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MEMORANDUM

TO: VELMA MONTOYA, CALIFORNIA ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS

FROM: SAMANTHA K. HARRIS, DIRECTOR OF SPEECH CODE RESEARCH, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION

RE: UNCONSTITUTIONAL HARASSMENT POLICIES AT CALIFORNIA COLLEGES AND UNIVERSITIES

DATE: 8/1/2009

CC: ADAM KISSEL, AZHAR MAJEED, GREG LUKIANOFF, WILLIAM CREELEY

Many of California's public colleges and universities maintain harassment policies that violate students' First Amendment right to freedom of speech. This memorandum will provide an overview of the law on harassment in the educational context, including Supreme Court decisions, official guidance from the U.S. Department of Education, and lower court decisions directly addressing the constitutionality of university harassment policies. It will then review and analyze harassment policies from various California public colleges and universities in light of the applicable law. Finally, it will discuss the implications of the continued maintenance of these policies and will provide suggestions for change.

I. Harassment Law: An Overview

In the educational context, harassment is prohibited by Title IX of the Education Amendments of 1972 (sexual harassment) and by Title VI of the Civil Rights Act of 1964 (harassment on the basis of race, color, or national origin). Speech constituting harassment in violation of these statutes is not protected by the First Amendment, subject to an exacting legal standard. Specifically, the Supreme Court has defined student-on-student harassment as conduct "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999). By definition, this includes only extreme

and usually repetitive behavior—behavior so serious that it would prevent a reasonable person from receiving his or her education. For example, in *Davis*, the conduct found by the Court to be actionable harassment was a months-long pattern of conduct including repeated attempts to touch the victim's breasts and genitals and repeated sexually explicit comments directed at and about the victim.

Universities are legally obligated to maintain policies and practices aimed at preventing this type of genuine harassment from happening on their campuses. Unfortunately, under the guise of this obligation, universities frequently prohibit speech and expression that does not rise to the level (or even close to the level) of seriousness necessary to constitute unprotected harassment.

Harassment, properly understood and as defined by the Supreme Court, refers to conduct that is (1) unwelcome; (2) discriminatory (3) on the basis of gender or another protected status, like race; (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." Put simply, to be legally punishable as harassment, a student must be *far* more than simply rude or offensive. Rather, they must be actively engaged in a specific type of discrimination, as defined by law.

The misapplication of harassment regulations became so widespread that in 2003, the federal Department of Education's Office for Civil Rights (OCR)—responsible for the enforcement of federal harassment regulations in schools—issued a letter of clarification to all of America's colleges and universities (enclosed). The letter stated:

> Some colleges and universities have interpreted OCR's prohibition of "harassment" as encompassing all offensive speech regarding sex, disability, race or other classifications. 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.

The letter emphasized that "OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution," and concluded that "[t]here is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment." This letter forecloses any argument that federal anti-harassment law requires colleges to adopt policies that violate the First Amendment.

In fact, federal and state courts have repeatedly invalidated college and university harassment policies that prohibit constitutionally protected expression, including in several decisions in California. Most recently, a federal judge in the Central District of California issued a preliminary injunction finding that the Los Angeles Community College District's (LACCD's) sexual harassment policy was likely unconstitutional and prohibiting the district from enforcing the policy until a final judgment is issued in the litigation. *Lopez v. Candaele et al.*, CV 09-0995 (C.D. Cal. Jul. 10, 2009).

LACCD's policy defined sexual harassment as conduct that "has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile or offensive work or educational environment." As part of the policy, the judge also considered two related websites that "purport to expound" upon the policy, providing examples of sexual harassment prohibited in the LACCD. One of those websites stated:

> The four most common types of sexual harassment are:
>
> 1. Sexual Harassment based on your gender: This is generalized sexist statements, actions and behavior that convey insulting, intrusive or degrading attitudes/comments about women or men. Examples include insulting remarks; intrusive comments about physical appearance; offensive written material such as graffiti, calendars, cartoons, emails; obscene gestures or sounds; sexual slurs, obscene jokes, humor about sex.

