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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 liability[1]; occur on school grounds[2]; 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]

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[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-

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[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]

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[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 grounds[24]).

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[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 student[25]) 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.

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[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]

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[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).s

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.

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[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-copsit-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

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[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]

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[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

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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 speech[47]). 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

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[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/department-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/department-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

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[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]

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[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).

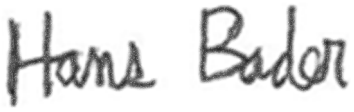
[57] Charles Huckabee, *U. of Colorado Settles With Philosophy Professor It Was Seeking to Fire*, Chronicle of Higher Education, May 13, 2015, http://chronicle.com/blogs/ticker/u-of-colorado-settles-with-philosophy-professor-it-sought-to-fire/98817.

[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,



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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).

PUBLIC COMMENT OF HENRY REICHMAN

First Vice-President and Chair, Committee on Academic Freedom and Tenure
American Association of University Professors

to the

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

in response to the June 2, 2015 Hearing on

First Amendment Protections on Public College and University Campuses

June 9, 2015

Chairman Franks, Vice-Chairman DeSantis and Members of the Subcommittee:

My name is Henry Reichman. I am Professor Emeritus of History at California State University, East Bay, located in the San Francisco Bay Area, and have taught at a variety of public colleges and universities in several states for over forty years. I write on behalf of the American Association of University Professors (AAUP), which I currently serve as First Vice-President and Chair of the Association's Committee A on Academic Freedom and Tenure.

Founded in 1915, the AAUP has for a century played a leading role in ensuring the rights of college and university faculty and has defined and defended the standards and principles of academic freedom that have helped make the American higher education system the envy of the world. In 1915, the AAUP issued its "Declaration of Principles on Academic Freedom and Academic Tenure," which first elaborated the principles of academic freedom that have subsequently been accepted by both the academic community and in important aspects the American judiciary. Our 1940 "Joint Statement of Principles on Academic Freedom and Tenure," formulated in cooperation with the Association of American Colleges (now the Association of American Colleges and Universities), along with its 1970 interpretive comments, has been endorsed by more than 240 scholarly organizations and institutions. The principles elaborated in the Joint Statement remain widely accepted throughout American higher education and continue today to provide the standard by which the academy measures academic freedom. The AAUP's principles have been adopted in whole or part by the great majority of American institutions of higher education, and may be found in hundreds of faculty handbooks, university policy manuals, and collective bargaining agreements. A copy of the Joint Statement is appended to these comments.

In 1967, the AAUP joined with the United States National Student Association (now the United States Student Association), the Association of American Colleges (now the Association of American Colleges and Universities), the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors to formulate a "Joint Statement on Rights and Freedoms of Students." This important statement remains the best and most thorough description of students' freedom to learn and to exercise the rights of citizenship, including those rights guaranteed by the First Amendment, on and off campus. A copy of this Statement is also appended to these comments.

The 1940 Joint Statement defines academic freedom as comprising three elements: 1) "full freedom in research and in the publication of the results;" 2) freedom of classroom instructors to discuss their subject matter and define curriculum and standards without political or other extraneous constraint; and 3) the freedom of faculty to speak as citizens on matters of both public and internal college or university concern. Although these principles of academic freedom developed outside the law, beginning in the 1950s the Supreme Court began to interpret the First Amendment to include some protections for academic freedom for faculty at public institutions. In 1967, in *Keyishian v. Board of Regents*, the U.S. Supreme Court stated, "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment." In a subsequent decision, *Rust v. Sullivan,* the Court described *Keyishian* as recognizing that "the university is a traditional sphere of free expression ... fundamental to the function of society."

Hence, the state of First Amendment protections and the application of the principles of free speech and academic freedom at both public and private colleges and universities are topics of great significance to our Association. We have read with interest the testimony heard by the Subcommittee on June 2, 2015 and wish both to comment on and add to that testimony.

On the Written Testimony

The written testimony provided by Greg Lukianoff of FIRE raises a number of issues that are also of concern to the AAUP. We largely agree with Mr. Lukianoff and Professor Jamin Raskin that impermissibly restrictive speech codes, overly broad harassment policies, and "free speech zone" policies imperil free expression, especially of students.[1] With respect to speech codes, our 1994 report "On Freedom of Expression and Campus Speech Codes," raised some of the same issues that rightfully trouble Mr. Lukianoff and FIRE, arguing that

> Freedom of thought and expression is essential to any institution of higher learning. Universities and colleges exist not only to transmit knowledge. Equally, they interpret, explore, and expand that knowledge by testing the old and proposing the new. This mission guides learning outside the classroom quite as much as in class, and often inspires vigorous debate on those social, economic, and political issues that arouse the strongest passions. In the process, views will be expressed that may seem to many wrong, distasteful, or offensive. Such is the nature of freedom to sift and winnow ideas.
>
> On a campus that is free and open, no idea can be banned or forbidden. No viewpoint or message may be deemed so hateful or disturbing that it may not be expressed. . . .
>
> An institution of higher learning fails to fulfill its mission if it asserts the power to proscribe ideas—and racial or ethnic slurs, sexist epithets, or homophobic insults almost always express ideas, however repugnant. Indeed, by proscribing any ideas, a university sets an example that profoundly disserves its academic mission.
>
> Some may seek to defend a distinction between the regulation of the content of speech and the regulation of the manner (or style) of speech. We find this distinction untenable in practice because offensive style or opprobrious phrases may in fact have been chosen precisely for their expressive power.

