

Written Statement of Hans Bader

Senior Attorney, Competitive Enterprise Institute

For the

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

June 2, 2015 Hearing on

“First Amendment Protections on Public College and University Campuses”

Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee, thank you for giving me the opportunity to comment for the record. I am concerned about how the Education Department, where I used to work, is now pressuring colleges to restrict constitutionally protected speech, by redefining sexual and racial harassment in ways that are at odds with federal court rulings.

SUMMARY

The Education Department has effectively redefined constitutionally protected speech as “sexual harassment” even when it would not offend the reasonable person; is not severe; does not occur on school grounds; and is not gender-discriminatory. By doing so, it has ignored Supreme Court rulings and other court decisions, which require that speech or conduct be offensive to a reasonable person to constitute sexual harassment; be both severe *and* pervasive to trigger Title IX liability¹; occur on school grounds²; and be based on victims’ *sex*, not merely sexual in content or subject matter.³

In doing so, it has effectively mandated an unconstitutional speech code even broader than the ones struck down by federal judges after college students demonstrated a real possibility that they could be punished merely for discussing certain gender-based differences between men and women, or advocating political positions on gender issues, such as that women be banned from combat roles in the

¹ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633, 650, 651, 652, and 654 (1999) (emphasizing five times that the conduct must be “severe, pervasive, and objectively offensive” to violate Title IX); *Harris v. Forklift System*, 510 U.S. 17 (1993) (even in the workplace, where conduct need only be “severe *or* pervasive” to trigger liability, the conduct must still be offensive to the “reasonable person” to be illegal).

² *Roe v. St. Louis Univ.*, 746 F.3d 874 (8th Cir. 2014) (declining to find that university had violated Title IX in situation involving student raped at off-campus party by another student because plaintiff failed to show that the university “had control over the situation in which the harassment or rape occurs,” as required by the Supreme Court’s *Davis* decision).

³ See *Gallant v. Board of Trustees*, 997 F. Supp. 1231 (N.D. Cal. 1998) (graphic sexual discussions were not a violation of Title IX where they did not occur because of the sex of the complainant or any victim). Similarly, in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), the Supreme Court noted that there is no liability for sexual harassment unless “members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed,” and the mere fact that a man addresses words with “sexual connotations” to a woman does not *automatically* make them sexually harassing.

military.⁴ The danger that overly broad definitions of harassment will stifle campus debate about important political and social issues is very real, since students have been charged with racial or sexual harassment for discussing issues such as affirmative action, feminism, homosexuality, and the death penalty under broadly worded campus harassment policies.⁵

While colleges could theoretically raise First Amendment objections to the Education Department's overly broad definition of harassment, they are unlikely to do so, because the Education Department's Office for Civil Rights (OCR) could cut off all their federal funds, or subject them to an extremely costly investigation, for failure to comply. It is generally cheaper for a college to violate the First Amendment than to be accused of violating laws against sexual harassment or discrimination, as I explain later on.

To prevent widespread censorship, and prevent OCR from enforcing an unconstitutionally overbroad definition of "harassment" at the expense of free speech, Congress should consider passing a law requiring the Education Department to use the definition of sexual harassment found in the Supreme Court's *Davis* decision in its regulations. That would keep speech from being defined as harassment in violation of federal regulations unless it is unwelcome, aimed at victims based on their sex, and "severe, pervasive, and objectively offensive" enough to interfere with access to an education.⁶

⁴ See, e.g., *Doe v. University of Michigan*, 721 F.Supp. 852, 858-860 (E.D. Mich. 1989) (in striking down the University of Michigan's discriminatory harassment policy, the court cited a "realistic and credible threat that" a graduate student "could be sanctioned were he to discuss certain biopsychological theories" "positing biologically-based differences between sexes and races" in his field of "biopsychology," the "study of the biological bases of individual differences in personality traits and mental abilities"); *DeJohn v. Temple University*, 537 F.3d 301, 305 (3rd Cir. 2008) ("because of the sexual harassment policy" at Temple, a former U.S. soldier "felt inhibited in expressing his opinions in class concerning women in combat and women in the military.").

⁵ See the examples cited in the *Amicus* brief of Students for Individual Liberty, *et al.*, filed in *Davis v. Monroe County Board of Education*, No. 97-843 (filed Dec. 8, 1998), available in the Westlaw database at 1998 WL 847365.

⁶ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); see also *Wolfe v. Fayetteville Sch. Dist.*, 648 F.3d 860 (8th Cir. 2011) (vulgar conduct not aimed at victim based on his sex did not violate Title IX).

I. How the Education Department's Office for Civil Rights Restricts Speech

To be classified as sexual harassment, speech needs to meet a certain threshold under Supreme Court precedent. That threshold is generally higher on campus than in the workplace.

