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U.S. Commission on Civil Rights
624 9th St., NW
Washington, DC 20425

Dear Members of the Commission:

I was asked to testify about the First Amendment constraints on “bullying” and “harassment” in K-12 schools. I think violence, vandalism, threats, on-campus vulgarities, on-campus speech that poses a substantial risk of materially disrupting class activities, and probably on-campus targeted insults can indeed be punished. But I would caution against policies that are written using vague terms such as “bullying,” “harassment,” or “hostile educational environment,” especially when the policies cover speech that isn’t targeted to a particular person, as well as speech that is said off-campus.

1. **“Bullying.”** The term “bullying” is often used today to cover an ill-defined but broad set of behavior that includes a great deal of constitutionally protected speech.

Consider, for instance, House of Representatives Bill 1966 (2009-10), the “Megan Meier Cyberbullying Prevention Act.” Though it was described by its chief sponsor as a tool for protecting children, the bill broadly criminalized “any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior.” This would have covered speech about adults as well as children. And it would have covered, among other things, “severe, repeated, and hostile” online criticism of

- government officials, including student government officials who you think are acting unfairly with regard to some groups of students,
- journalists, including high school student journalists who you think are unfairly criticizing classmates, teachers, administrators, or others,
- accused criminals, including students who are accused of attacking their classmates,
- people who say reprehensible things, including students who are themselves accused of wrongly taunting their classmates,
- ex-lovers who have cheated on you or abused you,

and others, so long as the speech was intended to “cause substantial emotional distress” to the target, for instance by shaming them for their misdeeds.

Such a restriction would violate the First Amendment when embodied in a criminal law (which HR 1966 was), but it would also be unconstitutionally overbroad even when implemented just as a school administrative regulation. The school might have considerable constitutional authority to restrict such speech if the specific statements pose a substantial risk of materially disrupting the school,¹ especially when the speech takes place on-campus. But it can't just categorically ban such speech because it is intended to "cause substantial emotional distress" and it "support[s] severe, repeated, and hostile behavior."

Other "anti-bullying" laws suffer from similar problems. *See, e.g.*, ARK. STAT. § 5-71-217, enacted by <http://www.arkleg.state.ar.us/assembly/2011/2011R/Pages/BillInformation.aspx?measureno=SB214>. School districts should avoid implementing rules that are this vague and this broad.

2. **"Harassment."** Banning "harassment," or speech that creates a "hostile or offensive environment," is likewise likely to violate the First Amendment, for reasons given by then-Judge (now Justice) Samuel Alito in *Saxe v. State College Area School Dist.*²

a. **No "harassment" exception to the First Amendment.** To begin with, as Judge Alito noted, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause."³ "[T]he free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs. When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications. 'Where pure expression is involved,' anti-discrimination law 'steers into the territory of the First Amendment.' *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir.1995)." "[W]hen anti-discrimination laws are 'applied to ... harassment claims founded solely on verbal insults, pictorial or literary matter, the statute[s] impose[] content-based, viewpoint-discriminatory restrictions on speech."

"Loosely worded anti-harassment laws ... may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint. Although the Supreme Court has written extensively on the scope of workplace harassment, it has never squarely addressed whether harassment, when it takes the form of pure speech, is exempt from First Amendment protection." Past precedent, including the Supreme Court's decision in *R.A.V. v. City of St. Paul*,⁴ "does not necessarily mean that anti-discrimination laws [including anti-harassment rules] are categorically immune from First Amendment challenge when they are applied to prohibit speech solely on the basis of its expressive content. 'Harassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emo-

¹ *See Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969).

² 240 F.3d 200 (3d Cir. 2001).

³ *See also Rodriguez v. Maricopa County Community College Dist.*, 605 F.3d 703 (9th Cir. 2010) (agreeing with *Saxe* on this score).

⁴ 505 U.S. 377 (1992).

tions that nevertheless implicate First Amendment protections.” And, more broadly, as Judge Alito noted, past precedent does hold that the First Amendment protects even offensive speech.

b. *Tinker v. Des Moines Independent School District*⁵ does not justify broad bans on “harassment” or speech that creates a “hostile or offensive environment.”

