FIRE
Foundation for Individual Rights in Education

January 20, 2017

President Donald Trump
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Sent via U.S. Mail

Dear President Trump,

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending student and faculty rights at our nation's colleges and universities. I write to you on this historic day to offer my congratulations on your inauguration, and—as we did for President Obama—to offer our input on what your administration can do to help protect free speech, academic freedom, and due process on college campuses. We have prepared the following list of pressing civil liberties concerns in higher education as well as our proposed solutions. Because we are certain you are receiving many similar requests for assistance from citizens and organizations across the country, we have opted for brevity in our descriptions. Of course, we would be pleased to provide your administration with more information regarding any or all of our concerns.

Problem: Unconstitutional and Illiberal Speech Codes Remain Widespread

When FIRE wrote President Barack Obama on the occasion of his inauguration on January 20, 2009, our research indicated that 77 percent of public colleges and universities maintained clearly unconstitutional speech codes that impermissibly restricted the ability of students and faculty members to exercise their First Amendment rights. Today, our research indicates that number has fallen to 33.9 percent of public colleges and universities. We are proud of this substantial and hard-earned improvement, secured by hard work from our staff, cooperating administrators, lawsuits from FIRE and other organizations, brave student and faculty plaintiffs willing to challenge their own colleges in court, and—most notably in the past year—Representative Bob Goodlatte, the Chairman of the U.S. House Judiciary Committee, who sent letters to university presidents demanding answers about unconstitutional policies.

However, the fact a third of our nation's public universities maintain policies that plainly violate the First Amendment is a national scandal. The situation is worse still when schools that maintain policies susceptible to administrative abuse are included in this tally. In that

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count, 93.3 percent of public schools maintain policies that impermissibly grant administrators significant discretion to punish speech protected by the First Amendment. Again, this is unacceptable. Following the First Amendment is not optional for our nation's public institutions of higher education.

Speech codes take many forms. For example, roughly 1 in 10 colleges have "free speech zone" policies which limit student demonstrations and other expressive activities to small and/or out-of-the-way areas on campus. Hundreds of colleges have implemented "bias reporting systems" to solicit reports of "bias" on campus, which most universities explicitly define to encompass speech protected by the First Amendment. A depressing number of colleges and universities discourage the invitation of controversial speakers by levying additional security costs on the sponsoring student organizations. And FIRE has seen a dramatic increase in the number of universities promulgating vague definitions of "bullying"—oftentimes by simply adding the term "bullying," without definition, to their existing speech codes, giving students no notice of what is actually prohibited.

Solution: Remind University Administrators They Risk Personal Liability for Violating Student and Faculty First Amendment Rights

Speech codes maintained by public universities are highly vulnerable to constitutional challenge. Indeed, speech codes have been consistently struck down by federal courts on First Amendment grounds in a virtually unbroken string of decisions dating back nearly three decades. Many more policies have been revised in favor of free speech as the result of legal settlements. To date, FIRE is aware of at least 54 successful challenges to campus speech codes since 1989, resulting in either a courtroom victory or a settlement in favor of the First Amendment. FIRE's Stand Up For Speech Litigation Project, launched in 2014, has already won nine victories, resulting in more than $400,000 in damages and attorney's fees and prompting policy changes affecting over 600,000 students.

Not only are speech codes likely to fail if challenged in court, they may prove very costly for administrators who do not recognize their unconstitutionality. Public university administrators may be held *personally liable* for enforcing policies that violate clearly established constitutional rights. Given the unmistakable clarity of the legal precedent governing students' First Amendment rights on public campuses, administrators are hard-pressed to argue that they are not violating "clearly established" law of which they should be aware, as needed in order to enjoy "qualified immunity" from monetary damages. Thus, public university administrators who continue to flout the law in this area should be made to pay out of their own pockets for violating students' clearly established free speech rights. The Department of Education's Office for Civil Rights (OCR) should issue a stern reminder to college and university administrators nationwide that maintaining policies that violate First Amendment rights is unacceptable and that enforcing them risks personal liability.

