



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

October 4, 2019

Chair Catherine E. Lhamon
U.S. Commission on Civil Rights
1331 Pennsylvania Ave., NW, Suite 1150
Washington, DC 20425

Dear Chair Lhamon:

Thank you for the opportunity to review the U.S. Commission on Civil Rights' (USCCR) draft report entitled *Freedom from Sexual Harassment, the Department of Education, and Free Speech on Campus* ("Report"). As you know, the report focuses heavily on the U.S. Department of Education's Office for Civil Rights (OCR). I was pleased to testify at the USCCR's 2014 briefing on this topic, and I appreciate that the Commission is focusing on these critical issues. OCR is committed to vigorous enforcement of the federal civil rights laws under its jurisdiction in a manner consistent with the U.S. Constitution. I write because the Report misrepresented my views and OCR's policies regarding the First Amendment to the U.S. Constitution, as applied to sexual harassment law.

My views on this issue are reflected in OCR's 2003 Dear Colleague Letter, entitled *First Amendment*, which states that "OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment." OCR's 2017 Questions & Answers on Campus Sexual Misconduct rightly reiterated that "[i]n regulating the conduct of students and faculty to prevent or redress discrimination, schools must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech."

During my current tenure, OCR has again emphasized that the First Amendment can apply in the context of sexual harassment claims. As Assistant Secretary, I authorized revisions to OCR's Case Processing Manual to emphasize that OCR will not interpret any law or regulation to impinge on First Amendment rights or to require schools to encroach on such rights.

As the Report references, the First Amendment's protections for speech can arise in the context of assessing sexual harassment allegations, requiring appropriate consideration of the facts and context. To take an example cited in your report, the First Amendment would generally shield a university professor from federal inquiry regarding her publications about university grievance procedures.

I trust that the final version of your Report will correct the mischaracterization of these issues, as well as the other errors that we have pointed out. Protecting the civil rights of all students in a manner consistent with the First Amendment is central to OCR's enforcement activities. Also, I request that you include this letter with your published Report.

Sincerely,

Kenneth L. Marcus
Assistant Secretary for Civil Rights

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