More recently, our 2007 statement on "Freedom in the Classroom" addressed concerns over the invocation of "hostile learning environments," which "presupposes much more than blatant disrespect or harassment":

> It assumes that students have a right not to have their most cherished beliefs challenged. This assumption contradicts the central purpose of higher education, which is to challenge students to think hard about their own perspectives, whatever those might be. It is neither harassment nor discriminatory treatment of a student to hold up to close criticism an idea or viewpoint the student has posited or advanced. Ideas that are germane to a subject under discussion in a classroom cannot be censored because a student with particular religious or political beliefs might be offended. Instruction cannot proceed in the atmosphere of fear that would be produced were a teacher to become subject to administrative sanction based upon the idiosyncratic reaction of one or more students.

[1] However, we can neither endorse nor oppose any of the three pieces of draft legislation submitted to the subcommittee by Mr. Lukianoff.

Then, last summer we issued an influential statement "On Trigger Warnings," which declared:

> A current threat to academic freedom in the classroom comes from a demand that teachers provide warnings in advance if assigned material contains anything that might trigger difficult emotional responses for students. This follows from earlier calls not to offend students' sensibilities by introducing material that challenges their values and beliefs. . . . The presumption that students need to be protected rather than challenged in a classroom is at once infantilizing and anti-intellectual.

In this light, we also largely share Mr. Lukianoff's and Wendy Kaminer's concerns about overly broad harassment policies, and in particular the apparent abuse of Title IX, although we disagree strongly with Ms. Kaminer's contention that such policies and abuse derive from the actions of "the left" or "progressive" groups. The source of the problem is, we believe, significantly more complex than her testimony would acknowledge. In his testimony, Professor Raskin opined that "the overwhelming number of public universities and colleges know the difference between a serious intellectual debate and a relentless campaign of personal harassment." I certainly hope that he is correct. However, some of the examples provided by Mr. Lukianoff and Ms. Kaminer suggest that this may not always be the case. Certainly the story shared by Ms. Kaminer of Professor Laura Kipnis's experience with a Title IX investigation is a troubling tale that has attracted attention in our Association as well. In response to growing concerns about this issue among faculty members, the AAUP has recently decided that a joint subcommittee of our Committee on Academic Freedom and Tenure and our Committee on Women and the Profession will investigate the implications for academic freedom and for student and faculty free expression rights of harassment rules, including enforcement of Title IX.[2]

With respect to the academic freedom of faculty, Mr. Lukianoff's written testimony focuses on the implications for faculty free speech of the U.S. Supreme Court's 2006 decision in *Garcetti v. Ceballos*. Again, we largely share his concerns. In fact, our organization submitted an *amicus curiae* brief to the Court when it heard this case, which warned of the sorts of difficulties that have since arisen. In 2009 we released a lengthy report, "Protecting an Independent Faculty Voice: Academic Freedom after *Garcetti v. Ceballos*," which expressed alarm at a number of post-*Garcetti* decisions that would restrict the First Amendment rights of faculty at public institutions and urged colleges and universities to adopt policies to protect free expression from the potential impact of the decision. Although we are heartened by subsequent rulings in the Ninth and Fourth Circuits limiting the application of *Garcetti* in academic speech cases, we share Mr. Lukianoff's unease about the unresolved nature of the issue and continue to urge faculty to develop policy statements at the institutional level that will explicitly incorporate protections for faculty speech on institutional academic matters and governance.

I would now like to turn to three topics not addressed in the written testimony: the impact of social media on academic freedom and free expression more generally; the growing abuse of financial justifications for faculty dismissals or program eliminations in ways that may restrict academic freedom; and the dramatic increase in employment of faculty on contingent or "adjunct" appointments as a major threat to academic freedom.

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[2] An additional statement, first issued by the AAUP in 1984 and subsequently revised in 1990 and again in 2014, also of relevance here is "Sexual Harassment: Suggested Policy and Procedures for Handling Complaints."

Social Media

In September 2013, at the University of Kansas, journalism professor David Guth, responding to a shooting incident at the Washington Navy Yard, tweeted a comment about gun control that many gun advocates found offensive, even threatening. He was barraged with hate messages and death threats, and several legislators called for his dismissal. Although the university publicly reaffirmed its commitment to his freedom of speech, he was suspended to "avoid disruption." This incident prompted the Kansas Board of Regents in December 2013 to adopt new rules under which faculty members and other employees may be suspended or dismissed for "improper use of social media." The new policy defined social media as "any facility for online publication and commentary," a definition that covered but was "not limited to blogs, wikis, and social networking sites such as Facebook, LinkedIn, Twitter, Flickr, and YouTube."

This definition could arguably also include any message that appears electronically, including email messages and even online periodicals and books. The policy defined "improper use of social media" in extremely broad terms, including communications made "pursuant to . . . official duties" that are "contrary to the best interest of the university," as well as communication that "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's official duties, interferes with the regular operation of the university, or otherwise adversely affects the university's ability to efficiently provide services."

The AAUP, the ACLU and faculty leaders in Kansas quickly condemned the new policy as "a gross violation of the fundamental principles of academic freedom." In the face of widespread criticism, the regents agreed to work with campus leaders to revise the policy, but when a faculty-administration task force recommended an entirely different approach, the idea was rejected and the policy remains largely intact.

In 2014, the AAUP published a revised and expanded version of its 2004 policy on "Academic Freedom and Electronic Communications." Our fundamental starting point when it comes to the regulation of all electronic communications by faculty is simple. As we stated initially in 2004 and have repeated frequently ever since:

> Academic freedom, free inquiry, and freedom of expression within the academic community may be limited to no greater extent in electronic format than they are in print, save for the most unusual situation where the very nature of the medium itself might warrant unusual restrictions—and even then only to the extent that such differences demand exceptions or variations. Such obvious differences between old and new media as the vastly greater speed of digital communication, and the far wider audiences that electronic messages may reach, would not, for example, warrant any relaxation of the rigorous precepts of academic freedom.

