



Aug. 11, 2026

The Honorable Linda McMahon
Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Call to Action in higher education, overbroad harassment codes, and “dual tracking”

Dear Secretary McMahon:

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan organization dedicated to protecting the free speech rights of all Americans. For over 25 years, we’ve defended the expressive rights of students and faculty, regardless of political viewpoint, on campuses across the country. We write today in response to your August 3, 2026 “National Call to Action to University Presidents and Governing Boards” and other emerging issues affecting free speech rights in higher education.

While FIRE has been critical of some of the Department’s approaches to higher education over the past year and a half,¹ we welcome your renewed approach and attention to several principles essential to higher education’s core mission: freedom of speech, open inquiry, and institutional transparency. Universities cannot regain public trust by asking Americans to tolerate the status quo. They must earn that trust by showing that they are places where truth-seeking takes precedence over orthodoxy, where rules are clear and evenhandedly enforced, and where students and faculty can speak, teach, debate, protest, and research without fear of punishment for lawful expression.

FIRE has been saying much the same for decades. We have urged universities to adopt clear speech-protective policies, abandon speech codes, protect peaceful protest,

¹ See, e.g., Robert Shibley, *The findings against Harvard are a blueprint for a National Campus Speech Code*, FIRE (Aug. 20, 2025), <https://www.fire.org/news/findings-against-harvard-are-blueprint-national-campus-speech-code>; Tyler Coward, *OCR’s new Title VI letter: FIRE’s analysis and recommendations*, FIRE (Feb. 21, 2025), <https://www.fire.org/news/ocrs-new-title-vi-letter-fires-analysis-and-recommendations>.

enforce viewpoint-neutral rules against disruption and violence, reject political litmus tests in hiring and admission, adopt institutional neutrality, provide fair procedures for misconduct allegations, and honor their legal obligations under the First Amendment and federal civil rights law.² We appreciate your call for university leaders to address “the free exchange of ideas, wide-ranging debate, and open-minded campus discourse,” and we agree that universities have much to gain by explaining to students, faculty, and the public how they will protect those principles in practice.

FIRE also recognizes that several topics raised in your letter fall outside our institutional mission or are subjects on which we do not take a position. We do not, for example, take a general position on admissions transparency, tuition pricing, loan repayment, grade inflation, or how universities should structure programs to serve particular workforce needs. We do, however, take a strong position when government action or university policy³ in those areas threatens expressive rights, academic freedom, or due process rights. We therefore offer the following thoughts and recommendations about higher education reform, peer harassment, and “dual tracking” policies occurring at institutions of higher education

Your “National Call to Action” Letter

As explained above, FIRE largely welcomed your letter titled “National Call to Action to University Presidents and Governing Boards.” In order to ensure that university responses are productive, we have two broad suggestions.

First, the Department should make clear that university reform must proceed through lawful, viewpoint-neutral means. Calls for intellectual pluralism can advance academic freedom if they encourage universities to protect dissent and to ensure that no orthodoxy — left, right, institutional, donor-driven, or governmental — controls campus life. But those same calls can undermine academic freedom if they become a pretext for government supervision of curriculum, faculty hiring, classroom teaching, or research conclusions. The Department should therefore emphasize that universities may pursue intellectual diversity through policies that protect freedom of inquiry, including but not limited to explicit commitments to free expression and

² See, e.g., *FIRE’s 10 common-sense reforms for colleges and universities*, FIRE, <https://www.fire.org/research-learn/fires-10-common-sense-reforms-colleges-and-universities>.

³ See, e.g., *Reges v. Cauce*, 162 F.4th 979 (9th Cir. 2025) (holding that University of Washington officials violated the First Amendment when they punished Professor Stuart Reges for substituting his satirical take on the university’s preferred “land acknowledgment” statement on his syllabus). FIRE represented Reges.

academic freedom, viewpoint-neutral non-discrimination rules, institutional neutrality, due process, and protection against compelled ideological statements. By contrast, the Department should warn against political tests, viewpoint quotas, or government-mandated orthodoxies.