Problem: The Federal "Blueprint" Definition of Sexual Harassment Threatens Campus Speech

In recent years, the Departments of Education and Justice have interpreted Title IX, a federal anti-discrimination law, to require colleges to adopt a shockingly broad definition of sexual harassment. Labeled as a "blueprint" for colleges across the country by the Departments, the policy defines sexual harassment as "any unwelcome conduct of a sexual nature," including "verbal conduct" (i.e., speech). Especially given that OCR definitions are often applied far beyond the realm of sex-related speech, this overbroad and vague standard threatens *any* speech that someone can argue he or she finds "unwelcome"—including speech protected by the First Amendment (at public universities) or by institutional promises of free expression (at private universities). This overly broad definition trivializes real harassment and forces students and faculty to self-censor rather than risk punishment. Indeed, students and faculty nationwide have already been threatened with punishment or disciplined under the "blueprint" definition.

Solution: Adopt the Supreme Court's Definition of Discriminatory Harassment

The recent push by the Departments to expand the definition of harassment beyond its logical limits is sharply at odds with the First Amendment, legal precedent, academic freedom, and common sense. The agencies must clarify to colleges and universities that the "blueprint" definition does not govern peer-on-peer sexual harassment in the educational context. Instead, the agencies must require the adoption of the definition of sexual harassment announced by the U.S. Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999): targeted, discriminatory 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."

The *Davis* definition should be used as the standard for prohibited expression, as the standard for what schools may investigate, and as the standard for what schools may punish. Until federal agencies and institutions of higher education require the *Davis* standard, speech will be at risk. If Congress does not take action, the agencies should do so through the formal regulatory process.

Problem: 2011 "Dear Colleague" Letter Threatens Due Process Protections

It should be beyond dispute that institutions adjudicating guilt or innocence in sexual assault cases must do so in a fair and impartial manner that is reasonably calculated to reach the truth. Indeed, in an April 4, 2011, "Dear Colleague" letter (DCL) issued by OCR, the federal agency responsible for enforcing Title IX, the agency acknowledged that "a school's investigation and hearing processes cannot be equitable unless they are impartial." Disappointingly, however, OCR's own rhetoric and actions have been overwhelmingly one-sided, emphasizing the rights of the complainant without paying sufficient attention to the rights of the accused. For example, in the April 4, 2011, DCL—which OCR issued without going through the notice and comment process required for substantive rulemaking under the

Administrative Procedure Act (a matter over which FIRE is sponsoring a lawsuit against the Office for Civil Rights)—the agency mandated that institutions use our judiciary's lowest burden of proof, the "preponderance of the evidence" standard, in both sexual harassment and sexual assault cases.

Under this standard, a fact-finder must hold the accused responsible even if they think that it is only 50.01% likely that the accused is guilty. OCR demanded that institutions use the preponderance of the evidence standard in Title IX proceedings only, arguing that it was the only lawful standard of evidence to use in those proceedings. But without the basic procedural protections that civil courts use (rules of evidence, discovery, subpoena power, trained legal advocates, the right to cross-examine witnesses, and so forth), campus tribunals are making life-altering determinations using a low evidentiary threshold that amounts to little more than a hunch that one side is right. This mandate is not just unfair to the accused—it reduces the accuracy and reliability of the findings and compromises the integrity of the system as a whole.

Sexual assault hearings are complex adjudications of allegations of behavior that (if proved) constitutes a serious felony, yet campus judiciaries lack the necessary tools, experience, or expertise to handle these matters properly. Without access to the resources, forensic evidence, technology, and experience that law enforcement and criminal courts possess, institutions are unfairly being asked to determine who is guilty and who is not in these very challenging cases. It should surprise no one that under these limitations, injustices have proliferated. Guilty students have gone unpunished, and innocent students have been expelled. Even the best-intentioned campus administrators, of whom there are many, simply lack the necessary expertise and tools to consistently perform this task properly.

Solutions: (1) Assign Law Enforcement and Colleges Appropriate Roles; (2) Follow the Administrative Procedure Act; (3) Provide Students with Right to Counsel

Assign Law Enforcement and Colleges Appropriate Roles

When accusations of campus sexual assault go unaddressed, it can create a hostile environment on campus that deters victims from continuing their education. At the same time, as stated above, colleges lack the tools, resources, and expertise possessed by law enforcement and courts that are crucial in conducting thorough investigations and reaching reliable, fair conclusions. Given the high stakes for all involved, it is dangerous to remove the adjudication of sexual assault allegations from professionals with the power to properly investigate and to impose appropriate punishment on those properly found guilty. For these reasons, FIRE urges your administration to prioritize dedicating resources to addressing the problem of campus sexual assault in a framework that takes the strengths and limitations of both colleges and law enforcement into proper account. While institutions have struggled and too often failed to provide fair, impartial, and thorough investigations and adjudications, they

are well-equipped to secure counseling for alleged victims, provide academic and housing accommodations, secure necessary medical attention, and provide general guidance for students who navigate the criminal justice system. Our federal law and policy should reflect that reality, require colleges to fulfill those functions, and assist them in doing so.

