**Feds to Students: You Can't Say That**

**The Justice and Education departments issue a dangerous new speech code for colleges.**

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The scandals roiling Washington over the past two weeks involve troubling government behavior that had been hidden—the IRS targeting of conservative groups and the Justice Department's surveillance of the Associated Press, among others. Largely overlooked amid the histrionics has been a shocker hiding in plain sight. Last week, the Obama administration moved to dramatically undermine students' and faculty rights at colleges across the country.

The new policy was announced in a joint letter from the Education Department and Justice Department to the University of Montana. The May 9 letter addressed the results of a year-long joint investigation by the departments into the school's mishandling of several serious sexual-assault cases. The investigation determined that the university's policies addressing sexual assault failed to comply with Title IV of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

But the joint letter, which announced a "resolution agreement" with the university, didn't stop there. It then proceeded to rewrite the federal government's rules about sexual harassment and free speech on campus.

If that sounds hyperbolic, consider the letter itself. The first paragraph declares that the Montana findings should serve as a "blueprint for colleges and universities throughout the country." After outlining the specifics of the case, the letter states that only a stunningly broad definition of sexual harassment—"unwelcome conduct of a sexual nature"—will now satisfy federal statutory requirements. This explicitly includes "verbal conduct," otherwise known as speech.



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The letter rejects the requirement, established by legal precedent and previous Education Department guidance, that sexual harassment must be "objectively offensive." By eliminating this "reasonable person" standard—which the Education Department has required since at least 2003, and which protects the accused against unreasonable or insincere allegations—the right not to be offended has been enshrined in a federal mandate.

The letter further states that campuses have "an obligation to respond to student-on-student harassment" even when that harassment occurs off-campus. In some circumstances, the letter says, universities may take "disciplinary action against the harasser" even "prior to the completion of the Title IX and Title IV investigation/resolution." In plain English: Students can be punished before they are found guilty of harassment.

Given that the letter represents an interpretation of federal law by major federal agencies, most colleges will regard it as binding. Noncompliance threatens federal funding, including Pell grants and Stafford loans.

The implications for professors and students are enormous. An unsuccessful request for a date, or even assigning a potentially offensive book like "Lolita," could now be construed as harassment. As attorney and civil libertarian Wendy Kaminer commented on The Atlantic's website this week: "The stated goal of this policy is stemming discrimination, but the inevitable result will be advancing it, in the form of content-based prohibitions on speech."

This attack on campus free speech follows the Education Department's directive two years ago requiring every college in the country that receives federal funds to lower the standard of evidence in sexual-harassment cases. The "preponderance of the evidence," the judiciary's lowest standard of proof, became the required standard. (Many institutions had previously used the "clear and convincing" standard.) As former Dean of Harvard CollegeHarry Lewis has noted, the "preponderance of evidence" mandate means "more convictions—of both guilty and innocent individuals," which is a troubling result "in a society that values individual rights."

Last week's letter is part of a decades-long effort by anti-"hate speech" professors, students, activists and administrators to classify any offensive speech as harassment unprotected by the First Amendment. Such speech codes reached their height in the 1980s and 1990s, but they were defeated in federal and state court and came in for public ridicule.

Despite these setbacks, harassment-based speech codes have become the de facto rule. Earlier this year, my organization, the Foundation for Individual Rights in Education, published a study that looked at 409 colleges and found that 62% maintain codes that violate First Amendment standards.

The stifling effect of these codes isn't theoretical. In 2011, the University of Denver suspended a professor and found him guilty of sexual harassment because his class discussion on sexual taboos in American culture (in a graduate-level course) was considered too racy. Last year, Appalachian State University suspended a professor for creating a "hostile environment" after she criticized the university's treatment of sexual-assault cases involving student-athletes and screened a documentary critical of the adult-film industry.

Recent history gives no reason to expect that the government's new directive on "verbal conduct" will remain confined to sexual speech. At Tufts in 2007, a conservative student publication was found guilty of harassment for criticizing Islam. The same happened to a professor at Purdue University at Calumet in 2012, who faced a four-month investigation.

An obsession with political correctness and the expansion of bureaucracy on campus are key factors in the proliferation of such free-speech abuses. But the hidden force that pushes schools to overreact to offensive, or merely dissenting, speech is fear of liability and the federal government. A growing "risk-management" industry—complete with regular conferences, conventions and consultants—has arisen from efforts by university administrators trying to avoid being sued for discrimination or harassment, and to avoid the costly investigations in which the Education Department's Office for Civil Rights specializes.

All of this effort and expense ought to be unnecessary. The Supreme Court already did the work in Davis v. Monroe County Board of Education (1999). Recognizing that workplace standards for harassment were inappropriate for educational institutions, in Davis the court offered a clear, narrow, workable definition of harassment as a targeted pattern of serious and ongoing discriminatory behavior.

Adopting this standard would have solved—and would still solve, if implemented—universities' liability panic, while allowing real harassers to be punished and avoiding serious threats to freedom of speech. But the Education and Justice departments apparently don't want to embrace the Supreme Court's solution. In their letter, they explicitly reject (and misquote) the court's thoughtful analysis in Davis, deeming it inapplicable for the agencies' "purposes of administrative enforcement."

When the Education Department lowered the standard of evidence for harassment accusations in 2011, some college administrators complained, but most meekly accepted the federal mandate. They may be regretting that submission, now that the government is pushing for even lower standards. Unless we decide that college should primarily be a social institution devoted to preventing offense, it is time for universities—as well as state governments, alumni, students, parents, faculty and citizens—to fight back.

Mr. Lukianoff is the author of "Unlearning Liberty: Campus Censorship and the End of American Debate" (Encounter, 2012) and the president of the Foundation for Individual Rights in Education.

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2. Describe your opinion of the issues discussed in the reading.