Second, the Department should speak with and invite universities to deploy particular precision when discussing protest and campus disorder. Your letter asks universities how they will “guarantee that unruly and violent protestors do not harass students or disrupt classes, research, public lectures, and campus operations.” FIRE has long made clear that universities must enforce rules against violence, true threats, vandalism, physical obstruction, discriminatory harassment, and the material and substantial disruption of classes, research, lectures, or events featuring invited speakers. Universities may also enforce reasonable, content- and viewpoint-neutral time, place, and manner rules. But the word “unruly,” standing alone, has no settled legal meaning. It is too vague to serve as an enforcement standard and too susceptible to viewpoint-based application. A protest may be loud, emotional, provocative, or deeply unpopular without losing constitutional protection. The Department should therefore avoid encouraging institutions to discipline “unruly” expression as such and should instead direct them to enforce clear rules against legally cognizable misconduct: violence, true threats, property destruction, unlawful occupation, and discriminatory harassment, properly defined.

A Consistent *Davis* Standard for Harassment Policies

Just as urgently, FIRE calls on the Department to use this opportunity to clarify the governing standard for discriminatory harassment under Title VI. More than 80 percent of the 486 universities in FIRE’s Spotlight Database⁴ continue to maintain overbroad harassment policies that restrict protected expression, and they often tell FIRE they do so because they believe federal civil rights enforcement requires it. That misunderstanding persists — at least in part — because federal guidance, enforcement letters, and institutional compliance practices have not consistently applied the Supreme Court’s speech-protective student harassment standard articulated in *Davis v. Monroe County Board of Education*.

Under *Davis*, student-on-student harassment is actionable when it is “so severe, pervasive, and objectively offensive” that it effectively denies “equal access to an

⁴ FIRE’s Spotlight Database, FIRE, <https://www.fire.org/research-learn/fires-spotlight-database>.

institution’s resources and opportunities,”⁵ and institutional liability depends on actual knowledge and deliberate indifference. The Supreme Court intentionally crafted that standard to protect student expression.⁶ It creates the constitutional line that allows institutions to address discriminatory harassment without transforming ordinary political disagreement, subjectively offensive expression, religious disagreement, satire, classroom discussion, or harsh criticism into federal civil rights violations.

That need for clarity is not hypothetical. In fact, the federal government is currently sending colleges and universities mixed signals. In May 2024, the Department of Education’s Office for Civil Rights issued shared-ancestry guidance that uses a non-*Davis* standard, defining a hostile environment as unwelcome conduct that is subjectively and objectively offensive and “so severe or pervasive that it limits or denies” participation in an educational program.⁷ It further provides that a school may violate Title VI when it knew or should have known of the hostile environment — a constructive knowledge standard well short of “actual knowledge” — and failed to take prompt and effective corrective steps to remedy that hostile environment.

By contrast, the Department of Justice’s July 2025 notice of findings concerning UCLA applied the *Davis* framework to a Title VI hostile-environment claim.⁸ Quoting the Supreme Court, DOJ required actual knowledge of peer harassment that is “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” DOJ further required deliberate indifference, meaning a response that is “clearly

⁵ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

⁶ Robert Shibley, *Why the Supreme Court’s Davis standard is necessary to restore free speech to America’s college campuses: Part I*, FIRE (Oct. 14, 2019), <https://www.fire.org/news/why-supreme-courts-davis-standard-necessary-restore-free-speech-americas-college-campuses-part> (highlighting “the interplay between the majority and dissent in that 5-4 decision, [which] makes it pretty clear that the Court was thinking about the effect its decision would have on student speech”).

⁷ Dear Colleague Letter from Catherine E. Lhamon, Assistant Sec’y for Civ. Rts., Office for Civ. Rts., U.S. Dep’t of Educ. 6 (May 7, 2024), available at <https://www.ed.gov/media/document/dear-colleague-letter-protecting-students-discrimination-such-harassment-based-race-color-or-national-origin-including-shared-ancestry-or-ethnic>.

⁸ Letter from Harmeet K. Dhillon, Assistant Att’y Gen., Civ. Rts. Div., U.S. Dep’t of Just., to Dr. Michael V. Drake, President, Univ. of Cal., Re.: U.S. Department of Justice Notice of Findings Regarding the University of California, Los Angeles 6 (July 29, 2025), available at <https://www.justice.gov/opa/pr/justice-department-finds-university-california-los-angeles-violation-federal-civil-rights>.

unreasonable” in light of known circumstances, and expressly stated that this framework applies to Title VI hostile-environment claims.

