides useful clarity regarding several aspects of the hearing process OCR expects recipient institutions to administer. FIRE welcomes OCR's specific and explicit emphasis on the necessity of equal treatment for both the complainant and the accused student with regard to many aspects of the hearing process, including but not limited to access to information to be used in the hearing, access to counsel and participation of counsel, the ability to review the other party's statements, access to pre-hearing meetings, and equal opportunities to present witnesses and evidence.

Additionally, FIRE is pleased that OCR recommends that recipient institutions provide accused students with a procedure for appeal and instructs recipient institutions to "maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings." These recommendations will help ensure that decisions unsupported by available evidence will not stand. FIRE is concerned, however, by OCR's insistence that "[i]f a school provides for appeal of the findings or remedy, it must do so for both parties." Given that accused students will now face an inappropriately low standard of proof, FIRE fears that allowing the accusing student to appeal a finding or remedy in favor of the accused tilts the scale still further toward the accusing student. We worry that because of the publicity that often surrounds claims of this nature and the resulting pressure on judiciary panelists to return a guilty verdict, such appeals would often essentially be reheard *de novo*.

Further, despite the welcome clarity OCR has provided with regard to several aspects of the hearing process, FIRE is concerned that OCR's letter nevertheless may leave recipient institutions uncertain as to their obligation to provide due process protections more generally. Specifically, OCR's April 4 letter states:

Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.

This language is unnecessarily opaque and deeply troubling. By failing to make clear that all recipient institutions, both public and private, have both a legal and a moral duty to ensure that those students accused of sexual harassment and sexual violence be accorded at least a minimum level of due process protection, OCR invites the potential for abuse. FIRE's experience defending student rights for more than a decade demonstrates that colleges and universities will quickly dispense with due process protections for those

students accused of misconduct if they believe they may do so with impunity, or if they believe that OCR has sanctioned them to do so.²⁶

Affording ample due process protections to those students accused of sexual harassment and sexual violence is of paramount importance and may not be sacrificed for purposes of expediency or compliance with OCR's administrative interpretations of Title IX requirements. As other commentators have noted, "OCR knows—and should state clearly—that no court will allow any set of administrative regulations to trump the United States Constitution."²⁷

III. Conclusion

OCR's "Dear Colleague" letter of April 4 raises serious concerns about OCR's continuing recognition of the central importance of freedom of expression on campus, as it fails to replicate or reference OCR's previous statements regarding freedom of expression. Even more worryingly, OCR's letter mandates a dramatic reduction of due process protections for students accused of sexual harassment or sexual violence—particularly, by requiring a lower standard of proof in grievance procedures. OCR's justifications for this new mandate are unsatisfactory, and its effects are likely to be far-reaching. Further, given OCR's overwhelming influence on college and university policies nationwide, it is important that OCR recognize that some recipient institutions will inevitably push too far in attempts to comply. FIRE's experience shows that colleges and universities will cite OCR's most recent guidance, in ways both genuine and disingenuous, as justification for curtailing student rights to freedom of expression and due process.

Indeed, OCR's April 4 letter has already begun to erode due process protections previously afforded those students accused of misconduct. As colleges and universities across the country scramble to comply with OCR's new requirements, FIRE has received reports from accused students who have found grievance procedures changed despite the fact that their hearings are already in progress. Further, parties entirely unconnected with a given institution have nevertheless filed OCR complaints alleging non-compliance,²⁸ and colleges and universities have rushed hastily written policies into effect in an

²⁶ One ready example is Valdosta State University's treatment of former student Thomas Hayden Barnes. Barnes was unilaterally expelled without being accorded a hearing following posts made on Facebook.com. The expulsion is now the subject of a federal civil rights lawsuit. *Barnes v. Zaccari*, No. 1:08-CV-0077-CAP (N.D. Ga. Sept. 3, 2010) (finding former Valdosta State University president liable for violating student's right to due process), *appeal docketed*, No. 10-14622 (11th Cir. Oct. 5, 2010).

²⁷ Gary Pavela & John Wesley Lowery, *The April 4, 2011 OCR "Dear Colleague" letter on sexual violence*, ASSOCIATION OF STUDENT CONDUCT ADMINISTRATION LAW AND POLICY REPORT, Apr. 14, 2011.

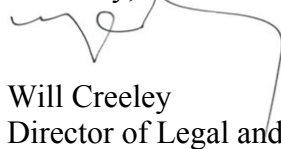
²⁸ Caroline M. McKay, *Law School Challenged Under Title IX*, HARVARD CRIMSON, Apr. 22, 2011, available at <http://www.thecrimson.com/article/2011/4/22/harvard-law-school-title-ix-wendy-murphy> (detailing current OCR investigation of Harvard Law School following complaint filed by New England School of Law professor; the complaint focused in part on Harvard Law School's "clear and convincing" standard).

apparent effort to avoid OCR investigation.²⁹ It is certain that more will follow, at a very high cost to due process protections on campus.

Many commentators have voiced concerns about OCR's April 4 letter.³⁰ FIRE shares these concerns. We ask that OCR address the issues we have outlined above, reaffirm the importance of freedom of expression on campus, rescind its imposition of a preponderance of the evidence standard, and make clear to recipient institutions that the due process rights of all students must be respected.

We appreciate your attention to our concerns, and we look forward to hearing from you.

Sincerely,



Will Creeley
Director of Legal and Public Advocacy

²⁹ See, e.g., Allie Grasgreen, *Rules Shifts After Federal Push*, INSIDE HIGHER ED, May 2, 2011, available at http://www.insidehighered.com/news/2011/05/02/ocr_title_ix_letter_prompts_universities_to_change_sexual_assault_procedures (discussing universities putting policy revisions on “the fast track” following OCR letter); Samantha Harris, *Student Rights in Jeopardy as University of Massachusetts Considers New Speech Codes*, THE TORCH, Apr. 26, 2011, available at <http://thefire.org/article/13123.html> (discussing constitutional problems with new “relationship violence” policy); Jon Ostrowsky, *New federal guidance on univ sexual assault: Brandeis follows Biden lead on Title IX*, BRANDEIS HOOT, Apr. 8, 2011, available at <http://thebrandeishoot.com/articles/10159> (discussing changes in Brandeis University’s standard of proof for internal hearings); Elizabeth Titus, *Stanford Lowers Standard of Proof for Sexual Assault*, STANFORD DAILY, Apr. 12, 2011, available at <http://www.stanforddaily.com/2011/04/12/stanford-lowers-standard-of-proof-for-sexual-assault> (discussing changes in Stanford University’s standard of proof for sexual assault cases).