In the workplace, it needs only to be “severe *or* pervasive” enough to create a hostile work environment based on the complainant’s sex.⁷ On campus, by contrast, it needs to be “severe, pervasive, and objectively offensive” enough to interfere with access to an education.⁸ A mildly offensive idea about a racial or sexual topic does not violate Title IX or Title VI merely because it is expressed by many students and thus is “pervasive” on campus, because the expression must also be “severe.” That higher threshold makes sense, because colleges and universities are the quintessential “marketplace of ideas.”⁹ You can’t have meaningful debate (about a subject like affirmative action, the frequency of false harassment or rape charges, or why there are gender-based pay disparities) when a participant in that debate can be disciplined or expelled for expressing a commonplace view in that debate, merely because that viewpoint is commonplace on campus and thus “pervasive.”

In colleges, even commonplace views like opposition to affirmative action have been depicted as racist, and OCR’s general counsel once refused to take a position on whether a student’s criticism of affirmative action could constitute racial harassment under Title VI if it was expressed to a black student.¹⁰ For example,

“In 1994, Judith Winston, overseer of the Clinton Administration's Office for Civil Rights (OCR), told American Lawyer columnist Stuart Taylor that

⁷ *Harris v. Forklift Systems*, 510 U.S. 17 (1993).

⁸ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). The Court emphasized five times that the conduct must be “severe, pervasive, and objectively offensive” to violate Title IX. *See id.* at 633, 650, 651, 652, and 654.

⁹ *Healy v. James*, 408 U.S. 169, 180 (1972) (Supreme Court describes universities as such).

¹⁰ Stuart Taylor, Jr., *A Clintonite Threat to Free Speech*, *The Legal Times*, May 9, 1994, at 27. *See OCR’s Racial Harassment Investigative Guidance*, 59 Fed. Reg. 11448 (1994) (imposing Title VI liability on schools for speech or conduct deemed to create a hostile learning environment or interfere with educational benefits).

federal laws against racial and sexual ‘harassment’ might be violated by a student arguing against affirmative action in a college classroom. (This same Judith Winston helped plan Mr. Clinton's national ‘dialogue’ on race). In 1993, Chico State University's award-winning historian Joseph Conlin was disciplined for ‘racial harassment’ after he publicly criticized the university's affirmative-action policies. The university claimed that his comments created a ‘racially hostile’ environment for minorities. After Prof. Conlin threatened a First Amendment lawsuit, the university dropped its harassment code and its action against him. But under pressure from OCR, the university subsequently imposed a new, vaguer harassment code.”¹¹

In 2007, a university found a student-employee guilty of racial harassment for merely reading the book, *Notre Dame vs. The Klan: How the Fighting Irish Defeated the Ku Klux Klan*, silently to himself, although it reversed this decision after a First Amendment lawsuit was threatened.¹²

Similarly, a prominent feminist professor and author, Laura Kipnis, was recently accused of sexual harassment and retaliation for an article she published in the Chronicle of Higher Education, and subsequent public statements on Twitter. She was accused of sexual harassment by students over an article she wrote arguing that overly broad notions of sexual harassment under Title IX had created a climate of fear and “sexual paranoia.”¹³ Then, when she wrote about the sexual harassment complaint against her based on that article, in tweets describing it as a violation of academic freedom, she was investigated for retaliation in violation of Title IX, even though she had not even mentioned the complainants’ names.¹⁴ (OCR’s policies contributed to her plight, since it has told schools to regulate off-

¹¹ Karl Jahn, *Harassment Almost Ruined Her Life*, Wall Street Journal, Jan. 21, 1999, <http://www.wsj.com/articles/SB91686693179718000>.

¹² *University Says Sorry to Janitor Over KKK Book*, Associated Press, July 15, 2008, www.nbcnews.com/id/25680655/ns/us_news-life/t/university-says-sorry-janitor-over-kkk-book

¹³ See Laura Kipnis, *Sexual Paranoia Strikes Academe*, Chronicle of Higher Education, Feb. 27, 2015, <http://chronicle.com/article/Sexual-Paranoia-Strikes/190351/>

¹⁴ Jonathan H. Adler, *How Northwestern University is Throwing Academic Freedom Under the Bus (and Wasting Money) Under the Guise of Title IX Compliance*, Washington Post, May 29, 2015, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/29/how-northwestern-university-is-throwing-academic-freedom-under-the-bus-and-wasting-money-under-the-guise-of-title-ix-compliance/>.

campus conduct, including speech “on the internet,”¹⁵ even though federal appeals courts have rejected Title IX lawsuits over off-campus conduct, including severe misconduct.¹⁶)

