



Foundation for Individual Rights in Education

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July 16, 2013

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Sent by U.S. Mail and Facsimile (202-514-8337 / 202-453-6012)

RE: “BLUEPRINT FOR COLLEGES AND UNIVERSITIES”

Dear Ms. Bhargava and Mr. Galanter:

The May 9, 2013, findings letter and resolution agreement concluding the joint investigation by the Departments of Justice and Education into the University of Montana’s response to allegations of student sexual misconduct present a grave threat to freedom of expression, academic freedom, and due process on campus. Because the findings letter characterizes the resolution agreement and its supporting legal analysis as “a blueprint for colleges and universities throughout the country,” this threat endangers student and faculty speech at every college and university receiving federal funding nationwide—indeed, at virtually every American institution of higher education. The Foundation for Individual Rights in Education and the undersigned write today to express our deep concern about the blueprint’s disregard for student and faculty rights and to urge you to issue an immediate retraction and clarification.

The blueprint mandates the adoption of a shockingly broad definition of sexual harassment: “any unwelcome conduct of a sexual nature,” including “verbal conduct.” The vast reach of this definition is further extended by the blueprint’s explicit rejection of an objective, “reasonable person” standard.

Under the blueprint's mandate, sexual or gender-based speech that is offensive to only the most unreasonable student constitutes "sexual harassment" prohibited by Title IV of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972—despite being protected by the First Amendment. The threat to free expression and academic freedom is obvious; per the blueprint's definition, a classroom discussion of *Lolita*, a campus reading of Allen Ginsberg's "Howl," a dorm-room viewing of a Sarah Silverman comedy routine, or a cafeteria debate about same-sex marriage will each constitute "sexual harassment" if a single student is made uncomfortable. This untenable result is plainly unconstitutional and sharply at odds with the United States Supreme Court's famous conception of the American college campus as being "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

Indeed, the blueprint's definition ignores decades of long-settled precedent establishing the primacy of the First Amendment on public campuses. *See, e.g., 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*, 408 U.S. at 180 ("[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.'").

Federal courts have repeatedly and consistently struck down overly broad and vague university harassment codes on First Amendment grounds. For example, in *DeJohn v. Temple University*, 537 F.3d 301, 318 (3d Cir. 2008), the United States Court of Appeals for the Third Circuit struck down a sexual harassment policy that, like the blueprint, failed to require that the allegedly harassing speech be evaluated objectively. The Third Circuit found that this omission meant that the policy "provide[d] no shelter for core protected speech." Under the blueprint, public institutions face an impossible choice: violate the Departments' broad new interpretation of Titles IV and IX, or violate the First Amendment. Likewise, private colleges and universities that accept federal funding—the vast majority—will find their ability to provide students a robust liberal education now limited by the federal government, as such an education is dependent upon unfettered expression.

Commentators nationwide have criticized the blueprint in *The Washington Post*, *The Wall Street Journal*, *The Chronicle of Higher Education*, *The Atlantic*, *The Huffington Post*, and many other outlets, including a staff editorial in the *Los Angeles Times*. Hundreds of students, alumni, faculty, and citizens have written your offices, and organizations from across the political spectrum have voiced concern. The Alliance Defending Freedom and several other organizations sent an open letter to you in June, noting that enforcing the blueprint's broad definition will amount to an "enormous, and unbridled, administrative burden." The American Association of University Professors' Committee on Women in the Academic Profession also sent a letter to you last month, noting that it is "deeply concerned" about the blueprint's threat to academic freedom.

In an attempt to answer the widespread concerns about the blueprint's impact, the Department of Education's Office for Civil Rights (OCR) emailed concerned citizens a response on May 29 arguing that the blueprint's broad definition is necessary to encourage student reporting and that the blueprint is consistent with prior OCR guidance and the First Amendment. Neither of these claims withstands scrutiny.

First, defining protected speech as "sexual harassment" prohibited by Title IX violates the First Amendment by chilling speech and is therefore an impermissible means of encouraging reporting. Second, the terms of the University of Montana resolution agreement go much further than mere encouragement. The agreement requires state employees to report protected speech labeled as "sexual harassment" under the blueprint's broad definition to administrators. The federal government may no more require the reporting of subjectively offensive but constitutionally protected speech as "harassment" than it may require the reporting of "unpatriotic" speech as treason.

Reporting protected speech carries 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. Incredibly, the blueprint even declares that in some instances, universities must take "disciplinary action against the harasser" even "prior to the completion of the Title IX and Title IV investigation/resolution"—a directive that ignores due process and fundamental fairness.

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 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.

Colleges and universities have a moral and legal obligation to address and prohibit sexual misconduct. FIRE and the undersigned organizations appreciate the gravity of this responsibility and share the Departments’ desire to ensure that our nation’s colleges and universities fulfill it. But institutions need not—and must not—sacrifice the civil liberties of their students and faculty members to do so.

We ask that the Departments of Justice and Education issue a swift and detailed retraction and clarification to every college and university receiving federal funding. We request a response by July 30, 2013.

Sincerely,

Foundation for Individual Rights in Education

Academic Freedom Coalition of Nebraska

American Booksellers Foundation for Free Expression

American Council of Trustees and Alumni

Defending Dissent Foundation

Electronic Frontier Foundation

First Amendment Coalition

Goldwater Institute

The John William Pope Center for Higher Education Policy

National Coalition Against Censorship

The Rutherford Institute

Students For Liberty

Student Press Law Center

The Tully Center for Free Speech at Syracuse University

Woodhull Sexual Freedom Alliance

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*These individuals have signed on in their individual capacities. Accordingly, affiliations are for identification purposes only.