Unfortunately, this is not always the case. The events in Kansas were perhaps the most extreme example of a growing and distressing trend in our public (as well as private) colleges and universities. Increasingly, college and university administrators are treating faculty emails, Facebook posts, and Twitter messages as somehow exempt from the full protections of academic freedom and, arguably, the First Amendment. There are many other examples in states as varied as Colorado, Idaho, Illinois, and Wisconsin, among others. Sometimes administrators have couched their censorious actions under

cover of combating cyberbullying, undoubtedly a significant problem among some students but hardly one that justifies the surveillance and censorship of faculty expression.

Finances and Freedom

Even before the 2008 economic crisis, public colleges and universities were facing increasingly difficult financial conditions stemming, we would argue, from a now decades-old trend among states and our society more generally to disinvest in public higher education, placing a growing burden on students who must make ever-increasing tuition payments and often accumulate inordinate levels of debt. But in a disturbing number of cases, difficult financial straits have provided college and university administrators with specious justifications for assaulting the academic freedom of the faculty.

The AAUP has long recognized that *bona fide* "financial exigency" may justify dismissal of even tenured faculty members.[3] In 2013 the AAUP published an extensive and detailed report on "The Role of the Faculty in Conditions of Financial Exigency." The report defined financial exigency as "a severe financial crisis that fundamentally compromises the academic integrity of the institution as a whole and that cannot be alleviated by less drastic means." The report also argued that increasingly college and university administrators are making budgetary decisions that profoundly affect the curricula and the educational missions of their institutions; rarely are those decisions recognized as decisions about the curriculum, even though the elimination of entire programs of study (ostensibly for financial reasons) has obvious implications for the curricular range and the academic integrity of any university.

In a disquieting and perhaps rising number of cases, college and university administrators (and some legislators) have sought to justify faculty layoffs and program discontinuance not by claiming exigency but simply some sort of ill-defined distress -- sometimes on grounds that seem unproven if not outright bogus. To take but one example, later this week our annual meeting will decide whether to censure the administration of the University of Southern Maine, which dismissed some 60 faculty members and closed several programs with the justification that this was required by the university's financial condition. In fact, as our investigation revealed, there was no genuine financial crisis, at least not one justifying such drastic actions, nor were the faculty ever consulted about the situation. The layoffs, many suspected, were as much designed to punish or silence critics of the administration as they were to save money or reorient the mission. Whether or not this was true, there can be little doubt that colleges and universities that employ the justification of financial distress or "program prioritization" to dismiss long-time faculty members establish a chilling atmosphere for free expression among the faculty that remain.

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[3] Contrary to common misperceptions, the tenure system in colleges and universities does not guarantee lifetime employment. It does guarantee that faculty members will be judged by professional and not political or arbitrary standards by academically qualified peers. I essentially agree with Professor Raskin's statement in his testimony that "the rank and tenure process is a professional domain different from a public speech forum. Academic freedom means you cannot get bounced out of academia because your ideas are unorthodox or contrary to prevailing opinion but you can get bounced out because your research is sloppy, your data is flawed, or your ideas are illogical or unjustified by evidence." I would add, however, that such judgments must be made only by qualified academic professionals in due process procedures that provide opportunities for all sides of a controversy to be heard and considered.

Perhaps the most dramatic example of how financial conditions may negatively impact the academic freedom of faculty is currently transpiring in Wisconsin. On May 29, the Joint Finance Committee of the Wisconsin legislature approved an omnibus higher education funding bill that would, if approved by the Legislature as a whole, cut funding for the University of Wisconsin system by $250 million over two years. In addition to this draconian cut, the committee also approved provisions to remove the protections of tenure from Wisconsin law, increase the power of administrators and degrade the longstanding system of shared governance, and lastly authorize the Board of Regents to terminate faculty appointments for reasons of "program discontinuance, curtailment, modification, or redirection." This is a profound departure from current policy, which allows termination of faculty appointments only for just cause after due notice and hearing, or in the event of a fiscal emergency.

As a group of 459 award-winning research scholars at the University of Wisconsin-Madison wrote, "this provision would greatly weaken any guarantees of tenure provided by the Board of Regents. In essence, state statute would say that tenure at the University of Wisconsin does not mean what it means at every other institution: a guarantee that university administrators cannot arbitrarily dismiss faculty who have earned tenure through research, teaching, and service." Or, as a statement by PROFS, an organization of UW-Madison faculty members, put it:

> Given legal cover by the vague terms "modification" and "redirection", there could be no meaningful limit on the power of the Regents to dismiss faculty and/or to close programs or research centers that fell out of favor with administrators or political leaders.
>
> It is above all the promise of academic freedom directly afforded by tenure that provides the fertile ground for independent scholarly inquiry. That promise would be rendered hollow by the provision in the omnibus motion on faculty and staff dismissals. The "fearless sifting and winnowing" central to the Wisconsin Idea would be no more.

Contingent and Adjunct Faculty

Our country's long-term disinvestment in higher education has also created another obstacle to academic freedom and free expression at public colleges and universities. Increasingly these institutions have, rightly or wrongly, felt compelled to respond to funding cuts in part by hiring fewer tenure-track and full-time faculty and ever more adjuncts, many of them part-time. At this point we estimate that only about one-fourth of all faculty teaching in American higher education are tenured or on the tenure track, down from nearly half in 1975.[4] And about half of all faculty are hired on a part-time basis, although many of these actually work full-time, sometimes at multiple institutions. While the AAUP and other organizations have won protections for such faculty members at some institutions where collective bargaining is permitted and the faculty have organized into unions, the overwhelming majority of such faculty members enjoy no job security; they may more often than not be dismissed without cause and without explanation, even after many years of service; and they frequently have diminished access to support systems, even office space, available to those on the tenure track.[5] It is little wonder

[4] AAUP, "Trends in Instructional Staff Employment Status, 1975-2011."