Moreover, a Title IX complaint was also filed against the faculty-support person who accompanied her to a session with her investigators, because he had described the charges against her as a potential threat to academic freedom in discussing her situation with the faculty senate. The Title IX attorneys investigating her case then informed her that due to the complaint against him, he could no longer be allowed to act as her support person.¹⁷

The Title IX complaint against Kipnis was dropped after a national outcry from professors in publications like the Washington Post (although a retaliation complaint against her under the Faculty Handbook, as opposed to Title IX, remains pending).¹⁸ But other colleges, to avoid the potential wrath of OCR, have punished professors for retaliation for speaking out, even when they did not even mention the identity of the complainant in questioning a complaint’s merit based on academic freedom. And due to the limited nature of public employees’ free speech rights against their employer in some circuits, one federal appeals court rejected a professor’s challenge to his punishment for speaking out in this fashion.¹⁹

¹⁵ See OCR, Oct. 26, 2010 Dear Colleague letter, at pg. 2 (“graphic and written statements” on “Internet”), and pg. 6 (“creating . . . Web sites of a sexual nature”), www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html; see also OCR Letter re: Complaint No. 01-11-2012 Harvard Law School, at pg. 15 (“the University has an obligation to consider the effects of off-campus conduct”) (www2.ed.gov/documents/press-releases/harvard-law-letter.pdf)

¹⁶ See, e.g., *Roe v. St. Louis Univ.*, 746 F.3d 874 (8th Cir. 2014) (declining to find that university had violated Title IX in situation involving student raped at off-campus party by another student because plaintiff failed to show that the university “had control over the situation in which the harassment or rape occurs,” as required by the Supreme Court’s *Davis* decision).

¹⁷ Jonathan H. Adler, *How Northwestern University is Throwing Academic Freedom Under the Bus (and Wasting Money) Under the Guise of Title IX Compliance*, Washington Post, May 29, 2015.

¹⁸ See Brock Read, *Laura Kipnis Is Cleared of Wrongdoing in Title IX Complaints*, Chronicle of Higher Education, May 31, 2015, <http://chronicle.com/blogs/ticker/laura-kipnis-is-cleared-of-wrongdoing-in-title-ix-complaints/99951>; Robin Wilson, *For Northwestern, the Kipnis Case Is Painful and Personal*, Chronicle of Higher Education, June 4, 2015, <http://chronicle.com/article/For-Northwestern-the-Kipnis/230665/>.

¹⁹ *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2000).

OCR has thumbed its nose at the Supreme Court's *Davis* decision by stating that speech or conduct need only be "persistent" or "pervasive" or "severe" to violate Title IX or Title VI, not "severe" and "pervasive," and need not necessarily interfere with a student's access to educational opportunities to violate Title IX.²⁰ For example, its April 4, 2011 Dear Colleague letter to the nation's school officials states that "a single or isolated incident of sexual harassment may create a hostile environment" if it is severe, even if it is not pervasive.²¹ Similarly, its 2010 "Dear Colleague" letter about bullying, sent to the nation's school officials, claimed that "harassment does not have to . . . involve repeated incidents" to be actionable, but rather need only be "severe, pervasive, or persistent." (The letter took aim at student speech even outside of school boundaries, arguing that harassment includes speech, such as "graphic and written statements" on the "Internet" and elsewhere,²² even though the courts have given schools less ability to restrict speech outside of school,²³ and even though the Supreme Court's *Davis* decision indicated that liability was limited to events occurring on school grounds²⁴).

²⁰ *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 65 Fed. Reg. 66092, 66097 (Nov. 2, 2000) (Education Department will hold schools liable for conduct that is "severe, persistent, or pervasive" so as to *either* "limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment"); *compare Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999) ("We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, 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.")

²¹ http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104_pg3.html.

²² See October 26, 2010 Dear Colleague letter about school bullying to the nation's school officials, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010_pg2.html.

²³ See, e.g., *Klein v. Smith*, 635 F.Supp. 1440 (D. Me. 1986) (school could not punish student for vulgar out-of-school gesture towards teacher that could certainly be punished in school).

²⁴ See *Roe v. St. Louis Univ.*, 746 F.3d 874 (8th Cir. 2014) (declining to find that university had violated Title IX in situation involving student raped at off-campus party by another student because plaintiff failed to show that the university "had control over the situation in which the harassment or rape occurs," as is required by language in the Supreme Court's *Davis* decision).

Needless to say, people’s views, especially when they are commonplace, tend to be “persistent,” and they tend to persistently express them over time in campus debates. By allowing liability for expression that is “persistent” but neither “pervasive” nor “severe,” OCR has defined sexual harassment even more broadly on campus than it is defined in the workplace, disregarding the Supreme Court’s decision to define sexual harassment more narrowly on campus than in the workplace, and turning the law upside down.