³⁰ See, e.g., Mike Armstrong and Daniel Barton, *A Thumb on the Scales of Justice*, STANFORD DAILY, Apr. 2011, available at <http://www.stanforddaily.com/2011/04/29/op-ed-a-thumb-on-the-scale-of-justice> (criticizing Stanford’s change in evidentiary standards); Peter Berkowitz, *Is Yale University Sexist?*, WALL STREET JOURNAL, Apr. 16, 2011, available at <http://online.wsj.com/article/SB10001424052748704529204576257121944716258.html> (detailing concerns about OCR investigation of Yale University); Wendy Kaminer, *The SaVE Act: Trading Liberty for Security on Campus*, THE ATLANTIC, Apr. 25, 2011, available at <http://www.theatlantic.com/national/archive/2011/04/the-save-act-trading-liberty-for-security-on-campus/237833> (discussing “disregard for the rights of students accused of misconduct” contained in April 4, 2011, OCR “Dear Colleague” letter); Harvey Silverglate, *Liability Reigns Supreme at the Corporate University*, FORBES, Apr. 22, 2011, available at <http://blogs.forbes.com/harveysilverglate/2011/04/22/liability-reigns-supreme-at-the-corporate-university> (detailing concerns about April 4, 2011, OCR “Dear Colleague” letter); Cathy Young, *Sexual Assault on Campus—Is It Exaggerated?*, MINDING THE CAMPUS, Apr. 18, 2011, available at http://www.mindingthecampus.com/originals/2011/04/_by_cathy_young_1.html (criticizing new OCR requirements and questioning statistics cited by OCR in support of new guidance).



Foundation for Individual Rights in Education

601 Walnut Street, Suite 510 • Philadelphia, Pennsylvania 19106
T 215-717-3473 • F 215-717-3440 • fire@thefire.org • www.thefire.org

Greg Lukianoff
PRESIDENT

Robert L. Shibley
SENIOR VICE PRESIDENT

William Creeley
DIRECTOR OF LEGAL AND
PUBLIC ADVOCACY

Sean M. Clark
VICE PRESIDENT OF
OPERATIONS

Alisha C. Glennon
DIRECTOR OF
DEVELOPMENT

Alan Charles Kors
CO-FOUNDER AND
CHAIRMAN EMERITUS

BOARD OF DIRECTORS

Harvey A. Silverglate
CO-FOUNDER AND
CHAIRMAN

Barbara Bishop
Rebecca Dunn
Richard Losick
Joseph M. Maline
Marlene Mieske
Daphne Patai
Virginia Postrel
Daniel Shuchman

BOARD OF ADVISORS

Lloyd Buchanan
T. Kenneth Cribb, Jr.
Candace de Russy
William A. Dunn
Benjamin F. Hammond
Nat Hentoff
Roy Innis
Wendy Kaminer
Woody Kaplan
Leonard Liggio
Herbert London
Peter L. Malkin
Muriel Morisey
Steven Pinker
Milton Rosenberg
John R. Searle
Christina Hoff Sommers
Lawrence H. Summers

September 12, 2013

Catherine Lhamon
Assistant Secretary for Civil Rights
Office for Civil Rights
United States Department of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, D.C. 20202

Sent via U.S. Mail and Facsimile (202-453-6012)

Dear Assistant Secretary Lhamon:

The Foundation for Individual Rights in Education (FIRE; thefire.org) is a non-partisan, non-profit organization dedicated to defending students' and faculty members' civil liberties. FIRE unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on our nation's campuses.

I am very pleased to write you today to congratulate you on your new position and to discuss FIRE's concerns regarding the threat to campus freedom of expression and due process rights presented by certain recent statements from the Department of Education's Office for Civil Rights.

Given your extensive experience defending civil liberties in several capacities, I very much look forward to working with you and your office in the interest of protecting student and faculty rights. Like OCR, FIRE strongly believes that our nation's colleges and universities must meet their moral and legal obligation to respond promptly, fairly, and effectively to allegations of sexual misconduct. As we have repeatedly stated, however, this important and necessary commitment does not require colleges and universities to violate student and faculty rights. In the hope of continuing our dialogue and correcting the problems raised by OCR's recent policy decisions, FIRE's concerns are explained below.

EXECUTIVE SUMMARY

FIRE and allied signatories wrote to OCR on July 16, 2013; February 25, 2013; and December 6, 2012 to express serious concern for campus civil liberties in light of recent pronouncements from OCR. Specifically, our letters discussed the threats to freedom of expression and due process presented by OCR's April 4, 2011 "Dear Colleague" letter and the May 9, 2013 findings letter and resolution agreement signed by OCR, the Educational Opportunities Section of the Department of Justice's Civil Rights Division, and the University of Montana.

OCR Acting Assistant Secretary Seth Galanter sent two responses to these letters on July 29, 2013, and August 23, 2013. Galanter's two replies focused in turn on our concerns regarding the impact of OCR's recent proclamations on freedom of expression and due process protections. As you know, the Supreme Court has long affirmed that the protection of free speech at our nation's colleges and universities is essential for the health of our democracy.¹ Accordingly, we were very pleased to receive Galanter's assurance in his letter of July 29 that OCR is committed to respecting First Amendment rights on campus.

However, while we appreciated Galanter's recognition of the primacy of freedom of expression in higher education, his letters did not fully allay our concerns. His July 29 response argued that the University of Montana "blueprint" is consistent with the First Amendment and past OCR guidance, but the legal analysis supporting the blueprint cannot be squared with either. Similarly, we disagree with Galanter's August 23 defense of OCR's decision to mandate use of the "preponderance of the evidence" standard of proof in campus adjudications of sexual misconduct, and we remain deeply concerned about the impact of OCR's 2011 "Dear Colleague" letter on campus due process rights.

I. Freedom of Expression

A. OCR's Broad Definition Establishes a New Form of "Sexual Harassment"

Acting Assistant Secretary Galanter's response failed to correct OCR's deeply problematic requirement that recipient institutions recognize a new form of "sexual harassment," as set forth in the May 9 findings letter to the University of Montana. In that letter, OCR and DOJ state:

Sexual harassment is a form of sex discrimination prohibited by Title IX and Title IV. **Sexual harassment is 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.²

¹ See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.").

² Letter from Anurima Bhargava, Chief, U.S. Dep't of Justice, Civil Rights Division, and Gary Jackson, Regional Director, U.S. Dep't of Educ., Office for Civil Rights, to Royce Engstrom, President, Univ. of

The May 9 findings letter makes clear that this sweeping conception of sexual harassment—which implicates a vast amount of expressive conduct protected by the First Amendment—is not simply a general description. Rather, the letter specifically requires the University of Montana to adopt this exact language as the institution’s operative, actionable definition of sexual harassment. Indeed, the letter rejects existing University of Montana sexual harassment policies as “inadequate” for failing to “accurately define[] ‘sexual harassment’” as specified.³

Further, the May 9 findings letter explicitly draws a distinction between “sexual harassment” and “hostile environment harassment,” stating:

The confusion about when and to whom to report sexual harassment is attributable in part to inconsistent and inadequate definitions of “sexual harassment” in the University’s policies. First, the University’s policies conflate the definitions of “sexual harassment” and “hostile environment.” Sexual harassment is unwelcome conduct of a sexual nature. When sexual harassment is sufficiently severe or pervasive to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex, it creates a hostile environment. The University’s Sexual Harassment Policy, however, defines “sexual harassment” as conduct that “is sufficiently severe or pervasive as to disrupt or undermine a person’s ability to participate in or receive the benefits, services, or opportunities of the University, including unreasonably interfering with a person’s work or educational performance.” Sexual Harassment Policy 406.5.1. While this limited definition is consistent with a hostile educational environment created by sexual harassment, sexual harassment should be more broadly defined as “any unwelcome conduct of a sexual nature.”⁴

This new and previously unidentified distinction threatens student and faculty rights in serious ways and cannot be justified as a means of encouraging students to report potentially harassing conduct.

