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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

November 14, 2013

Mr. Greg Lukianoff
President
Foundation for Individual Rights in Education
601 Walnut Street, Suite 510
Philadelphia, Pennsylvania 19106

Dear Mr. Lukianoff:

Thank you for your letter of September 12. I appreciate your warm words of congratulations and I also appreciate your raising concerns about some recent statements from the Office for Civil Rights (OCR).

Like you, I believe that “our nation’s colleges and universities must meet their moral and legal obligation to respond promptly, fairly, and effectively to allegations of sexual misconduct.” (Letter from Greg Lukianoff, September 12, 2013 (“Letter”) at 1). I also share your conviction that the bedrock constitutional rights of freedom of expression and due process must be respected on campus as well as everywhere else.

I firmly believe OCR is – through both our policy and our enforcement work – making a critical contribution to redressing the unfortunate prevalence of sexual violence and other sexual misconduct on our campuses today. I am pleased that OCR’s work has been fully respectful of freedom of expression and due process, and I commit that under my leadership OCR will continue to fully respect freedom of expression and due process while enforcing Title IX regarding campus sexual violence.

Letters sent by Acting Assistant Secretary Seth Galanter to FIRE on July 29, 2013 and August 23, 2013 speak to most of the specific concerns your most recent letter raised, so I do not rehash them here. Regarding the definition of a hostile environment articulated in *Davis v. Monroe*, 526 U.S. 629 (1999), I refer you to OCR’s Revised Sexual Harassment Guidance of 2001 at pages v-vi, where we explained that the *Davis* definition is consistent with the definition that we give in our guidance.

In discussing your due process concerns, you object to what you describe as “provisions in the University of Montana agreement allowing for university disciplinary action, prior to the

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completion of an investigation and hearing, against a student or faculty member accused of sexual harassment.” (Letter at 16.) The Agreement with the University of Montana of May 9, 2013 (the “Agreement”) did not bestow any new disciplinary powers on the University of Montana. The Letter of Findings in that case did, however, address the fact that there may be limited circumstances in which the University of Montana could legally choose to take disciplinary action with respect to the accused prior to the completion of its adjudicative process. See Letter of Findings to the University of Montana, May 9, 2013 (“Letter of Findings”) at 6, 17. Like any public university, the University must abide by constitutional due process standards in determining when this or any other discipline is appropriate. These standards, as set forth by the Supreme Court, allow for the immediate removal from school of “[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process,” with the “necessary notice and rudimentary hearing” following “as soon as practicable.” (*Goss v. Lopez*, 419 U.S. 565, 582-83 (1975)). The Agreement also makes clear that the imposition of interim disciplinary actions, when warranted and appropriate, would not dispose of the need to undertake “an adequate, reliable, prompt, and impartial investigation.” (Agreement ¶ II.A.8). Thus, the Letter of Findings and the Agreement do not mandate that the University of Montana use discipline prior to the completion of its adjudicative process; rather, they recognize that the University of Montana may constitutionally do so, and require that it ensure that any such action be taken “consistently and effectively” in “appropriate” circumstances. (Letter of Findings at 17). It is also important to note that the Agreement in the Montana case represents the resolution of that particular case and not OCR or DOJ policy.

Given the extensive written dialogue that has already occurred between your organization and OCR on these matters, I do not think a meeting to further discuss them would be useful. You have stated your views thoughtfully and thoroughly, and I appreciate your sharing them with us.

Sincerely,



Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education