Judge Alito also noted that even in K-12 schools, where the government has extra power to restrict disruptive speech (under the *Tinker* decision), speech may not be broadly banned simply because it’s labeled “harassment” or the creation of a “hostile or offensive educational environment.” While bans on speech that “substantially interfere[s] with a student’s educational performance” “may satisfy the *Tinker* standard” (at least when applied only to on-campus speech), not all speech that can be said to create a “hostile environment” necessarily qualifies.⁶

This is especially so, I think, given how vague terms such as “hostile or offensive environment” are. A policy that threatens students with disciplinary action for such speech is likely to deter a good deal of speech that speakers think *might* be found by the administration to create a “hostile or offensive environment,” and not just speech that is indeed ultimately found (after protracted litigation) to actually create a hostile or offensive environment. Vague rules lead speakers “to ‘steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.’”⁷

c. There are special constitutional difficulties in policies that restrict off-campus speech. Judge Alito also noted that the policy in *Saxe* “could even be read to cover conduct occurring outside of school premises.” Such a reading, he said, “would raise additional constitutional questions,” because (quoting an earlier Seventh Circuit case), “school officials’ authority over off-campus expression is much more limited than it is over expression on school grounds.”

It’s true that off-campus speech could cause on-campus disruption, and that off-campus Web sites can increasingly be seen at school, whether on library computers or on students’ cell-phones and iPads. And it’s easy to sympathize with school officials’ desire to prevent disruption caused by speech, including off-campus speech. But restrictions on on-campus speech can at least be defended on the grounds that the students remain free to speak elsewhere. Restrictions that apply to all speech that could cause trouble at school flatly ban all such speech by students, and leave no alternative channels for the students to speak.

⁵ 393 U.S. 503 (1969).

⁶ See also *Zamecnik v. Indian Prairie School Dist. No. 204*, 2011 WL 692059 (7th Cir. Mar. 1, 2011) (“A particular form of harassment or intimidation can be regulated ... only if ... the speech at issue gives rise to a well-founded fear of disruption or interference with the rights of others.” (quoting *Sypniewski v. Warren Hills Regional Bd. of Education*, 307 F.3d 243 (3d Cir. 2002)).

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⁷ *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

Thus, for instance, a ban on the display of Confederate flags on-campus—or on harshly anti-Christian statements, or on harsh condemnation of homosexuality—might be necessary to prevent fights, if in fact a particular school district’s recent history suggests that such speech on-campus does indeed disrupt the school environment. Even the ban on anti-war speech in *Tinker* itself would have been constitutional had there been enough evidence of disruption caused by such speech. But it doesn’t follow that a school may discipline a student for displaying a Confederate flag at a political event off-campus (or on his Web page that he maintains off-campus), or harshly criticizing Christianity or homosexuality, or speaking out off-campus against the war or against our soldiers.

d. **The wide range of speech that could be labeled “harassment.”** The dangers of broad bans on “harassment” or speech that creates a “hostile educational environment” are especially clear given the wide range of speech that has been labeled “harassment” by some in the past. In one incident, for instance, San Francisco State University’s College Republicans held an anti-terrorism rally at which they stepped on homemade replicas of Hamas and Hezbollah flags, which contain the word “Allah” in Arabic. Offended students filed charges of “attempts to incite violence and create a hostile environment” and “actions of incivility,” prompting a university “investigation” that lasted five months.⁸

Likewise, an undergraduate at the University of Central Florida was charged with “personal abuse” and “harassment” for engaging in electronic communication “intended to . . . cause severe emotional distress” after calling a candidate for student government “a Jerk and a Fool” on social networking website Facebook.com.⁹ At Grand Valley State University in Michigan, members of the College Republicans were charged with “discrimination” following student complaints after the group held a satirical “affirmative action bake sale” on campus.¹⁰ The university’s Director of Student Life told *The Grand Rapids Press* that “[t]o do something this offensive is not appropriate.”¹¹

A janitor at Indiana University-Purdue University Indianapolis was found guilty of “racial harassment” by the university for reading a book at work called “Notre Dame vs. the Klan: How the Fighting Irish Defeated the Ku Klux Klan.” Though the book praised those who fought the Klan, a coworker was offended by seeing the Klan

⁸ *College Republications at San Francisco State v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

⁹ Foundation for Individual Rights in Education, *University of Central Florida Notification of Charge Against Matthew Walston*, <http://www.thefire.org/article/6858.html> (letter from Office of Student Conduct detailing charges against student for electronic speech); University of Central Florida, *Rules of Conduct*, http://www.osc.sdes.ucf.edu/?id=process_roc (prohibiting “behavior (including written or electronic communication) that could cause severe emotional distress”).

¹⁰ John Leo, *Baking With Fire*, U.S. NEWS & WORLD REPORT, Apr. 18, 2005.