1. OCR’s newly mandated definition of “sexual harassment” breaks with legal precedent and contradicts prior OCR guidance.

Prior to the Findings Letter, sexual harassment under Title IX has been understood as encompassing either “*quid pro quo*” harassment or “hostile environment” harassment. This conception has been shared by federal courts and the Office for Civil Rights. In *Klemencic v. Ohio State University*, for example, the United States Court of Appeals for the Sixth Circuit stated:

For a plaintiff to proceed on a claim against an educational institution under Title IX, a plaintiff must establish a *prima facie* case showing that: [a)] she was

Montana, and Lucy France, Univ. Counsel, Univ. of Montana 4 (May 9, 2013), *available at* <http://www.justice.gov/opa/documents/um-ltr-findings.pdf> (emphases added) [hereinafter Findings Letter].

³ *Id.* at 8–9.

⁴ *Id.* at 8.

subjected to quid pro quo sexual harassment or a sexually hostile environment; b) she provided actual notice of the situation to an “appropriate person,” who was, at a minimum, an official of the educational entity with authority to take corrective action and to end discrimination; and c) the institution’s response to the harassment amounted to “deliberate indifference.”⁵

Similarly, OCR has stated in previous guidance that under Title IX, sexually harassing conduct in the educational context takes the form of either *quid pro quo* harassment or hostile environment harassment. For example, in OCR’s 2001 *Revised Sexual Harassment Guidance* (2001 *Guidance*), OCR characterized *quid pro quo* and hostile environment harassment as solely constituting “the different types of harassment”:

In each case, the issue is whether the harassment rises to a level that it denies or limits a student’s ability to participate in or benefit from the school’s program based on sex. **However, an understanding of the different types of sexual harassment can help schools determine whether or not harassment has occurred that triggers a school’s responsibilities under, or violates, Title IX or its regulations.**

The type of harassment traditionally referred to as quid pro quo harassment occurs if a teacher or other employee conditions an educational decision or benefit on the student’s submission to unwelcome sexual conduct. Whether the student resists and suffers the threatened harm or submits and avoids the threatened harm, the student has been treated differently, or the student’s ability to participate in or benefit from the school’s program has been denied or limited, on the basis of sex in violation of the Title IX regulations.

By contrast, sexual harassment can occur that does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct. **Harassment of this type is generally referred to as hostile environment harassment.** This type of harassing conduct requires a further assessment of whether or not the conduct is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex.

Teachers and other employees can engage in either type of harassment. **Students and third parties are not generally given responsibility over other students and, thus, generally can only engage in hostile environment harassment.**⁶

Among students, the 2001 *Guidance* makes no appreciable distinction between “sexual harassment” and “hostile environment” harassment. Rather, the 2001 *Guidance* states that with regard to student-on-student conduct, sexual harassment *is* hostile environment

⁵ *Klemencic v. Ohio State Univ.*, 263 F.3d 504, 510 (6th Cir. 2001) (citations omitted) (emphasis added).

⁶ U.S. Dep’t of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance* (Jan. 19, 2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (emphases added).

harassment. If the University of Montana’s policy conflated “sexual harassment” and hostile environment harassment, so too did the 2001 *Guidance*.

The findings letter also criticizes a University of Montana sexual harassment policy for “improperly suggest[ing] that the conduct does not constitute sexual harassment unless it is objectively offensive.”⁷ But this sharp rebuke cannot be reconciled with OCR’s 2003 “Dear Colleague” letter regarding anti-harassment policies and the First Amendment. In that letter, OCR stated that “OCR’s standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim’s position, considering all the circumstances, including the alleged victim’s age.”⁸

Galanter’s July 29 letter tacitly deemphasizes the blueprint’s newly operational, broad definition of “sexual harassment,” instead focusing specifically on hostile environment harassment and OCR’s understanding of the elements of such harassment. As Galanter writes, “to constitute unlawful harassment ... conduct must create a hostile environment.” While this formulation is correct and consistent with previous OCR guidance, it cannot be reconciled with the blueprint’s insistence that “sexual harassment should be more broadly defined as ‘any unwelcome conduct of a sexual nature.’”

Nevertheless, Galanter confusingly claims that the blueprint is “consistent with the principles articulated in prior OCR guidance,” and argues that both the 2001 *Guidance* and the 2003 “Dear Colleague” letter remain “fully in effect.” But by mandating that the University of Montana recognize a new, broad category of sexual harassment, distinct from either *quid pro quo* or hostile environment harassment, OCR has contradicted both federal courts and its own statements, breaking troubling new ground.

Finally, OCR’s creation of a separate category of sexual harassment is wholly unsupported by the agency’s previous Title IX guidance. As FIRE wrote in our open letter to OCR on July 16:

OCR’s response insists that previous agency statements, including its 2001 *Revised Sexual Harassment Guidance* and its 2003 “Dear Colleague” letter, “remain fully in effect.” But the blueprint contradicts both. For example, the blueprint rejected a University of Montana sexual harassment policy because it included an objectivity component, stating that the policy “improperly suggests that the conduct does not constitute sexual harassment unless it is objectively offensive.” In sharp contrast, the 2003 “Dear Colleague” letter makes clear that an objective evaluation of the allegedly harassing conduct is *required*:

Harassment, however, to be prohibited by the statutes within OCR’s jurisdiction, 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

⁷ Findings Letter at 9.

⁸ Letter from Gerald A. Reynolds, Assistant Sec’y, U.S. Dep’t of Educ., Office for Civil Rights, to Colleagues (July 28, 2003), *available at* <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

or benefit from the educational program. Thus, **OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position**, considering all the circumstances, including the alleged victim's age. [Emphasis added.]

The 2001 *Guidance* similarly instructed institutions to use a number of factors, including an objectivity component, "to evaluate conduct in order to draw commonsense distinctions between conduct that constitutes sexual harassment and conduct that does not rise to that level." Tellingly, both the 2001 *Guidance* and the 2003 "Dear Colleague" letter explicitly recognize the First Amendment and emphasize the importance of expressive rights, whereas the First Amendment and freedom of expression are not once mentioned in the blueprint's forty-seven pages. And of course, the blueprint's broad definition of sexual harassment is not constitutional simply because OCR declares it so in an email response to concerned citizens.

Unfortunately, OCR's July 29 response to FIRE fails to adequately address these issues or to point to any other past guidance from the agency that would support the creation of a third category of sexual harassment under Title IX. Therefore, FIRE remains concerned about the implications of OCR's agreement with the University of Montana for student and faculty free speech rights at universities across the country.

2. OCR's definition renders protected expression "sexual harassment" and is therefore an impermissible means of encouraging reporting.