[5] After public hearings in late 2013, in January 2014 the Democratic staff of the House Committee on Education and the Work Force produced a report, "The Just-in-Time Professor," which examined the working conditions of contingent faculty in higher education. The report concluded: "While the occupation of "college professor" still

then that many of these faculty members have decided that they cannot afford to exercise their rights to teach in accordance with their understanding of their disciplines, challenge students to think independently, engage in original but potentially controversial research, advocate unpopular or innovative ideas, or speak out on issues of institutional or public concern.

Throughout its 100-year history the AAUP has believed and argued that a system of tenure based on a reasonable probationary period is the strongest protection for academic freedom and that institutions whose faculty enjoy academic freedom are most likely to create an environment that supports the First Amendment rights of students. Unfortunately, the extraordinary expansion of what some have called the academic "precariat" calls this into question. I fervently hope that the abuse of adjunct and part-time faculty will be recognized not only as the terrible injustice it is, but also as a major threat to academic freedom and to educational quality. Should this trend not soon be reversed, I fear that free expression on campus will be meaningless in an environment in which teachers are perpetually fearful of retaliation and even dismissal should they ruffle the wrong feathers.

Lastly, it may be asked what might the Congress do about these problems? At this time the AAUP does not support any specific legislative remedies. We are cognizant of the country's long tradition of decentralized state and local control of public education, including higher education. But the Congress can do much by allocating federal funds to reverse the lamentable national trend to disinvest in public higher education. And the members can use their positions to help us educate the public about the important role that academic freedom and free expression have played in building the finest and most democratic system of higher education yet known and in ensuring that our campuses are havens for the robust exchange of ideas that is essential both for genuine quality education and the preservation of our democracy.

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retains a reputation as a middle -class job, the reality is that a growing number of people working in this profession fill positions not intended to provide the stability, pay, or benefits necessary for a family's long-term economic security. Whether some adjunct professors piece together a living from their teaching job or only use it to supplement a more stable primary career elsewhere, many contingent faculty might be best classified as working poor. . . . While these individuals worry about their own futures and how to provide for their families, they are equally distressed by what they believe is a shortchanging of students who pay ever-increasing tuitions to attend their courses. The link between student outcomes and contingent faculty working conditions—not just the adjuncts' schedules and compensation but the respect and professional support they receive from their schools—deserves serious scrutiny from the Committee and other policymakers around the country, as well as from institutions of higher education themselves." The AAUP has issued numerous reports and policy statements on contingent and adjunct appointments.

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APPENDIX 1

1940 Statement of Principles on Academic Freedom and Tenure

In 1915 the Committee on Academic Freedom and Academic Tenure of the American Association of University Professors formulated a statement of principles on academic freedom and academic tenure known as the 1915 Declaration of Principles, which was officially endorsed by the Association at its Second Annual Meeting held in Washington, D.C., December 31, 1915, and January 1, 1916.

In 1925 the American Council on Education called a conference of representatives of a number of its constituent members, among them the American Association of University Professors, for the purpose of formulating a shorter statement of principles on academic freedom and tenure. The statement formulated at this conference, known as the 1925 Conference Statement on Academic Freedom and Tenure, was endorsed by the Association of American Colleges (now the Association of American Colleges and Universities) in 1925 and by the American Association of University Professors in 1926.

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges (now the Association of American Colleges and Universities) agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement is known to the profession as the 1940 Statement of Principles on Academic Freedom and Tenure.

Following extensive discussions on the 1940 Statement of Principles on Academic Freedom and Tenure with leading educational associations and with individual faculty members and administrators, a joint committee of the AAUP and the Association of American Colleges met during 1969 to reevaluate this key policy statement. On the basis of the comments received, and the discussions that ensued, the joint committee felt the preferable approach was to formulate interpretations of the 1940 Statement from the experience gained in implementing and applying it for over thirty years and of adapting it to current needs.

The committee submitted to the two associations for their consideration Interpretive Comments that are included below as footnotes to the 1940 Statement.[1] These interpretations were adopted by the Council of the American Association of University Professors in April 1970 and endorsed by the Fifty- Sixth Annual Meeting as Association Policy.

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole.[2] The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.[3]

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

Academic Freedom

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.[4] Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.[5]
3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.[6]

Academic Tenure

After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

1. The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.
2. Beginning with appointment to the rank of full-time instructor or a higher rank,[7] the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution, it may be agreed in writing that the new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years.[8] Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.[9]
3. During the probationary period a teacher should have the academic freedom that all other members of the faculty have.[10]
4. Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused

teacher should be informed before the hearing in writing of the charges and should have the opportunity to be heard in his or her own defense by all bodies that pass judgment upon the case. The teacher should be permitted to be accompanied by an advisor of his or her own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from the teacher's own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.[11]

5. Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

Endorsers

The 1940 Statement of Principles has been endorsed by more than 240 scholarly and education groups.

Endnotes:

1. The Introduction to the Interpretive Comments notes: In the thirty years since their promulgation, the principles of the 1940 "Statement of Principles on Academic Freedom and Tenure" have undergone a substantial amount of refinement. This has evolved through a variety of processes, including customary acceptance, understandings mutually arrived at between institutions and professors or their representatives, investigations and reports by the American Association of University Professors, and formulations of statements by that association either alone or in conjunction with the Association of American Colleges. These comments represent the attempt of the two associations, as the original sponsors of the 1940 "Statement," to formulate the most important of these refinements. Their incorporation here as Interpretive Comments is based upon the premise that the 1940 "Statement" is not a static code but a fundamental document designed to set a framework of norms to guide adaptations to changing times and circumstances.

