FIRE

Foundation for Individual Rights in Education

601 Walnut Street, Suite 510 • Philadelphia, Pennsylvania 19106
T 215-717-3473 • **F** 215-717-3440 • fire@thefire.org • www.thefire.org

MEMORANDUM

TO: UNITED STATES COMMISSION ON CIVIL RIGHTS

FROM: SAMANTHA HARRIS, DIRECTOR OF SPEECH CODE RESEARCH, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION

DATE: May 26, 2011

RE: PEER-TO-PEER VIOLENCE AND BULLYING: EXAMINING THE FEDERAL RESPONSE

The Foundation for Individual Rights in Education (FIRE) unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals from across the political and ideological spectrum on behalf of freedom of speech, due process, and other fundamental rights on America's college campuses. Although FIRE's mission concerns student and faculty rights in higher education, restrictions on free speech and due process in the K–12 setting are of serious concern to FIRE because of their tendency to "trickle up" to colleges and universities. When the free speech rights of K–12 students are eroded, this erosion—in our significant experience—inevitably extends in some way to students at colleges and universities as well. Therefore, despite our focus on higher education, it is of critical importance to FIRE that students' free speech rights be protected across the educational spectrum.

As the Supreme Court of the United States has observed, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). Even in the K–12 setting, students have a right to free speech and expression that must be respected when crafting guidance and legislation to address harassment and bullying in schools.

FIRE appreciates the critical importance of preventing harassment and violence in schools. However, these necessary efforts need not be in tension with students' right to free speech; virtually all of the conduct that schools seek to prohibit as "bullying" is already prohibited by existing university regulations on harassment, stalking, and physical violence. Unfortunately, the loose use of terminology in the

national conversation on this issue and the expanded definition of harassment found in the Department of Education's Office for Civil Rights' (OCR's) October 2010 guidance (mirrored in much of the proposed anti-bullying legislation under consideration around the country) raise First Amendment concerns that must be addressed.

I. OCR's October 2010 Bullying Guidance Fails to Recognize Significant Free Speech Concerns

OCR's October 2010 bullying guidance (2010 Guidance)—as well as much of the proposed anti-bullying legislation under consideration nationwide—does not replicate the speech-protective understanding of student-on-student (or peer) hostile environment harassment contained in previous OCR guidance, including OCR's 2001 Revised Sexual Harassment Guidance (2001 Guidance). As courts have noted, the enforcement of federal civil rights laws (which includes Titles VI, VII, and IX of the Civil Rights Act of 1964) necessarily implicates First Amendment concerns when the alleged discriminatory harassment is comprised of expressive activity. In *DeAngelis v. El Paso Municipal Police Officers Association*, for example, the U.S. Court of Appeals for the Fifth Circuit noted:

> Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.

51 F.3d 591, 596–97 (5th Cir. 1995). Any guidance or legislation regarding federal civil rights laws must be mindful of the constitutional issues raised by their enforcement.

In the 2001 Guidance, OCR emphasized that in determining whether a hostile environment has been created, the severity, pervasiveness, and both objective and subjective impact of the behavior in question must be considered. OCR explicitly noted that its understanding of hostile environment harassment was informed by and consistent with the Supreme Court's decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). In *Davis*, the Court found that schools can be civilly liable under Title IX for harassment when the conduct is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Id.* at 651. Because of the careful balance struck by the Court in enunciating the *Davis* standard, we believe that any new guidance or legislation must—like OCR's 2001 Guidance—explicitly reference or incorporate the *Davis* standard to ensure that students' right to free expression is not inadvertently compromised by schools' efforts to address and eliminate harassment.

This exacting, speech-protective definition ensures an appropriate balance between freedom of expression and the importance of establishing an educational environment free from harassment. Indeed, federal courts have relied on the *Davis* standard when assessing the constitutionality of school anti-harassment policies. In *Saxe v. State College Area School District*, for example, the U.S. Court of Appeals for the Third Circuit found a public school district's anti-harassment policy unconstitutional because, among other things, "the Policy's prohibition extends beyond harassment that **objectively denies a student equal access** to a school's education resources." *Saxe*, 240 F.3d 200, 210 (3d Cir. 2001) (emphasis added). Echoing its holding in *Saxe*, the Third Circuit again recognized the importance of requiring that harassment be objectively offensive in *DeJohn v. Temple University*, 537 F.3d 301, 319 (3d Cir. 2008). In *DeJohn*, the Third Circuit struck down Temple University's former sexual harassment policy on First Amendment grounds, holding that because the policy failed to require that allegedly harassing speech "objectively" create a hostile environment, it provided "no shelter for core protected speech."

