



Testimony of the Foundation for Individual Rights in Education (FIRE)  
U.S. Senate Committee on Appropriations  
Subcommittee on Labor, Health and Human Services, and Education, and Related Agencies  
2017 Funding of the Department of Education's Office for Civil Rights (OCR)

April 15, 2016

The Honorable Thad Cochran  
Chairman  
Senate Committee on Appropriations  
Washington, DC 20510

The Honorable Barbara Mikulski  
Vice-Chairwoman  
Senate Committee on Appropriations  
Washington, DC 20510

The Honorable Roy Blunt  
Chairman  
Subcommittee on Labor, Health and  
Human Services, and Education  
Senate Committee on Appropriations  
Washington, DC 20510

The Honorable Patty Murray  
Ranking Member  
Subcommittee on Labor, Health and  
Human Services, and Education  
Senate Committee on Appropriations  
Washington, DC 20510

Dear Chairman Cochran, Vice-Chairwoman Mikulski, Chairman Blunt, and Ranking Member Murray:

The Foundation for Individual Rights in Education (FIRE; [thefire.org](http://thefire.org)) is a nonpartisan, nonprofit organization dedicated to defending student and faculty rights on America's college and university campuses. These rights include freedom of speech, freedom of assembly, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity. We write to express our opposition to requests for increasing the funding of the Department of Education's Office for Civil Rights (OCR) in the upcoming appropriations legislation.

As you are aware, on March 17, 2016, 22 Senators sent a joint letter urging the Subcommittee on Labor, Health and Human Services, and Education to increase OCR's funding from \$102 million to \$137.7 million for fiscal year 2017. If this request were to be approved, it would amount to an increase of nearly 30% over the agency's funding for the current fiscal year.

While FIRE supports OCR's goal of effectively addressing sexual assault and sexual harassment on college campuses, we have serious concerns about the manner in which the agency is pursuing that mission. In pursuit of this objective, OCR has unlawfully ordered institutions of higher education to reduce the due process protections afforded to individuals accused of sexual misconduct and has

redefined sexual harassment to include speech protected by the First Amendment under precedent from the Supreme Court of the United States. Until OCR stops infringing on the First Amendment and rolling back due process protections, the agency should not receive budget increases.

It should be self-evident that institutions adjudicating guilt or innocence in sexual assault cases must do so in a fair and impartial manner reasonably calculated to reach the truth. Indeed, in the April 4, 2011, “Dear Colleague” letter issued by OCR, the agency acknowledged that “a school’s investigation and hearing processes cannot be equitable unless they are impartial.”<sup>1</sup>

Disappointingly, however, OCR’s own rhetoric and actions have been decidedly one-sided, almost exclusively emphasizing the rights of the complainant while paying little to no attention to the rights of the accused. For example, OCR has mandated that institutions of higher education utilize our judiciary’s lowest burden of proof, the “preponderance of the evidence” standard, despite the absence of any of the fundamental procedural safeguards found in civil courts of law. Without basic procedural protections, campus tribunals are making life-altering findings using a low evidentiary threshold that amounts to little more than a hunch that one side is right. This mandate is not just unfair to the accused—it reduces the accuracy and reliability of the findings and compromises the integrity of the system as a whole.

Gary Pavela, of the National Association of College and University Attorneys (NACUA), recently told *Inside Higher Ed* that “[c]olleges and universities are escalating and criminalizing the prosecution of sexual misconduct cases, while eliminating basic due process for the accused.”<sup>2</sup> He continued:

Title IX does not require this approach and courts are unlikely to allow it. Silence on procedural fairness, however, sends the subliminal message that due process is an impediment to more “convictions.” We’re seeing the fruits of OCR’s due process silence now. University sexual misconduct policies are losing legitimacy in the eyes of the courts. That’s a disaster for Title IX enforcement. And OCR shares ample responsibility for it.

The merits of the preponderance of the evidence standard aside, there is little doubt that OCR’s insistence that institutions of higher education use any particular standard exceeds the agency’s authority. The Dear Colleague letter was not subjected to the notice-and-comment process required under the Administrative Procedure Act before an agency like OCR can impose new substantive rules.<sup>3</sup> Despite repeated sworn testimony to congressional committees from top officials at the Department of Education insisting that the terms of the Dear Colleague letter are not

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<sup>1</sup> U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

<sup>2</sup> Jake New, *Out of Balance*, *INSIDE HIGHER ED* (Apr. 14, 2016), <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault>.

<sup>3</sup> 5 U.S.C. § 553.

binding on institutions of higher education,<sup>4</sup> OCR continues to demand conformance with those terms when negotiating agreements with institutions of higher education.<sup>5</sup>

The agreement OCR and the Department of Justice entered into with the University of Montana on May 9, 2013, is a particularly galling example of OCR's willingness to exceed its authority. In the findings letter accompanying that agreement, OCR rejected the university's sexual harassment policy, stating that "sexual harassment should be more broadly defined as 'any unwelcome conduct of a sexual nature,'" including "verbal conduct"—that is, speech. The letter, which proclaimed itself a "blueprint" for schools across the nation to follow, then explicitly stated that allegedly harassing expression need not even be offensive to an "objectively reasonable person of the same gender in the same situation." If the listener takes offense to sex-related speech for any reason, no matter how irrationally or unreasonably, the speaker may be punished. To comply with this "blueprint," institutions nationwide are adopting unconstitutionally broad speech codes.<sup>6</sup>

OCR's overreach is so blatant that it has drawn criticism from Senators Lamar Alexander<sup>7</sup> and James Lankford,<sup>8</sup> the American Association of University Professors,<sup>9</sup> Feminists for Free Expression,<sup>10</sup> the National Coalition Against Censorship,<sup>11</sup> former American Civil Liberties Union president and New York Law School professor Nadine Strossen,<sup>12</sup> columnist George Will,<sup>13</sup> and

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<sup>4</sup> HelpCommitteeGOP, *Alexander Questions Dept. of Ed. Witness at HSGAC Hearing on Regulatory Guidance*, YOUTUBE (Sept. 23, 2015), <https://www.youtube.com/watch?v=dIiXuv-Oirw>; Joe Cohn, *Second Department of Education Official in Eight Days Tells Congress Guidance Is Not Binding*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: THE TORCH (Oct. 2, 2015), <https://www.thefire.org/second-department-of-education-official-in-eight-days-tells-congress-guidance-is-not-binding>.