The net result of OCR’s redefinition of harassment (whether intended or not) is to pressure colleges to punish students for a single instance of controversial speech that a complainant deems “severe” (like a criticism of a university’s affirmative action policy made to a black student²⁵) even though it is clearly not pervasive or persistent, and to punish students for individual instances of speech that are clearly only mildly offensive, but which the complainant views as collectively “pervasive” or “persistent” because multiple students say them.

Getting rid of the “severe” *and* “pervasive” requirement for educational harassment claims violates federal appeals court rulings that struck down campus hostile-environment harassment policies modeled on workplace harassment rules.²⁶ Two of those rulings cited *Davis*’s “severe” and “pervasive” requirement.²⁷

Getting rid of the severity requirement drives colleges to adopt unconstitutional zero-tolerance rules against sexual or racist speech, similar to the ones adopted by risk-averse employers in non-academic settings like factories.

²⁵ *Department of Corrections v. State Personnel Bd.*, 59 Cal.App.4th 131 (Cal. App. 1997) (appeals court, in 2-to-1 ruling, finds that angry diatribe by white prison guard against affirmative action to Hispanic colleague did not constitute hostile-environment racial harassment, although the Hispanic colleague viewed it as such; the liberal dissenting judge argued it was illegal racial harassment, while the majority argued it was largely free speech).

²⁶ *See, e.g., Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (striking down hostile-environment racial harassment policy as unconstitutionally overbroad as to student speech, but allowing coach to be fired for racial epithet due to fact that employees’ free speech rights are narrower than students’); *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008).

²⁷ *See Saxe v. State College Area School District*, 240 F.3d 200, 205-06, 210-11 (3d Cir. 2001) (striking down discriminatory harassment policy that lacked the severity and pervasiveness limitation found in the Supreme Court’s *Davis* decision, and also finding that even an instance of speech that manifests a “purpose” of creating a hostile environment can be protected, even though such speech is banned by the EEOC’s workplace guidelines); *DeJohn v. Temple University*, 537 F.3d 301, 317-19 (3d Cir. 2008) (same).

Describing how workplace harassment liability under Title VII works, one federal appeals court decision said, “In essence, while Title VII does not require an employer to fire all ‘Archie Bunkers’ in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society.”²⁸ To avoid the risk of a recurring viewpoint being deemed “pervasive,” civil rights agencies encourage employers to adopt zero tolerance policies banning all racially or sexually offensive comments or conduct, as some employers in fact do.²⁹

But banning “the expression of racist or sexist attitudes” and preventing “bigots from expressing their opinions” can sometimes create First Amendment problems even when applied to workplaces. For example, a federal appeals court concluded that the First Amendment barred a racial harassment lawsuit brought by Hispanic faculty over a white colleague’s persistent anti-immigration emails, in light of academic freedom considerations.³⁰ And a state supreme court justice cited the First Amendment in a ruling dismissing a sexual harassment lawsuit over the recurring, persistent sexual jokes told in the process of producing the TV show “Friends” by Hollywood sitcom writers, which offended a writer’s female assistant.³¹

²⁸ *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3rd Cir. 1990) (quoting the *Monsanto* decision).

²⁹ See Maryland Commission on Human Relations, *Preventing Sexual Harassment: A Fact Sheet for Employees* (1994) (“Because the legal boundaries are so poorly marked, the best course of action is to avoid all sexually offensive conduct in the workplace.”), quoted at <http://www2.law.ucla.edu/volokh/harass/breadth.htm#74>; Annette Delavallade, *Confusion About Harassment Is Not Seen as a Legal Excuse*, Cap. District Bus. Rev., Oct. 14, 1996 (“zero tolerance” policies needed to protect against liability); Eugene Volokh, *What Speech Does “Hostile Work Environment” Harassment Law Restrict?*, 85 Geo. L.J. 627 (1997).

³⁰ See *Rodriguez v. Maricopa Community College District*, 605 F.3d 703 (9th Cir. 2010).

³¹ See *Lyle v. Warner Brothers TV Productions*, 132 P.3d 211, 295-96, 300 (Cal. 2006) (Chin, J., concurring) (advocating a creative-necessity defense against liability for certain types of speech-based harassment claims).

Given how this “severe *or* pervasive” test can violate academic or artistic freedom even in the workplace, it is a big mistake for the Education Department to impose it on *student* speech despite the Supreme Court’s decision not to do so in its *Davis* decision. That is especially true given the fact that colleges and universities are the quintessential “marketplace of ideas.”³²

It would be a mistake for this Congress to overlook OCR’s overreaching, given the tendency of liberal civil-rights officials to classify commonplace conservative (and even moderate) views as racist in effect, if not intent.³³ For example, a civil-rights historian argued in a Washington Post op-ed that “the tea party movement’s assault on so-called Big Government,” “despite the sanitized language of fiscal responsibility,” “constitutes an attack on African American jobs,” because “public-sector employment . . . has traditionally been an important venue for creating a black middle class.”³⁴ Even the use of the term “black” rather than “African-American” is viewed as a racial provocation by some school racial equity officials.³⁵

This pressure to censor is aggravated by periodic advice to colleges from Education and Justice Department bureaucrats that they should classify *any* unwelcome sexual or racial speech as harassment, even if it is isolated and *not* even offensive to any reasonable person, in order to nip harassment in the bud.