By requiring the University of Montana to adopt a broad, new definition of "sexual harassment," unmoored to previous guidance or legal precedent, and by labeling the resolution agreement a "blueprint" for colleges and universities nationwide, OCR has endangered freedom of expression and academic freedom on campus. Deeming any and all speech of a sexual nature "sexual harassment" because a single student unreasonably finds it unwelcome subjects a vast swath of constitutionally protected speech to mandatory investigation and potential discipline. This result is plainly unconstitutional.

Attempting to explain this sharp break with both prior practice and common sense, OCR has repeatedly argued that the adoption of the broad definition is necessary to encourage students to report potentially harassing conduct.⁹ For example, Galanter's July 29 letter states that "it is important that students are not discouraged from reporting harassment because they believe it is not significant enough to constitute a hostile environment." To solve this problem, Galanter explains that "[t]herefore, under the Agreement, students will be allowed to bring complaints when they have been subjected to unwelcome sexual conduct."

⁹ See, e.g., Letter from Seth Galanter, Acting Assistant Sec'y, U.S. Dep't of Educ., Office for Civil Rights, and Jocelyn Samuels, Principal Deputy Assistant Attorney Gen., Dep't of Justice, to Professor Ann Green and Professor Donna Potts, American Ass'n of Univ. Professors (July 12, 2013), *available at* http://www.aaup.org/file/DoE_Respons_%20to_6-6-13_letter.pdf.

However well-intentioned such a motivation may be, it cannot and does not justify the broad definition's blatant encroachment upon student and faculty First Amendment rights. As we explained in our letter of July 16, classifying protected speech as "harassment" for the purpose of encouraging reporting will have punitive consequences:

Students and faculty accused of sexual harassment must be immediately subjected to a "thorough" mandatory investigation, even if the accusation solely concerns speech protected by the First Amendment. The names of the accused must be recorded indefinitely in a university database as a result of the accusation alone, even if no wrongdoing is found.

Even if those accused never receive formal discipline, labeling protected expression "sexual harassment" is deeply problematic. There can be no doubt that students and faculty will be deterred from expressing themselves on matters pertaining to sex and gender if doing so in a manner protected by the First Amendment may nevertheless result in an accusation of "sexual harassment" and mandatory investigation.

To encourage reporting of potentially harassing behavior, OCR should simply encourage students to report potentially harassing behavior. Rather than defining "sexual harassment" so broadly as to prohibit protected speech—a result that conflicts with the First Amendment and oversteps OCR's legal authority under Title IX—OCR should encourage colleges and universities to increase student awareness of their sexual harassment policies. A well-known and clearly stated sexual harassment policy that complies with the First Amendment will prove at least as effective in prompting student reporting as an obscure but overly broad policy.

3. OCR's new category of lawful "sexual harassment" will sow confusion and invite administrative overreaction.

Unfortunately, OCR's insupportable distinction between reportable "sexual harassment" and punishable hostile environment harassment will not survive contact with reality. The blueprint places recipient institutions in the untenable position of either being viewed as tolerating milder, non-actionable forms of alleged "sexual harassment," or taking disciplinary action against protected speech that falls well short of the legal standard for hostile environment harassment in the educational setting. Moreover, given the confusion that OCR's guidance will engender among university administrators—and the public pressure that recipient institutions face to adequately address and punish alleged harassment—there is a great likelihood that OCR's distinction will be ignored and abused on campus.

FIRE makes this argument from experience. We have spent over a decade fighting against the misuse and abuse of overbroad sexual harassment policies at colleges and universities. Despite clarity in the law with respect to student-on-student harassment in the educational setting—both in the form of the Supreme Court's decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), and in lower federal courts' uniform rejection of

overbroad and vague campus sexual harassment policies¹⁰—we have seen one institution after another apply such policies to restrict and punish protected speech.

For example, the University of Denver found a tenured professor guilty of sexual harassment in 2011 for teaching about sexual topics in a graduate-level course on “The Domestic and International Consequences of the Drug War,” one of the themes of which was “Drugs and Sin in American Life: From Masturbation and Prostitution to Alcohol and Drugs.”¹¹ In 2012, a professor at Appalachian State University was placed on administrative leave after students alleged that she had created a hostile environment in her sociology class by, among other things, showing a documentary that critically examines the adult film industry.¹² Likewise, East Georgia College ordered a professor to resign his position or be fired simply for criticizing the institution’s sexual harassment policy during a faculty training session.¹³ Perhaps most shockingly, the University of New Hampshire once evicted a student from his dormitory for posting satirical fliers joking that female students could lose the “Freshman 15” by taking the dormitory stairs instead of the elevator.¹⁴

Nor is restriction of protected speech likely to be limited to the enforcement of sexual harassment policies; FIRE is sadly confident that other discriminatory harassment policies will be similarly applied to censor or punish protected student and faculty expression. Indeed, OCR’s own letter of July 29 draws little distinction between racial and sexual harassment, citing the agency’s 1994 guidance regarding harassment on the basis of race, color, or national origin for the proposition that OCR’s analyses regarding the creation of a racially hostile environments “have direct corollaries in the area of sexual harassment.”

¹⁰ See *McCauley v. Univ. of the V. I.*, 618 F.3d 232 (3d Cir. 2010) (invalidating university speech policies, including harassment policy, on First Amendment grounds); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (striking down unconstitutional sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *College Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Booher v. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *The UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy due to unconstitutionality); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring “harassment by personal vilification” policy unconstitutional).

¹¹ Letter from Adam Kissel, Vice President of Programs, Foundation for Individual Rights in Education, to Robert Coombe, Chancellor, Univ. of Denver (Nov. 4, 2011), *available at* <http://thefire.org/article/13833.html>.

¹² Letter from Adam Kissel, Vice President of Programs, Foundation for Individual Rights in Education, to Kenneth E. Peacock, Chancellor, Appalachian State Univ. (May 8, 2012), *available at* <http://thefire.org/article/14498.html>.

¹³ Letter from Adam Kissel, Director, Individual Rights Defense Program, Foundation for Individual Rights in Education, to Erroll B. Davis Jr., Chancellor, Univ. System of Georgia (Aug. 27, 2009), *available at* <http://thefire.org/article/11071.html>.

¹⁴ Letter from Greg Lukianoff, Director of Legal and Public Advocacy, Foundation for Individual Rights in Education, to Ann Weaver Hart, President, Univ. of New Hampshire (Oct. 22, 2004), *available at* <http://thefire.org/article/5006.html>.

Based on FIRE’s experience, colleges and universities are likely to seize upon this opening and to continue to label protected speech as harassment. We have seen this occur in cases such as one involving a student-employee at Indiana University-Purdue University Indianapolis who was found guilty of racial harassment for silently reading during work breaks a book that a co-worker found to be offensive.¹⁵ Brandeis University, similarly, labeled a veteran professor a racial harasser after he used the word “wetbacks” in his Latin American Politics course in order to criticize its use.¹⁶ Just last fall, a student at the State University of New York at Oswego who emailed hockey coaches at rival schools as part of his research for a class assignment about the university’s men’s hockey coach was charged with violating a prohibition against “defam[ing], harass[ing], intimidat[ing], or threaten[ing] another individual.”¹⁷

The problem almost certainly will not remain cabined to allegations of sexual harassment and sexual misconduct. Rather, under the terms of OCR’s Findings Letter, institutions across the country will erroneously label and punish protected student and faculty expression as “harassment,” whether it be sexual harassment, racial harassment, or harassment based on another protected category. OCR’s July 29 response to FIRE fails to adequately address this problem.