Also, there have been relevant developments in the law itself reflecting a growing insistence by the courts on due process within the academic community which parallels the essential concepts of the 1940 "Statement"; particularly relevant is the identification by the Supreme Court of academic freedom as a right protected by the First Amendment. As the Supreme Court said in *Keyishian v. Board of Regents*, 385 US 589 (1967), "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

2. The word "teacher" as used in this document is understood to include the investigator who is attached to an academic institution without teaching duties.

3. First 1970 comment: The Association of American Colleges and the American Association of University Professors have long recognized that membership in the academic profession carries with it special responsibilities. Both associations either separately or jointly have consistently affirmed these responsibilities in major policy statements, providing guidance to professors in their utterances as citizens, in the exercise of their responsibilities to the institution and to students, and in their conduct when resigning from their institution or when undertaking government-sponsored research. Of particular relevance is the "Statement on Professional Ethics" adopted in 1966 as Association policy

(AAUP, *Policy Documents and Reports*, 11th ed. [Baltimore: Johns Hopkins University Press, 2015], 145–46).

4. Second 1970 comment: The intent of this statement is not to discourage what is "controversial." Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject. Back to text.

5. Third 1970 comment: Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 "Statement," and we do not now endorse such a departure.

6. Fourth 1970 comment: This paragraph is the subject of an interpretation adopted by the sponsors of the 1940 "Statement" immediately following its endorsement:

If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph 3 of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it may proceed to file charges under paragraph 4 of the section on Academic Tenure. In pressing such charges, the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

Paragraph 3 of the section on Academic Freedom in the 1940 "Statement" should also be interpreted in keeping with the 1964 "Committee A Statement on Extramural Utterances," *Policy Documents and Reports*, 31, which states inter alia: "The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position. Extramural utterances rarely bear upon the faculty member's fitness for the position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar."

Paragraph 5 of the "Statement on Professional Ethics," *Policy Documents and Reports*, 146, also addresses the nature of the "special obligations" of the teacher:

As members of their community, professors have the rights and obligations of other citizens. Professors mea sure the urgency of these obligations in the light of their responsibilities to their subject, to their students, to their profession, and to their institution. When they speak or act as private persons, they avoid creating the impression of speaking or acting for their college or university. As citizens engaged in a profession that depends upon freedom for its health and integrity, professors have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.

Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time probationary and the tenured teacher, but also to all others, such as part- time faculty and teaching assistants, who exercise teaching responsibilities.

7. Fifth 1970 comment: The concept of "rank of full-time instructor or a higher rank" is intended to include any person who teaches a full- time load regardless of the teacher's specific title. [For a discussion of this question, see the "Report of the Special Committee on Academic Personnel Ineligible for Tenure," *AAUP Bulletin* 52 (September 1966): 280– 82.]

8. Sixth 1970 comment: In calling for an agreement "in writing" on the amount of credit given for a faculty member's prior service at other institutions, the "Statement" furthers the general policy of full understanding by the professor of the terms and conditions of the appointment. It does not necessarily follow that a professor's tenure rights have been violated because of the absence of a written agreement on this matter. Nonetheless, especially because of the variation in permissible institutional practices, a written understanding concerning these matters at the time of appointment is particularly appropriate and advantageous to both the individual and the institution. [For a more detailed statement on this question, see "On Crediting Prior Service Elsewhere as Part of the Probationary Period," *Policy Documents and Reports*, 167– 68.]

9. Seventh 1970 comment: The effect of this subparagraph is that a decision on tenure, favorable or unfavorable, must be made at least twelve months prior to the completion of the probationary period. If the decision is negative, the appointment for the following year becomes a terminal one. If the decision is affirmative, the provisions in the 1940 "Statement" with respect to the termination of service of teachers or investigators after the expiration of a probationary period should apply from the date when the favorable decision is made.

The general principle of notice contained in this paragraph is developed with greater specificity in the "Standards for Notice of Nonreappointment," endorsed by the Fiftieth Annual Meeting of the American Association of University Professors (1964) (*Policy Documents and Reports*, 99). These standards are:

Notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should be given in writing in accordance with the following standards:

1. Not later than March 1 of the first academic year of service, if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

2. Not later than December 15 of the second academic year of service, if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

3. At least twelve months before the expiration of an appointment after two or more years in the institution.

Other obligations, both of institutions and of individuals, are described in the "Statement on Recruitment and Resignation of Faculty Members," *Policy Documents and Reports*, 153– 54, as endorsed by the Association of American Colleges and the American Association of University Professors in 1961.

10. Eighth 1970 comment: The freedom of probationary teachers is enhanced by the establishment of a regular procedure for the periodic evaluation and assessment of the teacher's academic performance during probationary status. Provision should be made for regularized procedures for the consideration of complaints by probationary teachers that their academic freedom has been violated. One suggested procedure to serve these purposes is contained in the "Recommended Institutional Regulations on Academic Freedom and Tenure," *Policy Documents and Reports*, 79– 90, prepared by the American Association of University Professors.

11. Ninth 1970 comment: A further specification of the academic due process to which the teacher is entitled under this paragraph is contained in the "Statement on Procedural Standards in Faculty Dismissal Proceedings," *Policy Documents and Reports*, 91– 93, jointly approved by the American Association of University Professors and the Association of American Colleges in 1958. This interpretive document deals with the issue of suspension, about which the 1940 "Statement" is silent.

The “Statement on Procedural Standards in Faculty Dismissal Proceedings” provides: “Suspension of the faculty member during the proceedings is justified only if immediate harm to the faculty member or others is threatened by the faculty member’s continuance. Unless legal considerations forbid, any such suspension should be with pay.” A suspension which is not followed by either reinstatement or the opportunity for a hearing is in effect a summary dismissal in violation of academic due process.