³² *Healy v. James*, 408 U.S. 169, 180 (1972) (Supreme Court describes universities as such).

³³ *Compare Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074 (3d Cir. 1996) (workplace racial harassment claim can be based on non-racial code words).

³⁴ Carol Anderson, *Ferguson Isn’t About Black Rage Against Cops. It’s White Rage Against Progress*, Washington Post, Aug. 29, 2014, www.washingtonpost.com/opinions/ferguson-wasnt-black-rage-against-cops-it-was-white-rage-against-progress/2014/08/29/3055e3f4-2d75-11e4-bb9b-997ae96fad33_story.html?hpid=z5. “Blacks generally have a higher representation in government than private industry.” *NAACP v. East Haven*, 892 F.Supp. 46, 50 (D.Conn.1995); see also *Cleveland Branch, N.A.A.C.P. v. Parma*, 263 F.3d 513, 518 (6th Cir. 2001).

³⁵ See Susan Du, *Distrust and Disorder: A Racial Equity Policy Summons Chaos in the St. Paul Schools*, City Pages, May 27, 2015 (discussing a school district policy designed to reduce suspensions of black students under which rather than being suspended, “disruptive or destructive students would essentially receive a 20-minute timeout . . . counseling by a ‘behavioral coach,’ then return to class when they calmed down”; a school “cultural specialist” said if minority “‘students cuss them out, teachers should evaluate their own failures to earn a child’s respect and trust’ . . . ‘When you use the word “black” versus “African American” and the student flips out, understand where that might be coming from.’”) (<http://blogs.citypages.com/blotter/2015/05/a-racial-equity-policy-summons-chaos-in-the-st-paul-schools.php>).

For example, the University of Montana applied federal court definitions of sexual harassment, which do not reach trivially-offensive conduct or comments that do not offend reasonable people, in its internal sexual harassment policy. The Justice and Education Departments took issue with this, saying that conduct, or speech on sexual topics, should be classified as harassment even if "it is" not "objectively offensive." In the course of a letter to the University of Montana finding it in violation of Title IX (largely for other reasons, such as campus sexual assaults), they wrote that the University of Montana's sexual harassment policy

improperly suggests that the conduct does not constitute sexual harassment unless it is objectively offensive. This policy provides examples of unwelcome conduct of a sexual nature but then states that "[w]hether conduct is sufficiently offensive to constitute sexual harassment is determined from the perspective of an objectively reasonable person of the same gender in the same situation." **Whether conduct is objectively offensive** is a factor used to determine if a hostile environment has been created, but it **is not the standard to determine whether conduct was "unwelcome conduct of a sexual nature" and therefore constitutes "sexual harassment."** . . . sexual harassment should be more broadly defined as **"any unwelcome conduct of a sexual nature."**³⁶

As education writers observed, under the Obama administration's logic, a professor could be classified as a sexual harasser merely for teaching sex education. If a professor discusses a sexual issue, like HIV transmission through anal sex, "making one of his 500 students uncomfortable," "he's a sexual harasser" under the Administration's proposed definition, noted Joanne Jacobs.³⁷ It would also cover any other "expression related to sexual topics that offends any person," such as "'The Vagina Monologues,' a presentation on safe sex practices, a debate about sexual morality, a discussion of gay marriage, or a classroom lecture on

³⁶ See May 9, 2013 Letter of Findings, at pg. 9, <http://www.justice.gov/opa/documents/um-ltr-findings.pdf>. (boldface added).

³⁷ Joanne Jacobs, *U.S. Rule Makes Every Student a Sex Harasser*, May 11, 2013 (<http://www.joannejacobs.com/2013/05/u-s-rule-makes-every-student-a-sex-harasser/>).

Vladimir Nabokov's *Lolita*.”³⁸ (Some overly sensitive students view discussion of such topics as sexual harassment and file charges as a result.³⁹).