Critically, the 2010 Guidance omits any reference to an objective component—a "reasonable person" standard—in the assessment of harassment claims. According to the definition set forth in that guidance, conduct constitutes harassment whenever it is "sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school." The loss of the crucial "reasonable person" standard means that a school's most sensitive students effectively determine what speech is prohibited. The "reasonable person" standard is a critical guard against punishing speech based solely on subjective (and possibly unreasonable) listener reaction—something that courts have repeatedly held unconstitutional over the years.

The second problem with the definition of harassment in the 2010 Guidance is that conduct must only "limit a student's ability to participate in or benefit from a program or activity at an institution of higher education," rather than effectively deny them equal access, as the *Davis* standard requires. This is problematic because "limit" is a broad term that could encompass effects of widely varying severity, setting a far lower bar for conduct that constitutes harassment.

II. Conflating Harassment and Physical Violence with the Undefined Term "Bullying" Threatens Protected Expression

It is also dangerous—in guidance and legislation—to use the term "bullying" in place of more precise terms such as harassment and physical violence. Unlike "harassment" or "intimidation" and other types of unprotected conduct with precise legal definitions, "bullying" is a colloquial term susceptible to a wide variety of definitions and meanings, many of which may implicate free speech concerns. The vast majority of conduct that a school or university would legitimately wish to prohibit as bullying is already prohibited under existing policies on harassment and

physical violence, and these policies could be amended (for example, to add additional protected classes) without introducing new and amorphous terminology into the policies.

Many of the definitions of bullying in existing school anti-bullying policies highlight the free speech concerns raised by the use of the term. For example, the Warwick School District in Lititz, Pennsylvania, defines "bullying" as (among other things) any "verbal conduct" that has the "effect" of "emotionally harming" another student. The Quincy Public Schools in Quincy, Massachusetts define "cyber-bullying" as "[s]ending mean, hurtful or threatening messages or images about another person." The Tulsa Public Schools' anti-bullying policy prohibits

> verbal or physical contact, epithets, slurs, gestures, or graffiti, even in jest, that are targeted toward an individual because of race, color, religion, sex, sexual orientation, age, national origin, marital status, veteran status, disability or genetic information.

That policy also explicitly rejects a "reasonable person" standard, noting:

> Individuals bring different levels of sensitivity to interaction. What may seem harmless, trivial, or "all in good fun" to one person may be extremely offensive to the person to whom the comments or actions are directed.

All of these existing policies, and many others, raise serious First Amendment concerns. The federal government's current, intense focus on "bullying" prevention, without clear guidance as to the First Amendment constraints under which schools operate when adopting such policies, is almost certain to lead to a large number of new policies that violate students' free speech rights.

III. Any New Guidance or Legislation Should Clearly Distinguish Between the K–12 Setting and Higher Education

Although the May 13 briefing specifically concerned harassment and bullying in the K–12 setting, restrictions on speech and expression imposed in the K–12 setting frequently "trickle up" to the collegiate setting. *See, e.g.*, *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (applying the U.S. Supreme Court's decision in *Hazelwood v. Kuhlmeier*, limiting expressive rights of high school students and teachers, to college media). When discussing the intersection between students' free speech rights and their rights under federal civil rights laws, it is therefore necessary that one take proper note of the important and substantive differences between the protections afforded to student speech in the K–12 context and the more robust protections afforded in the higher education setting. Students at public colleges and universities enjoy the full protection of the First Amendment. As the quintessential "marketplace of ideas," the college campus should always be open to dialogue and the free exchange of ideas, even when those ideas are in the minority or are found by some to be inconvenient, offensive, or uncomfortable. By

contrast, officials in elementary and secondary schools have greater authority to regulate the expression and conduct of their charges. Students in these settings enjoy a comparatively lesser right to express themselves freely. (For a detailed discussion of these differences, I urge you to review the United States Court of Appeals for the Third Circuit's recent decision in *McCauley v. University of the Virgin Islands*, 618 F.3d 232, 242–47 (3d Cir. 2010).) Any discussion of the ways in which schools can address issues of peer harassment and bullying without infringing upon their students' free speech rights must be cognizant of these differences.

IV. Conclusion

Schools' efforts to curb harassment and violence need not conflict with students' free speech rights. Indeed, virtually all of the examples of bullying and harassment discussed in the briefing undoubtedly rise to the level of actionable peer-on-peer hostile environment harassment that the Supreme Court has determined to be constitutionally unprotected: these examples describe behavior that is "so severe, pervasive, and objectively offensive ... that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999). But it is FIRE's experience that unless federal guidance and legislation are absolutely clear that constitutionally protected expression cannot serve as the basis for liability under federal civil rights laws, schools will, in their efforts to shield themselves from liability, enact policies that severely restrict the free speech rights of their students.