That divergence will confuse university administrators and will silence student and faculty expression. When one federal civil rights agency applies *Davis* while another appears to apply a more speech-restrictive standard, universities predictably err on the side of restricting expression, particularly when the perceived alternative is a federal investigation or the loss of funding.

Although *Davis* arose under Title IX, Congress modeled Title IX on Title VI, and courts routinely apply *Davis* to Title VI peer-harassment claims.⁹ **The Department should therefore make clear that the federal government will apply only a *Davis*-compliant harassment standard under Title IX, Title VI, and all other areas over which the Department has jurisdiction.** Regardless of the civil rights statute, the same constitutional concerns arise when universities punish speech as discriminatory harassment, and the same solution is required: a clear, consistent, constitutional standard that allows institutions to address genuine harassment without censoring protected expression.

The Department already recognized this in the 2020 Title IX regulations. There, the Department explained that the *Davis* definition helps ensure Title IX is enforced consistently with the First Amendment while allowing schools to address serious misconduct. The Department also recognized that schools benefit from “consistency and simplicity” in understanding actionable harassment and that a “multiplicity of definitions” serves neither institutions nor students.¹⁰ That reasoning applies with equal force under Title VI.

A consistent *Davis* standard is especially important given the rise in federal Title VI investigations and civil lawsuits brought by students alleging Title VI violations, most notably that institutions failed to respond adequately to known instances of unlawful antisemitic discrimination and other forms of discriminatory conduct. Given the growing prevalence of these cases, universities need a clear standard that enables them to act against violence, true threats, vandalism, and other unlawful conduct that

⁹ See, e.g., *Adams v. Demopolis City Schs.*, 80 F.4th 1259, 1273 (11th Cir. 2023) (joining the U.S. Courts of Appeal for the Second, Third, Fifth, and Tenth Circuits in adopting the *Davis* standard for Title VI).

¹⁰ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,036, codified at 34 C.F.R. pt. 106 (May 19, 2020).

denies equal access without sweeping in protected political expression merely because listeners find it offensive, hateful, wrong, or upsetting. Federal civil rights enforcement passes constitutional muster only when it strikes this balance.

The Department should therefore issue a public statement — perhaps jointly with the Department of Justice — making clear that *Davis* supplies the governing standard for all discriminatory peer harassment in higher education. The statement should explain that public universities may not maintain harassment policies that fall short of *Davis* and that the Department will not require or reward speech codes inconsistent with the First Amendment. The statement should also supersede guidance or enforcement language that relies on non-*Davis* formulations, constructive notice, or other unconstitutional standards that incentivize punishment of protected speech.

Ending “Dual-Tracking” Evasion of Title IX and Title VI

The Department should also address a related and growing problem: “dual-tracking” institutional harassment policies. Many universities maintain one policy for conduct they label “Title IX” harassment and another for conduct they label “non-Title IX” harassment, “non-Title IX sexual misconduct,” “bias-related harassment,” “discriminatory harassment,” or general “personal safety” misconduct. In practice, these parallel tracks often allow institutions to evade the speech-protective definition and procedural protections that apply when Title IX is implicated.

The 2020 Title IX regulations allow institutions to take this approach to address conduct outside Title IX’s jurisdiction under other policies — for instance, when addressing off-campus conduct beyond Title IX’s ambit. But permission to maintain other policies has become permission to plead around Title IX.

The U.S. Court of Appeals for the Third Circuit recently made this point in *Doe v. Trustees of Princeton University*.¹¹ Princeton charged a student under its Personal Safety Policy rather than its Title IX policy, but the court held that the Title IX framework still applied because the allegations were fairly read as involving male-against-female violence of a sexual nature. The court warned that universities “cannot insulate themselves from Title IX liability by recharacterizing disciplinary complaints that, on their face, indicate the alleged misconduct is of a sexual nature and adjudicating those charges under disciplinary policies with lower procedural

¹¹ *Doe v. Trs. of Princeton Univ.*, No. 25-2014, 2026 WL 2096642, at *6 n.5 (3d Cir. July 21, 2026).

protections for respondents.”¹² That principle should guide the Department’s enforcement policy.