In response to widespread outcry from civil libertarians, OCR's head backpeddled and indicated that its letter to the University of Montana merely “represents the resolution of that particular case” with the University of Montana, “and not OCR or DOJ policy” required for all colleges. However, other Justice and Education Department officials have continued to suggest that this overly broad definition of harassment was a blueprint for colleges nationwide.⁴⁰

As a result, some colleges have radically expanded their “harassment” policies to cover constitutionally protected speech that would not previously have been treated as harassment.⁴¹ That apparently includes Northwestern University, where Professor Kipnis was charged with sexual harassment over the essay she wrote in the *Chronicle of Higher Education*; its policy expansively provided that “sexual harassment is any unwelcome conduct of a sexual nature.”⁴²

³⁸ Joanne Jacobs, *U.S. Rule Makes Every Student a Sex Harasser*, May 11, 2013 (quoting the Foundation for Individual Rights in Education).

³⁹ For example, sexual harassment charges were brought after sex educator Toni Blake told a joke while demonstrating a condom. See <http://www.zoominfo.com/p/Toni-Blake/1720503>. Unlike the Education Department, courts have explicitly rejected the idea that such humor inherently constitutes “sexual harassment.” See *Brown v. Hot, Sexy & Safer Productions*, 68 F.3d 525 (1st Cir. 1995) (students sued over comments in sex education class; court ruled that since sexual speech must be “severe” or “pervasive” and create “hostile environment” to constitute sexual harassment, the lawsuit should be dismissed; it ruled that sexual humor in the sex education lecture about “erection wear” and anal sex was not enough for liability, since a reasonable person would not have viewed the comments as intended to harass).

⁴⁰ See Written Testimony of Greg Lukianoff for this hearing, at pp. 10-11 (http://judiciary.house.gov/_cache/files/cb2a2b82-2c21-4fa3-8a94-896c108c6b47/06022015-lukianoff-testimony.pdf).

⁴¹ See Written Testimony of Greg Lukianoff for this hearing, at pg. 11 (“Over the past several years, many universities—including Pennsylvania State University, the University of Connecticut, Clemson University, Colorado College, and Georgia Southern University — have revised their sexual misconduct policies to include the blueprint’s broad definition of sexual harassment.”).

⁴² Northwestern University, *Policy on Sexual Harassment, Title IX Statement, and Additional Guidance*, <http://www.northwestern.edu/sexual-harassment/university-policies/sexual-harassment-policy/index.html>; see also Jessica Gavora, *How Title IX Became a Political Weapon*, Wall Street

II. Why OCR's Pressure to Restrict Speech Succeeds Despite Its Illegality

Although the Office for Civil Rights has encroached on the First Amendment by defining protected speech as harassment, many colleges have acquiesced in its overly broad definition, because the real and perceived consequences of incurring the wrath of a civil-rights agency like OCR are much more severe for them than the consequences of violating the First Amendment.⁴³

OCR can cut off all of a college's federal funds for a violation of its Title IX regulations. For a college, that can mean losing hundreds of millions of dollars, including all federal financial aid to its students. For example, "Harvard received \$656 million" in 2012 just "in federal research funding,"⁴⁴ and its "Medical School alone took in over \$250 million in federal funds during the 2012 fiscal year, a sum that accounted for 34 percent of its operating budget."⁴⁵ Using this massive leverage, OCR is now forcing some colleges to pay large amounts of compensation to students who allege harassment or sexual assault, even though it lacks statutory

Journal, June 8, 2015 at A13 (under Northwestern's Title IX regulations, "an unwelcome . . . comment was grounds for a Title IX investigation").

⁴³ See, e.g., *Lela v. Board of Trustees of Community College District No. 516*, 2015 WL 351243, *2, *4 (N.D. Ill. Jan. 27, 2015) (college violated students' First Amendment rights when it denied plaintiffs' request to hand out flyers on the school's campus, which it did based on the rationale that their content was "in direct conflict with and disruptive of the College's mission to uphold and adhere to the legal requirements for maintaining a non-discriminatory educational environment, free of unlawful hostility")("defendant argues that WCC's antidiscrimination policy permissibly bars plaintiffs from leafleting on campus" because "plaintiffs' message is 'demeaning to a protected class at the College'"); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978) (school district violated First Amendment by kicking out racist group that sought to meet after hours in empty classroom based on its viewpoint, in order to appease the Office for Civil Rights' predecessor entity, HEW's Office for Civil Rights).

⁴⁴ Tracy Jan, *Research Giants Win on Federal Funding*, Boston Globe, March 18, 2013, <https://www.bostonglobe.com/news/nation/2013/03/17/harvard-mit-and-other-research-schools-thwart-obama-administration-effort-cap-overhead-payments/Nk5PT0Mc8MQZihFVNs5gNK/story.html>.