The concept of “moral turpitude” identifies the exceptional case in which the professor may be denied a year’s teaching or pay in whole or in part. The statement applies to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year’s teaching or pay. The standard is not that the moral sensibilities of persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally

APPENDIX 2

Joint Statement on the Rights and Freedoms of Students

In June 1967, a committee composed of representatives from the American Association of University Professors, the United States National Student Association (now the United States Student Association), the Association of American Colleges (now the Association of American Colleges and Universities), the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors formulated the joint statement. The document was endorsed by each of its five national sponsors, as well as by a number of other professional bodies. The governing bodies of the Association of American Colleges and the American Association of University Professors acted in January and April 1990, respectively, to remove gender-specific references from the original text; references were updated in 2006.

In September 1990, September 1991, and November 1992, an inter-association task force met to study, interpret, update, and affirm (or reaffirm) the Joint Statement. Members of the task force agreed that the document had stood the test of time quite well and continued to provide an excellent set of principles for institutions of higher education. The task force developed a set of interpretive endnotes to incorporate changes in law and higher education which had occurred since 1967. A list of associations endorsing the annotations appears as an appendix.

Preamble

Academic institutions exist for the transmission of knowledge, the pursuit of truth, the development of students, and the general well-being of society. Free inquiry and free expression are indispensable to the attainment of these goals. As members of the academic community, students should be encouraged to develop the capacity for critical judgment and to engage in a sustained and independent search for truth. Institutional procedures for achieving these purposes may vary from campus to campus, but the minimal standards of academic freedom of students outlined below are essential to any community of scholars.

Freedom to teach and freedom to learn are inseparable facets of academic freedom. The freedom to learn depends upon appropriate opportunities and conditions in the classroom, on the campus, and in the larger community.[1] Students should exercise their freedom with responsibility.

The responsibility to secure and to respect general conditions conducive to the freedom to learn is shared by all members of the academic community. Each college and university has a duty to develop policies and procedures that provide and safeguard this freedom. Such policies and procedures should be developed at each institution within the framework of general standards and with the broadest possible participation of the members of the academic community. The purpose of this statement is to enumerate the essential provisions for students' freedom to learn.

Freedom of Access to Higher Education

The admissions policies of each college and university are a matter of institutional choice, provided that each college and university makes clear the characteristics and expectations of students that it considers relevant to success in the institution's program.[2] While church-related institutions may give admission preference to students of their own persuasion, such a preference should be clearly and publicly stated. Under no circumstances should a student be barred from admission to a particular institution on the basis of race.[3] Thus, within the limits of its facilities, each college and university should be open to all students who are qualified according to its admissions standards. The facilities and services of a college or university should be open to all of its enrolled students, and institutions should use their influence to secure equal access for all students to public facilities in the local community.

In the Classroom

The professor in the classroom and in conference should encourage free discussion, inquiry, and expression. Student performance should be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards.

1. Protection of Freedom of Expression

Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.

2. Protection against Improper Academic Evaluation

Students should have protection through orderly procedures against prejudiced or capricious academic evaluation. 4 At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled.

3. Protection against Improper Disclosure

Information about student views, beliefs, and political associations that professors acquire in the course of their work as instructors, advisers, and counselors should be considered confidential. Protection against improper disclosure is a serious professional obligation. Judgments of ability and character may be provided under appropriate circumstances, normally with the knowledge and consent of the student.

Student Records

Institutions should have carefully considered policy as to the information that should be part of a student's permanent educational record and as to the conditions of its disclosure. To minimize the risk of improper disclosure, academic and disciplinary records should be separate, and the conditions of access to each should be set forth in an explicit policy statement. Transcripts of academic records should contain only information about academic status. Information from disciplinary or counseling files should not be available to unauthorized persons on campus, or to any person off campus without the express consent of the student involved, except under legal compulsion or in cases where the safety of persons or property is involved. No records should be kept that reflect the political activities or beliefs of

students. Provision should also be made for periodic routine destruction of non-current disciplinary records. Administrative staff and faculty members should respect confidential information about students which they acquire in the course of their work.[5]

Student Affairs

In student affairs, certain standards must be maintained if the freedom of students is to be preserved.[6]

1. Freedom of Association

Students bring to the campus a variety of interests previously acquired and develop many new interests as members of the academic community. They should be free to organize and join associations to promote their common interests.

a. The membership, policies, and actions of a student organization usually will be determined by vote of only those persons who hold bona fide membership in the college or university community.

b. Affiliation with an extramural organization should not of itself disqualify a student organization from institutional recognition.[7]

c. If campus advisers are required, each organization should be free to choose its own adviser, and institutional recognition should not be withheld or withdrawn solely because of the inability of a student organization to secure an adviser. Campus advisers may advise organizations in the exercise of responsibility, but they should not have the authority to control the policy of such organizations.

d. Student organizations may be required to submit a statement of purpose, criteria for membership, rules of procedure, and a current list of officers. They should not be required to submit a membership list as a condition of institutional recognition.

e. Campus organizations, including those affiliated with an extramural organization, should be open to all students without respect to race, creed, or national origin, except for religious qualifications which may be required by organizations whose aims are primarily sectarian.[8]

2. Freedom of Inquiry and Expression

a. Students and student organizations should be free to examine and discuss all questions of interest to them and to express opinions publicly and privately. They should always be free to support causes by orderly means that do not disrupt the regular and essential operations of the institution. At the same time, it should be made clear to the academic and larger community that in their public expressions or demonstrations students or student organizations speak only for themselves.

b. Students should be allowed to invite and to hear any person of their own choosing. Those routine procedures required by an institution before a guest speaker is invited to appear on campus should be designed only to ensure that there is orderly scheduling of facilities and adequate preparation for the event, and that the occasion is conducted in a manner appropriate to an academic community. The institutional control of campus facilities should not be used as a device of censorship. It should be made

clear to the academic and larger community that sponsorship of guest speakers does not necessarily imply approval or endorsement of the views expressed, either by the sponsoring group or by the institution.[9]

3. Student Participation in Institutional Government

As constituents of the academic community, students should be free, individually and collectively, to express their views on issues of institutional policy and on matters of general interest to the student body. The student body should have clearly defined means to participate in the formulation and application of institutional policy affecting academic and student affairs. 10 The role of student government and both its general and specific responsibilities should be made explicit, and the actions of student government within the areas of its jurisdiction should be reviewed only through orderly and prescribed procedures.