B. Conflating Sexual Harassment and Sexual Assault

FIRE strongly believes that universities are better positioned to create fair and accurate sexual harassment policies and procedures when they address the issue of sexual harassment separately from the issue of sexual assault. While both sexual harassment and sexual assault constitute gender-based discrimination under Title IX, they present substantially different issues and challenges for a responding institution. Sexual assault is violent criminal behavior and often involves complex and fact-intensive allegations—challenges that colleges and universities typically struggle to deal with, and that, in the eyes of FIRE and other commentators, may be better left to law enforcement possessing the requisite expertise and experience. Sexual harassment, on the other hand, presents its own complications and concerns, including the issue of potentially protected speech. At minimum, institutions should maintain separate standards for each offense.

OCR’s Findings Letter notes at the onset that the federal investigations of the University of Montana date back to the fall of 2011, when “the University received reports that two female students had been sexually assaulted on campus by male students.”¹⁸ The university then “received seven additional reports of student-on-student sexual assault that had occurred

¹⁵ Letter from Adam Kissel, Director, Individual Rights Defense Program, Foundation for Individual Rights in Education, to Charles R. Bantz, Chancellor, Indiana Univ.-Purdue Univ. Indianapolis (Mar. 28, 2008), *available at* <http://thefire.org/article/9191.html>.

¹⁶ Letter from Adam Kissel, Director, Individual Rights Defense Program, Foundation for Individual Rights in Education, to Jehuda Reinharz, President, Brandeis Univ. (July 9, 2008), *available at* <http://thefire.org/article/9503.html>.

¹⁷ Letter from Peter Bonilla, Associate Director, Individual Rights Defense Program, Foundation for Individual Rights in Education, to Deborah F. Stanley, President, State Univ. of New York at Oswego (Oct. 26, 2012), *available at* <http://thefire.org/article/15094.html>.

¹⁸ Findings Letter at 2.

between September 2010 and December 2011.”¹⁹ Former Montana Supreme Court Justice Diane Barz—hired by the university to conduct an independent investigation—“concluded that the University ‘has a problem with sexual assault on and off campus and needs to take steps to address it to ensure the safety of all students as well as faculty, staff and guests.’”²⁰

While sexual harassment is indeed a serious matter, this factual background suggests that the University of Montana’s most critical problems concerned sexual assault—a crime that does not implicate expressive rights. OCR would have been better served by addressing the issues of sexual assault and sexual harassment separately. Doing so would have allowed the agency to more carefully consider the First Amendment implications of its definition of sexual harassment and to ensure that constitutionally protected speech and expression do not get swept into that definition. By instead defining sexual harassment as any “unwelcome conduct of a sexual nature,” including “verbal conduct,” OCR has left student speech rights in jeopardy—both at the University of Montana and at colleges and universities throughout the country, the overwhelming majority of which currently receive federal funding.

II. Solution: Require Adoption of the Supreme Court’s *Davis* Definition

Given the myriad problems with the Findings Letter’s definition of sexual harassment, FIRE reiterates our support for the controlling legal standard for student-on-student hostile environment harassment in the educational context, as set forth by the Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). FIRE has repeatedly emphasized the utility and clarity of the harassment standard *Davis* establishes. In our May 5, 2011, letter to OCR in response to the 2011 “Dear Colleague” letter, for example, we stated:

In *Davis*, the Court found that behavior constitutes hostile environment sexual harassment when it is “so severe, pervasive, and objectively offensive, and ... 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,” and that institutions displaying deliberate indifference to actual knowledge of such behavior could be found liable for monetary damages. This exacting, speech-protective definition ensures an appropriate balance between freedom of expression on campus and the importance of establishing an educational environment free from harassment. [Citation omitted.]

Similarly, in our May 7, 2012, open letter, we wrote:

[T]he April 2011 DCL’s lack of concern for freedom of expression stands in disappointing contrast to OCR’s 2003 “Dear Colleague” letter, which more accurately reflects the state of the law then, and now. In that letter, former Assistant Secretary Gerald A. Reynolds made clear that “OCR’s regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment.” To provide much-needed definitional clarity, while simultaneously recognizing an institution’s twin obligations to protect free

¹⁹ *Id.*

²⁰ *Id.*

speech and prevent harassment, we once again urge OCR to make clear that institutions satisfy Title IX by adopting no more and no less than the definition of prohibited harassment in the educational context set forth by the Supreme Court of the United States in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999).

We again emphasize now that the Supreme Court’s *Davis* standard, including each of its operative elements, is the controlling standard for hostile environment peer harassment in the educational setting. To be consistent with both harassment law and the First Amendment, therefore, OCR must make clear to recipient institutions that peer harassment on campus should always be defined as no more and no less than the *Davis* standard.

A. Elements of the *Davis* Standard

The Supreme Court’s *Davis* standard properly balances universities’ dual obligations to prevent true harassment and protect freedom of speech, and is thus far preferable to the definition of hostile environment sexual harassment provided in OCR’s July 29 letter to FIRE—*i.e.*, conduct that is “sufficiently serious as to limit or deny a student’s ability to participate in or benefit from an educational program.”

1. Harassment should be targeted.

First, *Davis* suggests that to properly constitute harassment, the conduct in question should be targeted. *Davis*’ plaintiff student was subjected to a months-long, “prolonged pattern of sexual harassment” by one of her classmates.²¹ While Galanter’s July 29 letter argues that harassment “does not have to . . . be directed at a specific target,” requiring that the allegedly harassing conduct be targeted is necessary to avoid harassment allegations arising from speech that the complaining individual simply happens to overhear or witness. For example, a student should not be charged with hostile environment sexual harassment simply because he or she wrote an op-ed in the campus newspaper about a sexually related issue such as reproductive choice or gay marriage. Such a result would have a harmful chilling effect on campus discourse.

It is true that in the employment context, some federal courts have held that speech or conduct that someone overhears, even though not directed or targeted at that person, can create a hostile environment.²² However, federal courts have held in other cases that it is insufficient to allege that one is disparately impacted, as a male or female, by speech or conduct in the workplace, and that someone must allege that he or she was actually the target of such speech or conduct.²³ Additionally, legal commentators including Professor Eugene Volokh of the

²¹ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (internal quotation marks omitted).

²² See, e.g., *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811 (11th Cir. 2010); *Patane v. Clark*, 508 F.3d 106, 114 (2d Cir. 2007); *Huff v. Sheahan*, 493 F.3d 893, 903 (7th Cir. 2007).

²³ See, e.g., *Duncan v. Manager, Dep’t of Safety, City & Cnty. of Denver*, 397 F.3d 1300, 1312 (10th Cir. 2005); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 332 (4th Cir. 2003); *Scusa v. Nestle U.S.A. Co., Inc.*, 181 F.3d 958, 965 (8th Cir. 1999). See also *Lyle v. Warner Bros. Television Prod.*, 132 P.3d 211, 229 (Cal. 2006).