¹¹ Jennifer Ackerman-Haywood & Barton Deiters, *Offended Students Find GOP Bake Sale Tasteless*, GRAND RAPIDS PRESS, Mar. 25, 2005.

imagery on the cover; that sufficed to lead the university to discipline the janitor, until public pressure caused the university to relent.¹²

A Muslim student-employee at William Patterson University was charged with sexual harassment when he responded to a professor's message promoting a film labeled "a lesbian relationship story" with a response opining that homosexuals are "perver[ted]."¹³ The University of Michigan harassment policy, struck down in *Doe v. University of Michigan*,¹⁴ labeled as "harassment" (among other things) a student's saying "[w]omen just aren't as good in this field as men," "students excluding people from parties based on their sexual orientation," "tell[ing] jokes about gay men and lesbians," "sponsor[ing] entertainment that includes a comedian who slurs Hispanics," "display[ing] a confederate flag on the door of your room in the residence hall," "laugh[ing] at a joke about someone in your class who stutters," and "comment[ing] in a derogatory way about a particular person or group's physical appearance or sexual orientation, or their cultural origins, or religious beliefs." And these are just a few of many possible examples of how broadly "harassment" has been defined by some educational institutions.

Some such speech might well be restrictable on a K-12 school campus. For instance, students generally aren't allowed to hold their own rallies on a K-12 school campus, the way they are on a university campus, and some such speech might sometimes be restricted if it's likely to create substantial disruption. But some speech should remain constitutionally protected even on a K-12 campus, unless a risk of substantial disruption is shown: Consider, for instance, students' expressing the views on the relative competence of men and women (whether they think that men are better at something or that women are better at something), students expressing views of certain religions or cultures, students reading books about the Klan, and so on.

Moreover, as Judge Alito suggested, any restrictions on off-campus speech off this sort would pose especially serious constitutional problems—and, in my view, would be unconstitutional—even if the administration argues that they are "severe or pervasive" enough to create an on-campus "hostile or offensive environment." Public high schools may not ban their students from telling jokes, even racist or anti-gay jokes, or expressing views about race relations, religions, cultures, sex roles, homosexuality, or what have you on their weblogs or Facebook pages.

3. The Department of Education "Dear Colleague" letter. In light of this, I think there are some constitutional problems with the approach outlined in the Department of Education "Dear Colleague" letter. Some parts of the letter, such as the call for protecting students against violence and against threats of violence, are constitutionally unobjectionable. (Threats of violence generally fall into a First Amendment exception for "true threats.")

But other parts are likely to create First Amendment problems. For instance, the letter expressly says that "[h]arassment does not have to ... be directed at a specific target, or involve repeated incidents." This means that political or religious state-

¹² AP, *IUPUI Says Sorry to Janitor Scolded over KKK Book*, July 14, 2008.

¹³ See <http://thefire.org/case/682.html>.

¹⁴ 721 F. Supp. 852 (E.D. Mich. 1989).

ments—for instance, statements expressing disapproval of certain religious views, of homosexuality, of illegal immigration from certain countries, and the like—could be treated as “harassment” if they are seen as “severe” enough by an administrator, or if they aren’t even severe but are seen as “pervasive[] or persistent.” Nor does the brief reference in footnote 8 acknowledging that “[s]ome conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression,” and referring to two past letters, suffice to limit the scope of the proposed restrictions, or clarify their vagueness.

The letter also suggests that the school should discipline students even for off-campus conduct, such as for “creating e-mails or Web sites,” or posting insulting material “to social networking sites.” The letter urges restricting such behavior when it involves speech “of a sexual nature” and personal insults. But the letter’s reference to e-mails, Web sites, and social networking sites—which are predominantly created and updated off-campus—suggests more broadly that the Department sees schools’ responsibility as including policing students’ allegedly harmful off-campus speech. In principle, the same analysis would therefore apply to Web sites and social networking posts that contain allegedly racist, anti-religious, or anti-gay speech.

Likewise, consider the example that the letter gives of sexual harassment. Parts of the behavior in this instance can be punished—most obviously the threats, but also the “sexually charged names” said on-campus (which are unprotected under *Bethel School Dist. No. 403 v. Fraser*,¹⁵ discussed in more detail below). But “spreading rumors about her sexual behavior,” in the absence of evidence that the rumors are false, is likely constitutionally protected speech. Such gossip may be unkind, and schools can rightly try to discourage it by urging students to behave better. But especially if it is conducted off-campus, it is the sort of discussion of one’s friends and acquaintances’ lives that is routine in both adult and adolescent life, and that can’t be suppressed through coercive government action.