4. Student Publications

Student publications and the student press are valuable aids in establishing and maintaining an atmosphere of free and responsible discussion and of intellectual exploration on the campus. They are a means of bringing student concerns to the attention of the faculty and the institutional authorities and of formulating student opinion on various issues on the campus and in the world at large.

Whenever possible the student newspaper should be an independent corporation financially and legally separate from the college or university. Where financial and legal autonomy is not possible, the institution, as the publisher of student publications, may have to bear the legal responsibility for the contents of the publications. In the delegation of editorial responsibility to students, the institution must provide sufficient editorial freedom and financial autonomy for the student publications to maintain their integrity of purpose as vehicles for free inquiry and free expression in an academic community.

Institutional authorities, in consultation with students and faculty, have a responsibility to provide written clarification of the role of the student publications, the standards to be used in their evaluation, and the limitations on external control of their operation. At the same time, the editorial freedom of student editors and managers entails corollary responsibilities to be governed by the canons of responsible journalism, such as the avoidance of libel, indecency, undocumented allegations, attacks on personal integrity, and the techniques of harassment and innuendo. As safeguards for the editorial freedom of student publications the following provisions are necessary:

a. The student press should be free of censorship and advance approval of copy, and its editors and managers should be free to develop their own editorial policies and news coverage.

b. Editors and managers of student publications should be protected from arbitrary suspension and removal because of student, faculty, administration, or public disapproval of editorial policy or content. Only for proper and stated causes should editors and managers be subject to removal and then only by orderly and prescribed procedures. The agency responsible for the appointment of editors and managers should be the agency responsible for their removal.

c. All institutionally published and financed student publications should explicitly state on the editorial page that the opinions there expressed are not necessarily those of the college, university, or student body.

Off-Campus Freedom of Students

1. Exercise of Rights of Citizenship

College and university students are both citizens and members of the academic community. As citizens, students should enjoy the same freedom of speech, peaceful assembly, and right of petition that other citizens enjoy and, as members of the academic community, they are subject to the obligations that accrue to them by virtue of this membership. Faculty members and administration officials should ensure that institutional powers are not employed to inhibit such intellectual and personal development of students as is often promoted by their exercise of the rights of citizenship both on and off campus.

2. Institutional Authority and Civil Penalties

Activities of students may upon occasion result in violation of law. In such cases, institutional officials should be prepared to apprise students of sources of legal counsel and may offer other assistance. Students who violate the law may incur penalties prescribed by civil authorities, but institutional authority should never be used merely to duplicate the function of general laws. Only where the institution's interests as an academic community are distinct and clearly involved should the special authority of the institution be asserted. Students who incidentally violate institutional regulations in the course of their off-campus activity, such as those relating to class attendance, should be subject to no greater penalty than would normally be imposed. Institutional action should be independent of community pressure.

Procedural Standards in Disciplinary Proceedings

In developing responsible student conduct, disciplinary proceedings play a role substantially secondary to example, counseling, guidance, and admonition.[11] At the same time, educational institutions have a duty and the corollary disciplinary powers to protect their educational purpose through the setting of standards of scholarship and conduct for the students who attend them and through the regulation of the use of institutional facilities. In the exceptional circumstances when the preferred means fail to resolve problems of student conduct, proper procedural safeguards should be observed to protect the student from the unfair imposition of serious penalties.

The administration of discipline should guarantee procedural fairness to an accused student.[12] Practices in disciplinary cases may vary in formality with the gravity of the offense and the sanctions that may be applied. They should also take into account the presence or absence of an honor code, and the degree to which the institutional officials have direct acquaintance with student life in general and with the involved student and the circumstances of the case in particular. The jurisdictions of faculty or student judicial bodies, the disciplinary responsibilities of institutional officials, and the regular disciplinary

procedures, including the student's right to appeal a decision, should be clearly formulated and communicated in advance.[13] Minor penalties may be assessed informally under prescribed procedures.

In all situations, procedural fair play requires that a student charged with misconduct be informed of the nature of the charges and be given a fair opportunity to refute them, that the institution not be arbitrary in its actions, and that there be provision for appeal of a decision. The following are recommended as proper safeguards in such proceedings when there are no honor codes offering comparable guarantees.

1. Standards of Conduct Expected of Students

The institution has an obligation to clarify those standards that it considers essential to its educational mission and its community life. These general behavioral expectations and the resultant specific regulations should represent a reasonable regulation of student conduct, but students should be as free as possible from imposed limitations that have no direct relevance to their education. Offenses should be as clearly defined as possible and interpreted in a manner consistent with the aforementioned principles of relevancy and reasonableness.[14] Disciplinary proceedings should be instituted only for violations of standards of conduct formulated with significant student participation and published in advance through such means as a student handbook or a generally available body of institutional regulations.

2. Investigation of Student Conduct

a. Except under extreme emergency circumstances, premises occupied by students and the personal possessions of students should not be searched unless appropriate authorization has been obtained. For premises such as residence halls controlled by the institution, an appropriate and responsible authority should be designated to whom application should be made before a search is conducted. The application should specify the reasons for the search and the objects or information sought. The student should be present, if possible, during the search. For premises not controlled by the institution, the ordinary requirements for lawful search should be followed.

b. Students detected or arrested in the course of serious violations of institutional regulations, or infractions of ordinary law, should be informed of their rights.[15] No form of harassment should be used by institutional representatives to coerce admissions of guilt or disclosure of information about conduct of other suspected persons.

