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Campus rights clarification

By Terry Eastland

In a July letter to colleges and universities across the country, Gerald Reynolds, head of the Education Department's Office for Civil Rights, addressed "a subject," as he put it, "of central importance to our government, our heritage of freedom and our way of life: the First Amendment." Mr. Reynolds' office doesn't have the authority to bring lawsuits to enforce the First Amendment. What, you might wonder, possessed him to write a letter about it?

The answer begins with the fact that hundreds of colleges and universities have policies restricting speech that the First Amendment protects. Called "speech codes" when initiated in the 1980s — ironically by a generation of professors who in their youth supported the free speech movement of the 1960s — the policies have taken on new guises. Often, they are expressed in vague rules against harassment and target speech deemed to offend a person or group.

Shippensburg University of Pennsylvania, for example, loosely defines harassment as "unsolicited, unwanted conduct which annoys, threatens or alarms a person or group." The school says it will protect only speech that doesn't "provoke, harass, demean, intimidate or harm another."

Even when not enforced, as often appears to be the case, the restrictive policies promote an educational environment that discourages intellectual exchange. The ever-vigilant Foundation for Individual Rights in Education

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reports the attempt by students at Ithaca College last spring to get campus police to stop a speech sponsored by College Republicans (the speaker was Bay Buchanan, her topic "the failures of feminism") and have it declared a "bias-related incident" punishable under school rules. The attempt to censor failed, and the event was held. But the school's "Bias-Related Incidents Committee" now is exploring policies that could prohibit similar speeches in the future.

Now, what particularly interests Mr. Reynolds is that some schools defend their speech policies by saying they are required by the government — specifically, the Office for Civil Rights. Because we receive federal funds, they say, we must abide by the antidiscrimination regulations that the office administers. Yet to comply with those rules, we must regulate the content of such speech as might be deemed "offensive." That is, to protect civil rights we must curtail civil liberties. In sum, the government makes us do what we do.

Were the pertinent laws and regulations not on the books, the schools making that argument no doubt would keep the censorship policies they already have. After all, they believe in them.

In his letter, Mr. Reynolds concedes none of their disingenuous argument. "I want to assure you in the clearest possible terms," he writes, "that [the Office for Civil Rights'] regulations are not intended to restrict the exercise of any expressive activities protected" under the Constitution. Indeed, the laws on which those regulations are based "are intended to protect students from invidious discrimination, not to regulate the content of speech."

Mr. Reynolds specifically addresses harassment, which under the law can include "verbal or physical conduct." Some schools, he reports, have interpreted the office's prohibition of harassment as encompassing "all offensive speech regarding sex, disability [or] race." Yet mere words, symbols or thoughts "that some person finds offensive" aren't enough to establish harassment. There must be more. Indeed, the conduct must be so "severe, persistent or pervasive" as to limit a student's educational opportunity.

The First Amendment binds the states and, therefore, state institutions of higher education. The Reynolds letter underscores the vulnerability of speech-restricting state schools to lawsuits brought by students (or faculty members) claiming First Amendment violations.

At the same time, the letter sends an important message to private schools receiving federal funds (as most do). The First Amendment doesn't apply to those schools. Yet, as Mr. Reynolds explains, that doesn't mean they have the Office for Civil Rights' permission to limit speech in ways more restrictive than the First Amendment allows. A private school embarking on such a project, he writes, "does so on its own accord."

The Reynolds letter ought to stimulate a rethinking in higher education about its essential purposes and how they should be pursued. As Mr. Reynolds said in an interview, the key question here is "whether the kind of intellectual engagement that every self-respecting university says it wants to promote is compatible with restrictions on speech" that the Constitution protects.

Terry Eastland is publisher of the Weekly Standard.

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