FIRE

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May 7, 2012

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:

In the year since the Office for Civil Rights (OCR) issued its April 4, 2011, "Dear Colleague" letter (DCL), FIRE and others have written to you to express deep concerns about the DCL's impact on freedom of expression and due process on campus. We write again now, a full year since FIRE's May 5, 2011, letter, to reiterate our concerns and to ask you to promptly remedy these problems.

First, the DCL fails to provide a clear, controlling, and constitutional definition of discriminatory harassment in the educational context. Given the sweeping scope, depth, and specificity of the new mandates announced in the DCL's 19 pages, this omission is glaring. The DCL's silence on this crucial aspect of an institution's dual obligations under Title IX and the First Amendment confuses an issue that previously had some clarity and perpetuates the persistence of unconstitutional restrictions on student speech in the guise of overbroad or vague harassment policies.

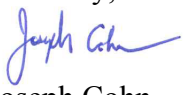
Indeed, the April 2011 DCL's lack of concern for freedom of expression stands in disappointing contrast to OCR's 2003 "Dear Colleague" letter, which more accurately reflects the state of the law then, and now. In that letter, former Assistant Secretary Gerald A. Reynolds made clear that "OCR's regulations 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 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).

Second, the DCL requires that institutions must provide the accuser a right to appeal if the accused is provided that right. This permits an accuser to appeal the outcome of a school hearing that has cleared the accused of wrongdoing, forcing the accused to defend himself or herself repeatedly and thus violating the basic constitutional principles of fairness underlying our justice system's prohibition of "double jeopardy." For a student, the consequences of being found guilty of sexual harassment or sexual assault are devastating. With so much at stake, it is simply unfair to force a student to defend himself or herself multiple times against the same accusation of sexual misconduct.

Third, the DCL damages student due process rights by mandating that institutions employ our judiciary's lowest standard of proof, the "preponderance of the evidence" standard, when hearing sexual harassment and sexual assault cases. The Supreme Court has unequivocally 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." *Goss v. Lopez*, 419 U.S. 565, 574, 580 (1975) (*quoting Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). 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.

OCR's leadership in encouraging colleges and universities to take meaningful action to combat sexual misconduct is laudable. However, in pursuit of this goal, the DCL has failed to protect fundamental constitutional principles. In the year that has passed since FIRE first wrote you about the erosions of student rights mandated by the DCL, we have waited patiently for you to address our concerns. We ask again that you take prompt, affirmative steps to preserve core civil liberties on campus.

Sincerely,



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