University of California, Los Angeles School of Law²⁴ and former American Civil Liberties Union President Nadine Strossen²⁵ have argued in favor of the requirement of targeted conduct even in the employment setting.

More importantly, there are reasons to require that allegedly harassing behavior be targeted in the context of student-on-student harassment that are not present in the employment setting. Courts and commentators alike have recognized the paramount importance of freedom of speech on college campuses, providing students with a level of protection that is inapposite in the workplace setting.²⁶ Simply importing workplace precedent fails to recognize the unique considerations present on campus, chief among them the Supreme Court's consistent recognition of the importance of First Amendment rights in the university setting and the qualitative difference in the relationships between students and their peers and employees and their employers.

In the Title IX context, hostile environment harassment is properly understood as the creation of a discriminatory atmosphere so antagonistic towards a student on the basis of his or her gender that he or she cannot receive an education. It cannot be understood as simply an all-purpose civility code, unmoored from the specific requirements of both the First Amendment and Title IX itself. Indeed, such an understanding would be incompatible with *Davis* and the Court's holding in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"

It is difficult to imagine what would constitute *untargeted* student-on-student harassment. If speech is untargeted, how might it be discriminatory on the basis of sex? If OCR regards Title IX as allowing for untargeted student-on-student harassment, what conduct may be prohibited? A newspaper column? A controversial question in class? An online posting? Sadly, FIRE has seen far too many instances of administrators abusing harassment codes to silence speech they find offensive, inconvenient, or simply disagreeable to be comfortable with a broad ban on untargeted "harassment."

²⁴ Professor Volokh has proposed drawing a line in the employment context "between *directed* speech—speech that is aimed at a particular employee because of her race, sex, religion, or national origin—and *undirected* speech, speech between other employees that is overheard by the offended employee, or printed material, intended to communicate to the other employees in general, that is seen by the offended employee." Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1846 (1992) (emphasis in original). "The state interest in assuring equality in the workplace would justify restricting directed speech, but not undirected speech." *Id.*

²⁵ Strossen has argued that harassment, properly construed, is "a type of conduct which is legally proscribed in many jurisdictions when *directed at a specific individual or individuals* and when intended to frighten, coerce, or unreasonably harry or intrude upon its *target*." Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 706 (1995) (quoting ACLU, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, Policy No. 72a (rev. ed. 1995)) (emphasis added). She therefore advocates distinguishing "generalized statements of opinion—which should enjoy absolute protection no matter how sexist—from gender-based verbal abuse that ... is targeted on a particular employee." *Id.* at 717 (quoting Kingsley R. Browne, *Stifling Sexually Hostile Speech: To What Extent Does the First Amendment Limit the Reach of Sexual Harassment Law When the Hostile Environment is Created by Speech?*, CONN. L. TRIB., Nov. 29, 1993, at 19).

²⁶ See Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385 (2009).

2. Harassment must be unwelcome.

Second, *Davis* requires that the conduct at issue be unwelcome. This requirement ensures that the allegedly harassing conduct is subjectively unwanted and offensive to the target. It is not enough, for example, that the alleged harasser have the intent to create a hostile environment or directly target an individual. The conduct must be subjectively unwelcome from the perspective of the target. In *Davis*, the victim-student made the unwelcome nature of the conduct in question clear by reporting the incidents to her mother and to various teachers.²⁷ In contrast, OCR’s proffered definition of hostile environment harassment as conduct that is “sufficiently serious as to limit or deny a student’s ability to participate in or benefit from an educational program” fails to specify that the conduct must be unwelcome.

3. Harassment must be severe.

Third, *Davis* requires that truly harassing conduct be “severe.” OCR’s July 29 response to FIRE worryingly states that “harassing conduct can take many forms, including verbal acts and name-calling, and graphic and written statements.” Yet the Supreme Court took the opposite position in *Davis*:

[I]n the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. **Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender.** Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.²⁸

OCR’s broad classification encompasses a wide swath of constitutionally protected expression. Under *Davis*, the vast majority of “verbal acts” and “graphic and written statements”—whether or not they involve “name-calling”—are not severe enough to create a hostile environment unless they are part of a larger pattern of harassing conduct. Here, the distinction between *conduct* and pure *speech* is key. To ensure a proper balance of the interests involved and to protect students’ First Amendment rights, peer harassment law requires an extreme and usually repetitive pattern of conduct, as illustrated by the factual background of *Davis* itself.²⁹ Indeed, one federal court after another has struck down university harassment policies for restricting speech protected by the First Amendment.³⁰

Again, the special nature of student interaction on campus requires this exacting standard. Students are engaged in the search for truth, not the production of widgets, and thus policing student dialogue involves substantially different considerations than those faced by employers

²⁷ *Davis*, 526 U.S. at 633–34.

²⁸ *Id.* at 651–52 (emphasis added).

²⁹ *Id.* at 633–34.

³⁰ See *supra* note 10.

overseeing a workplace. The campus standard for severity must accordingly be higher to provide students the breathing room they need to engage with one another and to prevent colleges from feeling forced to monitor student dialogue to an unreasonable and counterproductive degree.

4. Harassment must be pervasive.

Fourth, *Davis* requires that harassing conduct be “pervasive.” This element establishes the need to demonstrate a pattern of repetitive behavior and, crucially, ensures that isolated instances of protected speech will not, standing alone, be incorrectly labeled as “harassment.” Indeed, the U.S. Court of Appeals for the Third Circuit invalidated an overbroad sexual harassment policy at Temple University in large part on these grounds.³¹ The appellate court declared that “[a]bsent any requirement akin to a showing of severity or pervasiveness—that is, a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual’s work—the policy provides no shelter for core protected speech.”³² Thus, the Third Circuit found that the terms of Temple’s sexual harassment policy were “sufficiently broad and subjective that they ‘could conceivably be applied to cover any speech’ of a ‘gender-motivated’ nature ‘the content of which offends someone,’” including “‘core’ political and religious speech, such as gender politics and sexual morality.”³³

5. Harassment must be objectively offensive.

Fifth, *Davis* requires that the conduct in question be “objectively offensive.” This requirement ensures that speech or conduct is not erroneously labeled as harassment because it offends the subjective sensibilities of a complaining individual, no matter how unreasonable or hypersensitive he or she may be. As FIRE wrote in our open letter to OCR on January 6, 2012:

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.

Once again, this component of the *Davis* standard is missing from the standard set forth in OCR’s July 29 response letter to FIRE: conduct that is “sufficiently serious as to limit or deny a student’s ability to participate in or benefit from an educational program.” While Galanter’s letter adds that “[i]n determining whether harassment has created a hostile environment, OCR considers the conduct in question from both a subjective and objective perspective,” this explanation does not set forth the requirement of objective offense as clearly as *Davis*, which

³¹ *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008).

³² *Id.* at 317–18.

³³ *Id.* at 317 (citation omitted).

reduces its efficacy. OCR would avoid unnecessary confusion among recipient institutions if it made the crucial requirement of objective offense an express element of its standard for hostile environment sexual harassment.