⁴⁵ Nicholas Fandos & Samuel Weinstock, *Harvard Braces for Decline in Federal Funding*, Harvard Crimson, Dec. 30, 2012, <http://www.thecrimson.com/article/2012/12/30/sequestration-research-budget-cuts/>.

authority to award such compensatory damages (which is the province of the judiciary).⁴⁶

By contrast, private colleges are not subject to the First Amendment (although a student could theoretically sue the government for forcing a private college to restrict speech⁴⁷). And even if a state university violates the First Amendment, it often pays nothing for the violation. The Eleventh Amendment protects a state university from having to pay any monetary damages for such a violation.⁴⁸ (The Supreme Court has said that Congress can waive Eleventh Amendment immunities to protect civil rights, but Congress has only done so for discrimination and harassment cases, not First Amendment cases.⁴⁹)

State university officials -- as opposed to the university itself -- can be individually sued for First Amendment violations, but they are protected by the defense of qualified immunity from having to pay any monetary damages at all, unless the court finds that they not only violated the First Amendment, but did so

⁴⁶ See, e.g., Marcella Bombardieri, *US, Tufts University at odds on handling sexual assaults*, Boston Globe, April 29, 2014 (“Tufts signed an agreement with the government earlier this month . . . providing monetary compensation to the student.”), www.bostonglobe.com/metro/2014/04/28/departments-education-finds-tufts-university-violating-title-sexual-assault-cases/VO7QmYgGvyCpz8c4q0mWNM/story.html; Hans Bader, *Dept. of Ed's Sexual Harassment Guidance Radically Expands Harassment Liability*, CNS News, March 2, 2015 (<http://cnsnews.com/commentary/hans-bader/dept-eds-sexual-harassment-guidance-radically-expands-harassment-liability>) (discussing how OCR's January 2014 guidance suggests even blameless colleges may be forced to pay compensation for student-on-student harassment even if they punished the harasser); Catherine Sevchenko, *Department of Education's Latest 'Dear Colleague' Letter on Title IX Retaliation is Puzzling*, The Torch, April 29, 2013 (OCR's “granting an individual monetary relief seems like an insupportable usurpation by OCR of a function usually provided by the courts”) (www.thefire.org/departments-of-educations-latest-dear-colleague-letter-on-title-ix-retaliation-is-puzzling/).

⁴⁷ See *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003) (city official could be sued for pressuring a billboard company to stop displaying a church's anti-homosexuality billboard); *Rattner v. Netburn*, 930 F.2d 204 (2d Cir.1991) (pressure on chamber of commerce to not publish ad in its publication violated First Amendment).

⁴⁸ *Dube v. State Univ. of New York*, 900 F.2d 587, 594-95 (2d Cir.1990).

⁴⁹ See *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997) (Congress waived schools' sovereign immunity against damages in Title IX sexual harassment lawsuits).

in a very clear, unambiguous way that violated a controlling court decision.⁵⁰ Even when damages are awarded for First Amendment violations, the amount is typically rather small.⁵¹

Although universities cannot be sued for damages for First Amendment violations, they can be sued for an injunction barring further violations of First Amendment rights. But a university can often avoid such an injunction (as well as the need to pay the student's attorneys' fees) by dropping the challenged speech restriction at the last minute, right before a court ruling.⁵² Free speech may be priceless, but for a school's bottom line, First Amendment violations are cheap.

By contrast, a college or school district can be ordered to pay a million dollars or more in damages in a racial or sexual harassment lawsuit.⁵³ To avoid the possibility of such damages, and head off a costly Title IX investigation by the Office for Civil Rights that can consume hundreds of hours of staff time and result in huge amounts of negative publicity, colleges will pay out hundreds of thousands of dollars to settle sexual harassment complaints. While the courts have generally not defined "harassment" as expansively as OCR, the law can be murky or confusing to colleges, and they don't want to incur even the risk of an adverse ruling in a high profile case. As a result, they have paid large amounts to settle

⁵⁰ See, e.g., *Reichle v. Howards*, 132 S.Ct. 2088, 2094 (2012) (the right "violated must be established, not as a general proposition, but in a particularized sense"); *Harrell v. Southern Oregon University*, 474 Fed. Appx. 665 (9th Cir. July 20, 2012) (circuit court of appeals granted qualified immunity because "the appropriate speech standard for college and graduate students' speech remains an open question in this circuit"; First Amendment violation must be "sufficiently clear that every reasonable official would have understood" that it was illegal).

⁵¹ *Nekolny v. Painter*, 653 F.2d 1164, 1172-73 (7th Cir.1981) (the court reversed awards of damages for emotional harm for firings in violation of the First Amendment, based on statements that employees were "depressed," "a little despondent," or even "completely humiliated"), *Spence v. Board of Educ. of Christina Sch. Dist.*, 806 F.2d 1198, 1201 (3d Cir.1986) (overturning award of \$22,060 as excessive in First Amendment case, where "The evidence of emotional distress consisted chiefly of plaintiff's own testimony that she was depressed and humiliated by the transfer and that she had lost her motive to be creative".)]