The other website stated that sexual harassment can include "disparaging sexual remarks about your gender" and "repeated sexist jokes," and cautioned students that "if [you are] unsure if certain comments or behavior are offensive do not do it, do not say it…."

The district court concluded that the policy "prohibits a substantial amount of protected free speech, even judged in relation to the unprotected conduct that it can validly prohibit." The court cited several reasons for this holding. First, the LACCD policy did not require that the conduct create an objectively hostile environment (i.e., an environment that would interfere with a reasonable person's work or academic performance); instead, it was sufficient that the conduct in question was subjectively perceived as hostile or offensive by the actual victim. This lowered standard directly contradicted the Supreme Court's holding in *Davis*, discussed above, that conduct must (in addition to other requirements) be "objectively offensive" in order to constitute harassment.

The court also looked to the two ancillary websites providing examples of harassment and held that those websites, which constituted part of the policy, prohibited constitutionally protected speech "such as discussions of religion, homosexual relations and marriage…or even gender politics and policies." For example, the court noted, the prohibition on "generalized sexist statements" could prohibit "an individual's outdated, though protected, opinions on the proper role of the genders."

The LACCD decision is the latest in an unbroken, growing line of cases finding college and university speech codes masquerading as harassment policies unconstitutional. In November 2007, a federal judge in the Northern District of California enjoined the California State University (CSU) System from maintaining a policy that required students "to be civil to one another," and enjoined San Francisco State University (SFSU) from maintaining a policy requiring students to act in accordance with SFSU "goals, principles, and policies." *College Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007). In addition to *Lopez* and *Reed*, the full list of court decisions holding university harassment policies unconstitutional is as follows: *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (sexual

harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) ("discriminatory harassment" policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (sexual harassment policy); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) ("racism and cultural diversity" policy); *Booher v. N. Ky. Univ. Bd. of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998) (sexual harassment policy); *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wisc. 1991) ("discriminatory harassment" policy); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) ("discrimination and discriminatory harassment" policy); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) ("harassment by personal vilification" policy).

The last case on that list—*Corry v. Leland Stanford Junior University*—is unique because unlike the other schools on the list, Stanford University is private. Ordinarily, private colleges and universities are not legally bound by the First Amendment, which regulates only government action. California, however, has a law applying the First Amendment to private, secular colleges and universities. California's "Leonard Law" (California Education Code § 94367, named for its author, former California State Senator Bill Leonard) provides:

> No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.

Thus, most private colleges and universities in California are bound by the same constraints as public universities. Although this memo will focus on policies at California's public institutions, it is important to note that many private universities must follow the same constraints as far as regulating student speech is concerned.

III. California Policies

To be consistent with the First Amendment, harassment policies may only ban expressive conduct which is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"—the standard set forth by the Supreme Court in *Davis v. Monroe County Board of Education*. A review of harassment policies from a number of California's leading public institutions, however, demonstrates that many colleges and universities define harassment to include expression that does not meet the narrow *Davis* standard. Indeed, the definition of sexual harassment contained in the California Education Code itself does not meet the *Davis* standard; the Code defines sexual harassment, in relevant part, as sexual conduct that "has the purpose or effect of having a negative impact upon the individual's work or academic performance…." Cal. Educ. Code § 212.5(c).

This standard suffers from two serious constitutional flaws. First, it contains no requirement that the environment be *objectively* hostile or offensive—that is, it contains no "reasonable person" standard—thus allowing the bounds of permissible speech on campus to be defined by the most

sensitive members of the community. The Court's decision in *Davis* required that conduct be both subjectively *and objectively* harassing to prevent precisely this result. Second, this standard allows for the punishment of expression that merely has a "negative impact" on another student, a restriction that is both vague and overbroad. A law or regulation is unconstitutionally vague if it fails to "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). In this case, it is impossible to know what the Code means by a "negative impact"—it could be anything from genuine interference with the educational process to mere discomfort or upset. Without knowing what is prohibited, students may not be able to comply with this regulation even if they attempt, in good faith, to do so. The prohibition of speech that has a "negative impact" on other students is also unconstitutionally overbroad, in that a great deal of speech that negatively impacts others is nonetheless entirely constitutionally protected. Again, harassment in the legal sense is only conduct so severe and pervasive that it interferes with a reasonable person's ability to obtain his or her education.