6. Harassment must deny victims equal access to resources and opportunities.

Sixth, *Davis* requires that harassing conduct “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.”³⁴ This threshold differs significantly from OCR’s requirement, as stated in Galanter’s July 29 letter to FIRE, that the alleged conduct “limit or deny a student’s ability to participate in or benefit from an educational program.” The chief benefit of the *Davis* standard is that it affords certainty and precision to an institution’s determination of whether hostile environment sexual harassment took place by requiring that the conduct in question must “undermine[] and detract[]” from the alleged victim’s educational experience to such a degree that he or she is “effectively denied equal access” to educational resources and opportunities. Comparatively, OCR’s language is vague, giving institutions unchecked discretion to determine whether given conduct “limit[s]” the alleged victim’s “ability to participate in or benefit from an educational program.” The term “limit” in this context could mean virtually anything, affording institutions a less precise standard to apply and leaving accused students with less certainty in the protection of their First Amendment rights.

B. Certainty and Precision

For these reasons, we ask that OCR make clear to recipient institutions that the Supreme Court’s *Davis* standard, including each of its crucial elements, is the controlling standard for hostile environment peer harassment in the educational setting, and that, to be consistent with both harassment law and the First Amendment, peer harassment on campus should always be defined as no more and no less than the *Davis* standard. Doing so would afford both students and the institutions they attend the certainty and precision they require with respect to this issue.

As FIRE observed in our letter to OCR of January 6, 2012:

[T]he *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. . . . *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 reiterate the request we made to OCR in that letter:

³⁴ *Davis*, 526 U.S. at 651.

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.’” [Emphasis in original.]

These points remain as true today as they did then, and we again call on OCR to secure recipient institutions the certainty and precision provided by *Davis*.

III. Due Process

FIRE has repeatedly raised due process concerns with OCR, both in our July 16 open letter and in response to OCR’s April 4, 2011 “Dear Colleague” letter (DCL).

In our open letter, we objected to the provisions in the University of Montana agreement allowing for university disciplinary action, prior to the completion of an investigation and hearing, against a student or faculty member accused of sexual harassment. However, Galanter’s responses to FIRE of July 29 (concerning freedom of expression) and August 23 (concerning due process protections) fail to address this issue. This is deeply disappointing, as such a serious concern warrants an answer. We therefore restate our concern at this time.

Further, Galanter’s August 23 response to our worries regarding the DCL’s reduction of due process protections for students and professors accused of sexual harassment or sexual assault fails to allay our concerns. In our May 5, 2011, letter to OCR, FIRE argued against the DCL’s imposition of the “preponderance of the evidence” standard of proof in all such adjudications on college campuses, writing:

In cases involving allegations of criminal misconduct such as acts of sexual violence, the preponderance of the evidence standard fails to sufficiently protect the accused’s rights and is thus inadequate and inappropriate. Given the unequivocal value of a college education to an individual’s prospects for personal achievement and intellectual, professional, and social growth, OCR’s insistence that schools reduce procedural protections for those students accused of sexual harassment and sexual violence is deeply troubling. Because of the seriousness of these charges, virtually all institutions will punish those students

found guilty with lengthy suspensions, if not immediate expulsion. The interest held by both the accused student and society at large in ensuring a correct and just result is therefore far greater than that implicated by a simple “monetary dispute,” and a higher standard of proof is demanded. It is unconscionable, given the prospect of life-altering punishment, to require only that those accused of such serious violations be found merely “more likely than not” to have committed the offense in question. [Citations omitted.]

FIRE wrote in the same letter that the DCL’s requirement that “[i]f a school provides for appeal of the findings or remedy, it must do so for both parties” threatens the due process rights of accused individuals. In pertinent part, we wrote:

Given that accused students will now face an inappropriately low standard of proof, FIRE fears that allowing the accusing student to appeal a finding or remedy in favor of the accused tilts the scale still further toward the accusing student. We worry that because of the publicity that often surrounds claims of this nature and the resulting pressure on judiciary panelists to return a guilty verdict, such appeals would often essentially be reheard *de novo*.

We repeated many of these same arguments in an open letter sent to OCR a year later, on May 7, 2012, in which we were joined by a coalition of 19 other signatories. We wrote, for example:

Adjudicating accusations of serious sexual misconduct requires equally serious procedural protections. By mandating that institutions use the weak preponderance of the evidence standard, OCR has undermined the reliability, integrity, and basic fairness of disciplinary proceedings and invited error. Given the divergence in quality and competency of school disciplinary hearings and the potential for life-altering punishment, it is unconscionable to require that those accused of such serious violations be found merely “more likely than not” to have committed the offense in question. If OCR is to mandate an evidentiary standard for the adjudication of allegations of sexual harassment and sexual assault, it must be no less protective of the rights of the accused than the “clear and convincing” standard.

Responding to these letters, Galanter’s reply of August 23 makes three arguments. None is convincing.

First, Galanter argues that because the preponderance of the evidence standard is used in certain civil cases, including those adjudicating “issues involving sexual violence” and those where penalties may involve expatriation, OCR is justified in interpreting Title IX to mandate its use in campus sexual misconduct hearings. But as FIRE has repeatedly pointed out, campus hearings are simply not comparable to civil proceedings in terms of the protections afforded to both parties, the governing legal doctrines, and the professional expertise of presiding authorities. As FIRE Legislative and Policy Director Joseph Cohn wrote for *The Chronicle of Higher Education*:

While it is true that most civil cases in federal court are decided under the preponderance standard, due process requires that this low burden of proof be offset by procedural safeguards—lots of them.

For example, to ensure fairness, reliability, and constitutionality, civil trials are presided over by experienced, impartial, and legally educated judges. At either party's request, facts are determined by a jury of one's peers. The parties have the right to representation by counsel, and a mandatory process of "discovery" ensures that all relevant evidence will be made available if the opposing party asks for it.

And speaking of evidence, strict rules apply that exclude hearsay, evidence of prior bad acts or crimes, and other information that is either irrelevant or unreliable. Moreover, all depositions and testimonies are given under oath or affirmation, with witnesses subject to perjury charges if they intentionally lie about material issues. The list goes on and on.

So which of those procedural protections are guaranteed in college disciplinary hearings? None. The procedural safeguards used at most colleges are embarrassingly minimal.

Colleges decide for themselves who will preside over these hearings and serve as fact finders. In some instances it's a panel of faculty, students, and/or administrators, the last of whom may have a powerful incentive to come to the conclusion that is most convenient for the institution. (In the real court system, we are very careful to avoid any hint of this bias from our judges and juries.) Even worse, some colleges have a single administrator designated to serve as both judge and jury.

Similarly, the parties to these hearings frequently have no right to counsel—even if they are able to pay for representation. Neither party has the benefit of discovery, and the rules of evidence don't apply. Hearsay and even irrelevant "evidence" are regularly considered. Parties are usually not placed under oath and may not be subject to discipline if they lie.

Without any of the safeguards designed to increase the reliability and fairness of civil trials, the risk of erroneous findings of guilt increases substantially, especially when a fact finder is asked to decide only if it is merely 50.01 percent more likely that a sexual assault occurred. The absence of the protections listed above makes the preponderance standard inappropriate and renders the comparison of campus sexual-misconduct hearings to civil suits in federal court inexact.