⁵² See *Buckhannon Board and Care Home v. West Virginia*, 532 U.S. 598 (2001).

⁵³ *Zeno v. Pine Plains Central School District*, 702 F.3d 655 (2nd Cir. 2012) (upholding million dollar damage award in Title VI racial harassment case); cf. *Passantino v. Johnson & Johnson*, 212 F.3d 493 (9th Cir. 2000) (court upheld \$1 million in emotional distress damages for retaliatory refusals to promote woman who alleged sex discrimination).

Title IX sexual harassment lawsuits, sometimes exceeding a million dollars.⁵⁴ Individual school officials can also be sued for engaging in, or condoning, sexual harassment under 42 U.S.C. 1983.⁵⁵ Even back before OCR or the courts awarded damages for Title IX or Title VI violations, schools were inclined to violate the First Amendment rather than OCR's interpretation of these statutes, when a conflict arose.⁵⁶

For example, the University of Colorado paid \$825,000 to settle a student's Title IX retaliation lawsuit after a professor "challenged her allegations" of sexual harassment "in a report to the university that, among other things, accused her of lying." The complainant viewed this speech as retaliatory harassment in violation of Title IX regulations. The university, which was under investigation by the Education Department's Office for Civil rights, paid out this settlement, and moved to fire the professor, even though a faculty grievance panel was skeptical about whether the professor's "derogatory" criticisms rose to the level of illegal retaliation,⁵⁷ and even though some court rulings suggest such speech is protected by the First Amendment.⁵⁸

⁵⁴ Howard Pankratz, *\$2.8 million deal in CU rape case*, Denver Post, Dec. 5, 2007 (\$2.5 million to a plaintiff), www.denverpost.com/ci_7640880; Associated Press, *UConn to pay \$1.3M to settle federal lawsuit over handling of sex assault claims*, New York Daily News, July 18, 2014 (\$900,000 to a plaintiff), <http://www.nydailynews.com/sports/college/uconn-pay-1-3m-settle-lawsuit-handling-sex-assault-claims-article-1.1871933>; Lester Munson, *Landmark Settlement in ASU Rape Case*, ESPN, Feb. 3, 2009 (\$850,000 to a plaintiff), <http://sports.espn.go.com/espn/otl/news/story?id=3871666>.

⁵⁵ See, e.g., *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009).

⁵⁶ See, e.g., *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978) (court found that school district violated First Amendment by kicking out racist group that sought to meet after hours in empty classroom, to appease the Office for Civil Rights' predecessor entity, HEW's Office for Civil Rights).

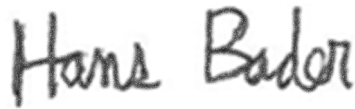
⁵⁷ Charles Huckabee, *U. of Colorado Settles With Philosophy Professor It Was Seeking to Fire*, Chronicle of Higher Education, May 13, 2015, <http://chronicle.com/blogs/ticker/u-of-colorado-settles-with-philosophy-professor-it-sought-to-fire/98817>.

⁵⁸ See the settlement in *Osborne v. Mesabi Community College*, expunging a professor's discipline for "retaliation" for criticizing a harassment complaint against him, after Judge Kyle indicated that his First Amendment lawsuit could proceed, a case discussed in Alan Charles Kors & Harvey Silverglate, *The Shadow University* (1998) at pp. 125-127; *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000) (noting that banning criticism or ostracism in response to a discrimination charge could violate the First Amendment freedoms of speech and association);

CONCLUSION

The Education Department is pressuring colleges to adopt unconstitutional speech codes. To put a stop to that, Congress should, as a first step, consider passing legislation to replace the Education Department's overly broad harassment definition with a narrower definition. For example, it could codify the more limited definition found in the Supreme Court's *Davis* decision, defining sexual harassment as unwelcome conduct aimed at victims based on their sex that is "severe, pervasive, and objectively offensive" enough to interfere with access to an education.⁵⁹

Respectfully submitted,



Hans Bader
Senior Attorney
Competitive Enterprise Institute
1899 L Street, NW, 12th Floor
Washington, D.C. 20036
(202) 331-2278
hans.bader@cei.org

Bain v. City of Springfield, 678 N.E.2d 155 (Mass. 1997) (retaliation ban, as applied to criticism of harassment charge to newspaper, is limited by "constitutional guarantees of freedom of speech. The interest in remedying discrimination is weighty but not so weighty as to justify what amounts to a restriction on core political speech."); *BE&K Constr. Co v. NLRB*, 536 U.S. 516 (2002) (First Amendment protected employer's non-baseless lawsuit against union even if it had a retaliatory motive, and federal labor laws could not ban such petitioning activity by the employer). *But see Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2000) (court ruled that professor's criticism of harassment complaint was not protected, given limited free speech rights of public employees).

⁵⁹ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).