4. **What schools can do:** Let me stress again that schools have a wide range of constitutionally sound options in dealing with violence, threats, and insults. In particular:

a. Schools can and should **punish violence and vandalism**.

b. Schools can and should **punish threats of violence**, which, as I’ve mentioned, are constitutionally unprotected.¹⁶

c. Schools can and often should **condemn rude and harmful speech**, even if the speech is constitutionally protected. Such condemnation can itself be an important part of education. And there are many possible avenues for such condemnation: public statements by administrators and respected teachers, statements coordinated with influential student groups, and individual meetings with students and their parents. Students need to learn that some statements are not only unkind but, if repeated later on in life, can cost them jobs or even destroy their careers. Explanations that appeal both to people’s decency and their self-interests can often be quite effective.

¹⁵ 478 U.S. 675 (1986).

¹⁶ *Virginia v. Black*, 538 U.S. 343 (2003).

d. Under *Bethel School Dist. No. 403 v. Fraser*, school districts are free to “**prohibit the use of vulgar and offensive terms**” at school.¹⁷ This is not a basis for suppressing speech because it expresses an offensive *viewpoint*.¹⁸ But it does justify schools’ insisting that students express their viewpoints without epithets and vulgarities.

e. *Tinker* and lower court cases that follow it hold that school districts are **free to restrict on-campus statements when there is evidence of a substantial risk that they will materially disrupt school activities**. But there has to be either actual disruption or evidence that the speech will indeed cause material disruption. Such evidence can stem from disruptive incidents triggered by similar speech in the past, either at this school or at similar schools.

Also, as Judge Alito’s *Saxe* opinion points out, it’s not at all clear that schools would have the same latitude in restricting off-campus speech as well. Lower court cases are split on the subject; but it seems to me very likely that political and religious off-campus statements, even ones that cause disruption when the speaker returns to school, can’t be punished. Otherwise, all of students’ speech during their K-12 years would be controlled, not just at school but at home, by school administrators and by the “heckler’s veto” of other students who may act disruptively in reaction to their classmates’ off-campus speech. I doubt that the Supreme Court would accept such an outcome.

f. Schools might also be able to prohibit **unwanted one-to-one communication by one student to another student, when the target has said he doesn’t want to hear more from the speaker**. *Rowan v. United States Post Office Department*¹⁹ held that the government could ban people from sending mail to recipients who have demanded that the mailings stop. By analogy, schools should be able to give students a similar veto power over phone calls, e-mails, targeted instant messages, and face-to-face statements from other students, when all these are said *to the students who demanded that the statements stop*, rather than to other people or to the public at large.

But this exception is limited to one-to-one statements (or perhaps one-to-a-few statements when all the listeners have told the speaker to stop). It can’t be used to justify suppressing speech among willing communicators—even when the speech is offensive to a third party, for instance when it reveals accurate information about a romantic or sexual relationship involving the third party—or speech addressed to the public at large, as on a Web site or T-shirt.

g. Finally, the Supreme Court’s *Davis v. Monroe County Board of Education* decision²⁰ suggests that Title IX (and, by extension, Title VI) does require schools to ban certain forms of harassment. But the Court did not consider the First Amendment is-

¹⁷ 478 U.S. 675 (1986).

¹⁸ See *Saxe* (favorably quoting statements that *Fraser* exception is limited "to the appropriateness of the manner in which the message is conveyed, not of the message's content" and that "*Fraser* speaks to the form and manner of student speech, not its substance. It addresses the mode of expression, not its content or viewpoint.").

¹⁹ 397 U.S. 728 (1970).

²⁰ 526 U.S. 629 (1999).

sues, since the behavior in that case consisted of physical touching and unwanted vulgar sexual references, and it's not clear that its holding would apply in a case based on politically or religiously themed speech.

And beyond that, *Davis* repeatedly held that liability could only be imposed “where the behavior is **so severe, pervasive, and objectively offensive that it denies its victims the equal access to education** that Title IX is designed to protect” (emphasis added). Any harassment policy that might apply to speech, and that relies on Title VI or Title IX as its foundation, must therefore be limited to statements that are severe, pervasive, *and* objectively offensive, and not just “severe, pervasive, or persistent” (emphasis added), as suggested in the Dear Colleague letter.

* * *

It seems to me that schools should be encouraged to craft policies in terms such as these, rather than using terms such as “bullying,” “harassment,” or the creation of a “hostile or offensive environment” through “severe or pervasive” conduct.

Please let me know if I can elaborate further on these statements.

Sincerely Yours,

A handwritten signature in cursive script that reads "Eugene Volokh". The signature is written in black ink and is positioned to the right of the typed name.

Eugene Volokh