If anything, because there are so few procedural protections in place during sexual-misconduct hearings on campuses, the burden of proof should be

higher, to offset the increased risk of error. After all, a guilty finding for sexual misconduct on campus may result in life- and career-altering punishment.³⁵

Galanter justifies his dismissal of these concerns by arguing that he is “not aware of any case that has held the Due Process Clause requires a higher standard be used” when adjudicating sexual misconduct in campus courts. But FIRE is unaware of any case that has held that Title IX *requires* use of the preponderance of the evidence standard in adjudicating campus claims of sexual misconduct, as OCR has mandated.

Citing *Herman & Maclean v. Huddleston et al.*, 459 U.S. 375, 389–90 (1983), Galanter acknowledges that the Supreme Court has found that due process requires use of the clear and convincing standard in cases “where particularly important individual interests or rights are at stake.” But, again citing *Herman & Maclean*, Galanter notes that the Court has allowed the “imposition of even severe civil sanctions that do not implicate such interests” in hearings using the preponderance of the evidence standard. Galanter’s reliance on *Herman & Maclean* for this proposition is telling, as that case concerned a civil action involving allegations of securities misconduct—“a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff’s burden of proof is a mere preponderance of the evidence.”³⁶ In cases involving “quasi-criminal wrongdoing by the defendant”—such as campus sexual misconduct—the Court has allowed use of the clear and convincing standard because the “interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof.”³⁷ Galanter’s easy dismissal of the “particularly important individual interests” so obviously at stake for students accused of sexual misconduct is deeply disappointing and cannot be reconciled with our national commitment to fundamental fairness.

Second, Galanter argues that OCR’s interpretation of Title IX to require use of the preponderance of the evidence standard is necessary because of the “significant interests for a victim” of sexual misconduct. But until the hearing has been held, whether the accusing student is indeed a “victim” has not been determined; shockingly, Galanter’s justification presumes guilt as a function of the accusation. Galanter contends that use of the standard “represents an appropriate balancing of the important interests of both complainant and the accused” and is thus “equitable to both parties,” again citing *Herman & Maclean* for the proposition that “use of any other standard expresses a preference for one side’s interests.” But again, when more than monetary damages are at stake, fundamental fairness and the presumption of innocence demand protection for the interests of the accused. As we wrote in our May 5, 2011, letter to OCR:

Requiring a lower standard of proof does not provide for the “prompt and equitable” resolution of complaints regarding sexual harassment and sexual

³⁵ Joseph Cohn, *Campus Is a Poor Court for Students Facing Sexual-Misconduct Charges*, CHRON. OF HIGHER EDUC., Oct. 1, 2012, available at <http://chronicle.com/article/Campus-Is-a-Poor-Court-for/134770>.

³⁶ *Addington v. Texas*, 441 U.S. 418, 423 (1979).

³⁷ *Id.* at 424, 425.

violence. Rather, the lower standard of proof serves to undermine the integrity, accuracy, reliability, and basic fairness of the judicial process. Insisting that the preponderance of the evidence standard be used in hearing sexual violence claims turns the fundamental tenet of due process on its head, requiring that those accused of society's vilest crimes be afforded the scant protection of our judiciary's least certain standard. Under the preponderance of the evidence standard, the burden of proof may be satisfied by little more than a hunch. Accordingly, no matter the result reached by the campus judiciary, both the accuser and the accused are denied the necessary comfort of knowing that the verdict reached is accurate, trustworthy, and fair. The lack of faith in the judicial process that such uncertainty will likely engender should be of great concern to OCR and recipient institutions.

Finally, Galanter argues that OCR's decision to mandate the use of the preponderance of the evidence standard is permissible because many colleges and universities employed the preponderance standard prior to the DCL, citing FIRE's research. But Galanter ignores that FIRE's research indicated that many of the nation's most prestigious institutions—including nine of the top 10 colleges as ranked that year by *U.S. News & World Report*—did not use the “preponderance of the evidence” standard. Further, an institution's decision to adopt our judiciary's lowest standard of proof voluntarily, following careful consideration of its unique campus circumstances and needs, is qualitatively different than an institution's being forced to do so by a federal agency's new interpretation of a federal statute. This difference is particularly acute when the agency's new interpretation breaks with prior practice and is announced unilaterally, without being subjected to the notice-and-comment requirements of the Administrative Procedure Act, as was the case with this new mandate. As we wrote in our May 5, 2011, letter:

In mandating that schools adopt a preponderance of the evidence standard in their grievance procedures governing sexual harassment and sexual violence allegations, OCR has broken significant—and troubling—new ground. In contrast to the April 4 mandate, the *2001 Guidance* is silent with regard to the standard of proof required of schools' grievance procedures. While the *2001 Guidance* stated that recipient institutions must maintain “grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex,” it did not specify that a specific burden of proof must be employed in university grievance procedures. Indeed, the *2001 Guidance* granted schools considerable autonomy in determining the particular protocols to be utilized on their campuses, noting that “[p]rocedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience.” However, the April 4 letter's mandate revokes this discretion—and with it, schools' ability to grant students due process protections that are appropriate for the gravity of the offenses of which they are accused.

Given the May 9 blueprint's problematic definition of sexual harassment and the threat it poses to campus free speech rights nationwide, the lack of due process protections afforded to

students and professors accused of sexual misconduct under the DCL is that much more troubling. By combining the blueprint's expansion of the definition of sexual harassment with the DCL's lowering of the certainty with which an institution finds an accused individual guilty of sexual misconduct—in other words, coupling the broadest imaginable definition of sexual harassment with our judiciary's lowest standard of proof—OCR has created the perfect storm for labeling innocent students and professors as sexual harassers.

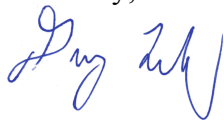
IV. Conclusion

In the months since the blueprint's issuance, colleges and universities have begun taking steps to ensure that their policies are compliant with its requirements. Given OCR's recent emphasis on enforcement and the failures of colleges and universities like the University of Montana to effectively address sexual assault, this proactive response is unsurprising. Indeed, such a prompt response should be encouraging, but the blueprint's lack of clarity with regard to core student and faculty rights makes the mobilization to comply with its highly publicized interpretation of Title IX deeply problematic.

Despite OCR's subsequent clarifications in the form of private letters sent to concerned citizens and to groups like FIRE and the American Association of University Professors' Committee on Women in the Academic Profession, OCR must recognize that the confusion engendered by the blueprint's statements requires clarification. The blueprint should be retracted and new guidance should be issued, clarifying the issues discussed above for college administrators and establishing bright-line rules that align with Supreme Court precedent. In so doing, OCR can create a safer, freer environment at colleges nationwide.

FIRE deeply appreciates OCR's attention to our concerns about students' and faculty members' civil liberties. We hope that under your leadership, OCR and FIRE can work together to achieve our shared goals of preventing and addressing sexual misconduct on campus while preserving the civil rights of all members of the college community. To that end, I would be very grateful for a chance to meet with you and further discuss our concerns so that together we may find a solution that will best serve the interests of all students and faculty. I thank you again for your time and attention, and I very much look forward to hearing from you.

Sincerely,



Greg Lukianoff
President