<sup>5</sup> See, e.g., U.S. Dep't of Educ., Office for Civil Rights, OCR Review No. 11-11-6001, *UVA Letter of Finding* (Sept. 21, 2015), <http://www2.ed.gov/documents/press-releases/university-virginia-letter.pdf>; U.S. Dep't of Educ., Office for Civil Rights, OCR Review No. 15-11-2098 and 15-14-2113, *MSU Letter of Finding* (Sept. 1, 2015), <http://www2.ed.gov/documents/press-releases/michigan-state-letter.pdf>; U.S. Dep't of Justice, Civil Rights Division, and U.S. Dep't of Educ., Office for Civil Rights, DOJ No. DJ 169-44-9, OCR No. 10126001, *UM Letter of Finding* (May 9, 2013), <https://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf>.

<sup>6</sup> FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2016: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, available at <https://www.thefire.org/spotlight-on-speech-codes-2016>.

<sup>7</sup> Susan Kruth, *Senators Ask Key Questions at Hearing on Campus Sexual Assault*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: THE TORCH (June 30, 2014), <https://www.thefire.org/senators-ask-key-questions-at-hearing-on-campus-sexual-assault>.

<sup>8</sup> *Letter from Senator James Lankford to Acting Secretary John B. King, Jr., U.S. Department of Education* (Jan. 7, 2016), available at <https://www.thefire.org/sen-james-lankford-letter-to-the-education-department>.

<sup>9</sup> *The History, Uses, and Abuses of Title IX*, AM. ASS'N OF UNIV. PROFESSORS (Mar. 24, 2016), <http://www.aaup.org/file/TitleIX-Report.pdf>.

<sup>10</sup> *Dept. of Education Challenged by FIRE, Coalition about Silence on Threats to Student Rights*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: THE TORCH (May 7, 2012), <https://www.thefire.org/dept-of-education-challenged-by-fire-coalition-about-silence-on-threats-to-student-rights> (listing Feminists for Free Expression as a member of the coalition challenging the Department of Education).

<sup>11</sup> *Id.*

<sup>12</sup> Alex Morey, *Strossen Praises FIRE at Harvard Free Press Lecture, Criticizes OCR for Chilling Speech*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: THE TORCH (Oct. 21, 2015), <https://www.thefire.org/strossen-praises-fire-at-harvard-free-press-lecture-criticizes-ocr-for-chilling-speech>.

University of California System president and former secretary of the Department of Homeland Security Janet Napolitano.<sup>14</sup> Napolitano's observations are particularly noteworthy:

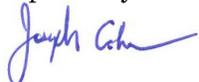
Unfortunately, OCR neglected to provide notice or an opportunity for comment in advance of issuing either the Dear Colleague Letter or the April 2014 Questions and Answers guidance regarding Title IX and sexual violence, even though both documents clearly imposed new mandates on schools. Campuses facing these new mandates had no opportunity to provide feedback for the Department of Education's consideration prior to the issuance of the guidance documents and were left with significant uncertainty and confusion about how to appropriately comply after they were implemented.<sup>15</sup>

FIRE is eager to work with Congress and OCR to effectively address campus sexual assault and sexual harassment. But until Congress holds OCR accountable for its unlawful abuse of power and its blatant disregard for campus civil liberties, the agency will continue to both exceed its authority and take an inappropriately one-sided approach to addressing these issues.

We hope that Congress requires OCR to abide by the rule of law before it rewards the agency with a budget increase.

Thank you for your consideration of our testimony. We would be pleased to discuss our concerns with you further. I may be reached via email ([joe@thefire.org](mailto:joe@thefire.org)) or telephone (215-717-3473) at your convenience.

Respectfully submitted,



Joseph Cohn  
Legislative and Policy Director

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<sup>13</sup> George F. Will, *The legislative and judicial branches strike back against Obama's overreach*, WASH. POST (Feb. 19, 2016), [https://www.washingtonpost.com/opinions/the-legislative-and-judicial-branches-strike-back-against-obamas-overreach/2016/02/19/15f403b8-d672-11e5-be55-2cc3c1e4b76b\\_story.html](https://www.washingtonpost.com/opinions/the-legislative-and-judicial-branches-strike-back-against-obamas-overreach/2016/02/19/15f403b8-d672-11e5-be55-2cc3c1e4b76b_story.html).

<sup>14</sup> Janet Napolitano, "Only Yes Means Yes": *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & PUB. POL'Y 387 (2015), available at [http://ylpr.yale.edu/sites/default/files/YLPR/33.2\\_policy\\_essay\\_-\\_napolitano\\_final.pdf](http://ylpr.yale.edu/sites/default/files/YLPR/33.2_policy_essay_-_napolitano_final.pdf).

<sup>15</sup> *Id.* at 394-95.