



SPEECH FIRST

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Washington, DC 20005

June 11, 2021

VIA ELECTRONIC SUBMISSION

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Reviewing Enforcement of Title IX – Public Hearing

Dear Ms. Goldberg:

Speech First is a nationwide membership organization of students, alumni, and other concerned citizens. Speech First is dedicated to preserving civil rights secured by law, including the freedom of speech guaranteed by the First Amendment. Speech First seeks to protect the rights of students and others at colleges and universities through litigation and other lawful means.

Speech First writes in strong opposition to any efforts by the Department to substantially change or withdraw the May 19, 2020 rule entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” 85 Fed. Reg. 30026, specifically as it relates to the definition of sexual harassment. The Department scheduled a public meeting to reevaluate the 2020 Rule and to “gather information for the purpose of improving enforcement of Title IX.” Announcement of Public Hearing; Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27429 (May 20, 2021). Specifically, the Department sought comments on steps it can take to “ensure that schools are providing students with educational environments free from discrimination in the form of sexual harassment,” to “ensure that schools have grievance procedures,” and to “address discrimination based on sexual orientation and gender identity.” *Id.* Noticeably absent from that list is any consideration of the First Amendment.

As it stands, the 2020 Rule struck the proper balance between allowing universities to properly regulate sexual harassment under Title IX and complying with the First Amendment. It defines “sexual harassment” to include “[u]nwelcome conduct [as] determined by a reasonable person” that is “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.” 85 Fed. Reg. at 30574. That definition precisely tracks

the Supreme Court’s definition of actionable sexual harassment in *Davis v. Monroe County Board of Education*, 562 U.S. 629, 650 (1999), a case where a private plaintiff sued a funding recipient under Title IX for its deliberate indifference to peer-on-peer sexual harassment. *Davis* held that “sexual harassment is a form of discrimination” under Title IX when it 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.” *Id.* at 649-50.

The 2020 Rule adopts the *Davis* standard for good reasons. The *Davis* standard “provides consistency ... for judicial and administrative enforcement and gives [schools] flexibility and discretion.” 85 Fed. Reg. at 20149. More importantly, the First Amendment *requires* it. There is no “harassment” or “anti-discrimination” exception to the First Amendment. *DeJohn v. Temple Univ.*, 537 F.3d 301, 316 (3d Cir. 2008). Unless harassment policies are drafted to reach only harassing *conduct*, they “impose[] content-based, viewpoint-discriminatory restrictions on speech.” *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 596-97 (5th Cir. 1995). By requiring that the harassment be severe, pervasive, *and* objective offensive, the *Davis* standard draws the line between actionable conduct and protected speech.

Any broader definition of sexual harassment, including the ones that preceded the 2020 Rule, would be inconsistent with the First Amendment. *See, e.g., Dear Colleague Ltr.* (Apr. 4, 2011), bit.ly/2YPR0DS (defining sexual harassment as “unwelcome conduct of a sexual nature”); *Sexual Harassment Guidance*, 62 Fed. Reg. 12034 (defining sexual harassment as harassment that is “sufficiently severe, persistent, or pervasive that it adversely affects a student’s education or creates a hostile or abusive educational environment,” including a “one-time incident”). These broader definitions would reach what *Davis* explicitly meant to exclude: “a single instance of one-on-one peer harassment.” 526 U.S. at 652-53. Congress would not have wanted universities to prohibit “severe *or* pervasive” harassment, *Davis* explained, because such policies would ignore “the practical realities of responding to student behavior.” 526 U.S. at 652-53. The most obvious practical reality, of course, is the First Amendment’s “legal constraints” on universities’ “disciplinary authority.” *Id.* at 649 (citing *id.* at 667 (Kennedy, J., dissenting)).

In short, the 2020 Rule is a measured solution that allows universities to police sexual harassment without trampling the free-speech rights of students. Indeed, the 2020 Rule “us[es] the *Davis* definition verbatim” because other, watered-down standards have “led to infringement of rights of free speech and academic freedom of students and faculty.” 85 Fed. Reg. 30036. Because the federal government is prohibited from violating the First Amendment, “it is also prohibited from enacting [policies] mandating that third parties” violate the First Amendment.

The Department should leave the 2020 Rule alone.

Respectfully submitted,

/s/ Cherise Trump

Cherise Trump

Executive Director

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