We now turn to a sampling of unconstitutional harassment policies at some of California's major public institutions.

A. CSU-Bakersfield

CSU-Bakersfield defines "sexual harassment" as:

> sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature directed towards an employee, student or applicant when one or more of the following circumstances are present: … The conduct had the purpose or effect of interfering with a student's academic performance, creating an intimidating, hostile, offensive or otherwise adverse learning environment, *or adversely affecting any student*. (Emphasis added.)

This policy suffers from the same flaws as the "negative impact" standard contained in the California Education Code; an "adverse effect" is as vague and overbroad as a "negative impact."

B. CSU-Chico

CSU-Chico's Student Judicial Affairs website refers to a form of sexual harassment in which faculty "make disparaging remarks about or implicitly devalue students for their gender or sexual orientation…." Listed examples of this type of harassment include "stereotypic generalizations," "[r]einforcement of sexist stereotypes through subtle, often unintentional means," and "[c]ontinual use of generic masculine terms such as to refer to people of both sexes." This policy is egregiously overbroad and threatens to have a terrible chilling effect on classroom speech. The suggestion that "subtle," "unintentional" reinforcement of gender stereotypes can constitute sexual harassment essentially forces faculty members whose courses address any issues touching on gender relations to walk on eggshells for fear of running afoul of this policy.

Chico's Student Judicial Affairs website also maintains a list of "common forms of sexual harassment," including "sexist comments" and "humor or jokes about gender." This list explicitly includes protected expression, and threatens to punish core political expression and satire. A California federal court recently addressed this very issue in the *Lopez* case, discussed above, and held that a policy prohibiting "sexist statements" was presumptively unconstitutional.

C. CSU-Fullerton

CSU-Fullerton's Diversity and Equity Office maintains a "sexual harassment brochure" defining sexual harassment as any "sexual or gender-based behavior that adversely affects a person's working or learning environment." As discussed more extensively under CSU-Bakersfield, this is unconstitutional for the same reasons as the California Education Code standard.

D. CSU-Monterey Bay

The CSU-Monterey Bay Catalog's policy on "Sexual Harassment and Sexual Assault Nontolerance" states that examples of harassment include "sending inappropriate jokes or comments in print or by e-mail" and "derogatory cartoons, drawings, or posters, or inappropriate gestures." As discussed more extensively under CSU-Chico, this is unconstitutionally overbroad.

E. CSU-Northridge

The CSU-Northridge Catalog's policy on "Discrimination and Harassment" provides that "[i]ndividual (s) or group (s) actions or activities that promote degrading or demeaning social stereotypes based upon age, disability, ethnicity, gender, national origin, religion or sexual orientation will not be tolerated." In violation of the First Amendment, this policy contains no requirement that the actions in question be severe, pervasive, or objectively offensive; it is sufficient that they promote demeaning stereotypes about particular groups, regardless of the severity of the conduct or its effect on others. The policy also threatens core political expression, since many expressions of opinion on important topics might promote what some believe to be demeaning stereotypes about certain groups. For example, a student could be punished under this policy for arguing that the Department of Motor Vehicles should re-test drivers annually after age 65, since that argument promotes the demeaning stereotype that the elderly are poor drivers.

F. San Francisco State University

Although San Francisco State University has already been successfully sued over several of its speech-related policies, it still maintains a sexual harassment policy that prohibits constitutionally protected expression. The university's "Sexual Harassment Policy and Procedure" provides that "[s]exual [h]arassment is one person's distortion of a university relationship by unwelcome conduct which emphasizes another person's sexuality." Like so many other policies, this policy is lacking any requirement of severity or pervasiveness; the mere fact that conduct is "unwelcome" is not sufficient to establish the level of interference necessary to constitute actual harassment.