The Department should state clearly that if Title IX is implicated, institutions may not avoid Title IX’s procedural requirements by relabeling the matter as “non-Title IX,” nor may they put students through multiple overlapping processes for the same alleged conduct, one under Title IX and another under a less protective policy designed to more readily facilitate discipline. And public universities may not use a non-Title IX harassment policy to punish speech that Title IX, properly understood through *Davis*, would not reach. Other policies might exist for conduct outside Title IX’s jurisdiction or for genuinely distinct misconduct. But where the alleged conduct is, in substance, sex-based harassment or sexual misconduct implicating Title IX, institutions both public and private must use their Title IX process and the constitutional standard that governs it.

The same principle should apply under Title VI. A public university may not avoid *Davis* by evaluating a complaint under “bias,” “civility,” “personal conduct,” or “community standards” policies when the alleged violation is, in substance, a peer hostile environment claim under Title VI. Nor may a public university punish protected expression under a broader internal harassment policy and then attribute that censorship to federal civil rights law. The Department should again make clear that, at public institutions, any harassment policy authorizing punishment of protected speech below the *Davis* threshold is unconstitutional. At private institutions, the Department should make equally clear that federal civil rights law does not require sub-*Davis* speech codes, and that institutions may not invoke federal law as the reason for restricting protected expression or breaking their own promises of free speech.

Such guidance would incentivize universities to stop maintaining two sets of harassment policies. That bifurcation confuses students and encourages administrators to choose the disciplinary path with fewer safeguards. We know from experience that, when given the choice of providing more protections or fewer, institutions all too often choose fewer. That result harms students who experience genuine harassment by diverting institutional resources toward controversies

¹² *Id.*

involving protected speech rather than conduct that actually denies equal educational access.

The Department should also distinguish discipline for punishable harassment from non-punitive responses available in other circumstances, including support services, security, academic adjustments, voluntary mediation where appropriate, counter-speech, public condemnation of bigotry, and educational programming. And it should make clear that violence, true threats, vandalism, physical obstruction, and substantial disruption may be addressed under separate, viewpoint-neutral rules.

Finally, the Department would also be well-served by reminding public institutions that there is no general “harassment” exception to the First Amendment. Twenty-five years ago, then-Judge Alito explained in *Saxe v. State College Area School District* that the First Amendment protects a wide range of speech listeners may find offensive, and that anti-harassment rules aimed at speech must be carefully limited.¹³ OCR said the same more than two decades ago. In its 2003 First Amendment guidance, OCR explained (1) that its regulations do not require or prescribe codes that impair First Amendment rights, and (2) that OCR must interpret and apply its rules consistent with First Amendment principles.¹⁴ The Department should reaffirm that guidance now.

Conclusion

If the Department expects universities to state their principles publicly, the Department should also state the legal standards it will use to judge them. Universities should not have to guess whether the federal government wants them to protect free speech or punish “offensive” speech; whether it expects *Davis* under Title IX but a broader standard under Title VI; whether it will tolerate dual-track systems designed to evade free speech and procedural protections; or whether vague terms like “unruly” will be treated as invitations to discipline protected protest. Clear federal standards will help institutions comply with civil rights law, protect student

¹³ *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 206–07 (3d Cir. 2001). *See also Speech First, Inc. v. Fenves*, 979 F.3d 319, 337 n.16 (5th Cir. 2020) (“Whether *Davis* may constitutionally support purely verbal harassment claims, much less speech-related proscriptions outside Title IX protected categories has not been decided by the Supreme Court or this court and seems self-evidently dubious.”).

¹⁴ Dear Colleague Letter on the First Amendment from Gerald A. Reynolds, Assistant Sec’y, Office for Civ. Rts., U.S. Dep’t of Educ. (July 28, 2003), available at <https://www.ed.gov/laws-and-policy/civil-rights-laws/harassment-bullying-and-retaliation/dear-colleague-letter-first-amendment>.

safety, and preserve the freedom of expression and academic freedom on which higher education depends.

FIRE would welcome the opportunity to work with the Department toward these ends. We share the Department's interest in restoring public trust in higher education. That project cannot succeed unless universities protect speech, enforce rules evenhandedly, provide fair procedures, and focus civil rights enforcement on conduct that actually denies equal educational access.

Sincerely,



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