Administrative Procedure Act

The Administrative Procedure Act requires federal agencies like OCR to notify the public of proposed rules and to solicit feedback before imposing new obligations on regulated entities, like colleges and universities. OCR did not fulfill this obligation before issuing the 2011 Dear Colleague letter. Because OCR is enforcing the letter's mandates as though they were legally binding, FIRE is sponsoring ongoing litigation in federal court challenging the letter's legality. However, to obviate the need for future legal challenges, restore public confidence in agency decisionmaking, and ensure that the concerns of all affected stakeholders are taken into account, the Department of Education must withdraw its unlawful guidance and strictly adhere to the Administrative Procedure Act's requirements moving forward.

The Right to Counsel

If campuses are to continue investigating and adjudicating allegations of sexual assault, one of the most important things that the federal government can do to improve the reliability and fairness of the investigations and campus disciplinary hearings is to require schools to allow student complainants and accused students to have legal representation actively participate throughout the process.

Under the recent Violence Against Women Act Reauthorization of 2013, institutions must allow students to have counsel *present* during the proceedings, but the statute did not require schools to allow counsel to *participate*. In the typical campus proceeding, the university represents the complainant's interests by bringing and prosecuting the charges against the accused party. Universities are free to employ lawyers to conduct this function, while most institutions restrict the ability of the accused student's counsel to participate in the process. Providing student complainants with a matching right to have their own counsel actively participate in the process will serve as an important check to ensure that a college proceeds in a just manner rather than giving into the temptation to act in a manner that protects its own interest in avoiding liability.

So far, right to counsel legislation has passed with near-unanimous support in North Carolina and North Dakota. Students in Tennessee and Oregon already enjoy the right to counsel pursuant to their state Administrative Procedure Acts, which apply beyond the educational context to any administrative hearings against state agencies. Students in every state should enjoy this critical right.

Adding due process protections like the right to counsel into the legal framework will help improve the reliability of campus findings and lend credibility to the proceedings that they currently lack. FIRE is eager to work with your administration and with Congress to improve our nation's response to sexual assault on campus. We are hopeful that with your help we can implement changes that will advance the rights of complainants and accused alike.

Conclusion

The inauguration of a new president presents an opportunity to reinforce our national commitment to protecting core civil liberties on campuses nationwide. I am hopeful that you share our belief in the importance of free speech and due process and will take action to protect these commitments in our institutions of higher education. Freedom of expression and due process are in serious need of protection on our nation's campuses. The threats of censorship are real, persistent, and various, and students and faculty are routinely denied any semblance of a fair, impartial hearing. Assistance from the executive branch could be of particular benefit to FIRE's work in defense of individual rights on campus.

I recognize that your administration faces serious challenges both at home and abroad, and I understand that protecting freedom of expression and fundamental fairness on campus may not appear to be an especially important task. But I deeply believe that allowing the next generation of American citizens and leaders to be denied free speech and due process will have disastrous consequences. If illiberal misconceptions about the value of civil liberties take root, our republic will suffer grave consequences. As University of Pennsylvania Professor Alan Charles Kors, FIRE's co-founder, wisely warned: "A nation that does not educate in liberty will not long preserve it and will not even know when it is lost."

Thank you for your attention to our concerns. I wish you the best of luck in stewarding our nation through these challenging times.

Sincerely,

Greg Lukianoff
President and Chief Executive Officer
Foundation for Individual Rights in Education

cc:

Andrew Bremberg, Director, White House Domestic Policy Council
Betsy DeVos, United States Secretary-designate of Education

Senator Lamar Alexander, Chairman, U.S. Senate Committee on Health, Education, Labor and Pensions
Senator Patty Murray, Ranking Member, U.S. Senate Committee on Health, Education, Labor and Pensions
Representative Virginia Foxx, Chairman, Committee on Education and Labor, United States House of Representatives
Representative Bobby Scott, Ranking Member, Committee on Education and Labor, United States House of Representatives