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Foundation for Individual Rights in Education

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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:

For decades now, college administrators have struggled to define discriminatory harassment. Define harassment too broadly, and an institution might be on the losing end of a First Amendment lawsuit, the latest in a long line of courtroom defeats dating back more than twenty years. Define harassment too narrowly, and a student might sue for ignoring Title IX violations. As you know, a college that fails to maintain a sufficient harassment policy may be subject to investigation by the Office for Civil Rights, and a violation might mean loss of federal funding.

This confusion has led to the stubborn persistence of unconstitutional restrictions on student speech. A 2010 survey of policies at nearly 400 universities conducted by attorneys from the Foundation for Individual Rights in Education found that two-thirds of schools maintain policies that clearly and substantially restrict protected speech. Many of these restrictions are broad or vague harassment policies. For example, the University of Illinois at Urbana-Champaign defines sexual harassment to include any "statement that is offensive, humiliating, or an interference with required tasks or career opportunities." Jackson State University prohibits as harassment "verbally abusive language by any person on University-owned or controlled property." Marshall University's harassment policy bans expression that causes or was intended to cause "mental harm, injury, fear, stigma, disgrace, degradation, or embarrassment." Unconstitutional policies like these persist despite an overwhelming string of defeats for similarly broad or vague harassment codes dating back to 1989, when a federal district court found the University of Michigan's speech code unconstitutional. The continued

maintenance of such overreaching harassment policies benefits no one. Students risk punishment for protected speech; institutions risk losing lawsuits.

Fortunately, the Supreme Court has provided a clear standard for student-on-student harassment that simultaneously prohibits harassment and protects speech. In *Davis v. Monroe County Board of Education* (1999), the Supreme Court confronted the question of when a school could be held liable in a lawsuit for damages filed by a student victim of harassment. The Court held that a grade school properly faced liability after it demonstrated "deliberate indifference" to serious, ongoing student-on-student harassment. In reaching this conclusion, the Court formulated a definition of student-on-student harassment. The Court determined that to avoid liability, schools must respond to conduct "that is 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."

Twelve years later, the *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. 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. Furthermore, by including both "severity" and "pervasiveness" requirements, *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 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.'"

Sincerely,

Foundation for Individual Rights in Education

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