3. Status of Student Pending

Final Action Pending action on the charges, the status of a student should not be altered, or the student's right to be present on the campus and to attend classes suspended, except for reasons relating to the student's physical or emotional safety and well-being, or for reasons relating to the safety and well-being of other students, faculty, or institutional property.

4. Hearing Committee Procedures

When the misconduct may result in serious penalties, and if a penalized student questions the fairness of disciplinary action, that student should be granted, on request, the privilege of a hearing before a regularly constituted hearing committee. The following suggested hearing committee procedures satisfy the requirements of procedural due process in situations requiring a high degree of formality.

a. The hearing committee should include faculty members or students, or, if regularly included or requested by the accused, both faculty and student members. No member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding.

b. The student should be informed, in writing, of the reasons for the proposed disciplinary action with sufficient particularity, and in sufficient time, to ensure opportunity to prepare for the hearing.[16]

c. The student appearing before the hearing committee should have the right to be assisted in his or her defense by an adviser of the student's choice.

d. The burden of proof should rest upon the officials bringing the charge.

e. The student should be given an opportunity to testify, to present evidence and witnesses, and to hear and question adverse witnesses. In no case should the committee consider statements against the student unless he or she has been advised of their content and of the names of those who made them and has been given an opportunity to rebut unfavorable inferences that might otherwise be drawn.

f. All matters upon which the decision may be based must be introduced into evidence at the proceeding before the hearing committee. The decision should be based solely upon such matters. Improperly acquired evidence should not be admitted.

g. In the absence of a transcript, there should be both a digest and a verbatim record, such as a tape recording, of the hearing.

h. The decision of the hearing committee should be final, subject only to the student's right of appeal to the president or ultimately to the governing board of the institution.[17]

Appendix

The following associations endorsed the interpretive notes below:

American Association of Community Colleges
American Association of University Administrators
American Association of University Professors
American College Personnel Association
Association for Student Judicial Affairs
National Association for Women in Education
National Association of Student Personnel Administrators
National Orientation Directors Association
Southern Association for College Student Affairs
United States Student Association

Notes

1. In order to protect the freedom of students to learn, as well as enhance their participation in the life of the academic community, students should be free from exploitation or harassment.

2. In order to enable them to make appropriate choices and participate effectively in an institution's programs, students have the right to be informed about the institution, its policies, practices, and characteristics. Institutions preparing such information should take into account applicable federal and state laws.

3. The reference to race must not be taken to limit the nondiscrimination obligations of institutions. In all aspects of education, students have a right to be free from discrimination on the basis of individual attributes not demonstrably related to academic success in the institution's programs, including, but not limited to, race, color, gender, age, disability, national origin, and sexual orientation. Under *Grutter* v. *Bollinger*, 539 US 306, 330 (2003), "student body diversity"— including racial diversity—" is a compelling state interest that can justify the use of race in university admissions." This means that, when colleges and universities determine that achieving diversity within the student body is relevant to their academic mission, their admissions offices may take an applicant's race into account as one factor among many in making an admission decision.

4. The student grievance procedures typically used in these matters are not appropriate for addressing charges of academic dishonesty or other disciplinary matters arising in the classroom. In these instances, students should be afforded the safeguards of orderly procedures consistent with those set forth in "Procedural Standards in Disciplinary Proceedings." (In 1997, the AAUP's Committee A on Academic Freedom and Tenure approved a statement on "The Assignment of Course Grades and Student Appeals," AAUP, *Policy Documents and Reports*, 11th ed. [Baltimore: Johns Hopkins University Press, 2015], 29– 30.)

5. The Family Educational Rights and Privacy Act (FERPA) provides for the protection of student records. Consistent with FERPA, institutions should have a statement of policy on the content of a student's educational record, as well as the conditions for its disclosure. Institutions should also have policies and security practices to control access to student records that may be available or transmitted electronically.

6. As in the case of classroom matters, students shall have protection through orderly procedures to ensure this freedom.

7. "Institutional recognition" should be understood to refer to any formal relationship between the student organization and the institution.

8. The obligation of institutions with respect to nondiscrimination, with the exception noted above for religious qualifications, should be understood in accordance with the expanded statement on nondiscrimination in note 3. Exceptions may also be based on gender as authorized by law.

9. The events referred to in this section should be understood to include the full range of student-sponsored activities, such as films, exhibitions, and performances.

10. “Academic and student affairs” should be interpreted broadly to include all administrative and policy matters pertinent to students’ educational experiences.

11. The student conduct that may be subject to the disciplinary proceedings described in this section should be understood to include alleged violations of standards of student academic integrity.

12. In addition, student organizations, as well as individual students, may be subject to institutional disciplinary sanctions, and in those circumstances, student organizations should also be guaranteed procedural fairness.

13. Like other practices in disciplinary cases, the formality of any appellate procedures should be commensurate with the gravity of the offense and the sanctions that may be imposed.

14. The institution should state as specifically as possible the sanctions that may be imposed through disciplinary proceedings.

15. This provision is intended to protect students’ rights under both institutional codes and applicable law. Where institutional regulations are violated, students should be informed of their rights under campus disciplinary procedures. Where arrests are made for infractions of the law, students must be informed of their rights by arresting authorities.

16. The student should also be informed of the specific sanctions that may be imposed through the disciplinary proceeding.

17. As a matter of responsible practice, the decision of the hearing committee, as well as grounds and procedures for appeal, should be communicated to the student in writing within a reasonable period of time.