G. San Jose State University

San Jose State University maintains two unconstitutional harassment policies. The first is a sexual harassment policy which provides:

> CSU policy defines sexual harassment to include 'such behavior as sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature directed towards an employee, student or applicant when one or more of the following circumstances are present: ... The conduct had the purpose or effect of … adversely affecting any student.'

For the reasons discussed under the entry for CSU-Bakersfield, this policy is unconstitutional.

Secondly, the university's Housing License Agreement Booklet sets forth the following harassment policy for the residence halls:

> Any form of activity, whether covert or overt, that creates a significantly uncomfortable, threatening, or harassing environment for any UHS resident or guest will be handled judicially and may be grounds for immediate disciplinary action… *The conduct is evaluated from the complainant's perspective*. (Emphasis added.)

This policy completely lacks any "reasonable person" standard, instead basing claims of harassment entirely on the subjective reaction of the listener. Any speech that makes the most sensitive member of the community "significantly uncomfortable" is grounds for punishment. This directly contradicts the Supreme Court's requirement that harassment be both subjectively *and objectively* offensive—that is, offensive to a reasonable person in the victim's position and to the actual victim.

H. UC-Santa Cruz

UC-Santa Cruz policy states that "[e]xamples of sexual harassment and discrimination include: … Sexual jokes, comments, or innuendoes … Sex based cartoons or visuals that ridicule or denigrate a person." For the reasons discussed under the entry for CSU-Chico, this prohibits speech protected by the First Amendment and in fact threatens core political expression and satire.

IV. Discussion and Conclusion

The policies discussed above are only a sample of the unconstitutional harassment policies in force at California's public institutions. In addition, a number of California's highest rated private institutions—including the California Institute of Technology, Stanford University, and the University of Southern California—maintain policies that are impermissible under California's Leonard Law, which applies the requirements of the First Amendment to private, secular colleges and universities. Given the growing weight of legal precedent holding such

speech codes unconstitutional, the continued maintenance of these policies carries significant risk both to California's colleges and universities and to individual administrators at those institutions. Any public university policy prohibiting constitutionally protected expression is an unlawful deprivation of constitutional rights under 42 U.S.C.S. § 1983 for which university administrators can be sued in their individual capacities. While state officials and employees are offered *qualified* immunity from personal liability, this immunity only applies when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When the law is as clearly established as it is with regard to unconstitutional speech codes, claims of immunity from liability on the part of individual administrators may fail, meaning that administrators could be held personally liable for continuing to maintain unconstitutional speech codes in violation of students' First Amendment rights.

The solution to the problem of these unconstitutional harassment policies is relatively simple, since the Supreme Court has set forth a clear definition of peer-on-peer harassment. If California's colleges and universities revise their harassment policies to accord with that definition—that is, if they prohibit only conduct which is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit—then they will not be susceptible to claims of a First Amendment violation based on their harassment policies. It is important to note, however, that this memorandum only addresses harassment policies; many California universities also maintain other policies—such as Internet usage policies, disorderly conduct policies, and other speech-related policies—that also violate students' First Amendment rights. Those policies are beyond the scope of this memo, but must also be addressed by universities seeking to avoid liability for constitutional violations.

California's universities are far from unique in their disregard for students' First Amendment rights. In a study of speech-related policies conducted last year, FIRE found that nationwide, over 75% of public universities surveyed maintain policies that prohibit constitutionally protected speech and expression. These policies are increasingly being challenged in federal courts, and to date those challenges—including several in California—have been overwhelmingly successful. Colleges and universities need to realize that while they do have a legal obligation to prevent genuine harassment from occurring on their campuses, they have an equally important legal obligation to uphold the First Amendment rights of their students and faculty.