NCAC Backgrounder:

The First Amendment and School Policies on Harassment and Bullying

Introduction

The problem of school bullying and harassment is a serious issue that deserves national attention. The questions that do arise concern the approach to be taken, not the mission itself. There is little doubt of the need to prevent bullying and harassment in schools, especially when the targets are young and vulnerable, which is true, for example, of many LGBTQ high school students.

NCAC fully supports the efforts of schools officials to prevent such behavior through educational programs, counseling, parental involvement, and other means. We are, however, concerned about punitive measures that penalize pure speech, and about the use of laws prohibiting discrimination on the basis of race, sex, national origin, and disability. These approaches may not be the most effective way to address the issue, and have the potential to undermine other rights that are essential to advance the cause of equality.

Some federal and state efforts stretch the definition of harassment to encompass protected speech and threaten the delicate balance the Supreme Court has struck between the right to equality and the First Amendment right to free speech. This is likely to create confusion and avoidable litigation, with potentially deleterious effects for civil rights law, First Amendment jurisprudence, and the students it seeks to benefit.

Approaches that threaten free speech rights endanger the cause of equality as much as free speech. The civil rights movement, and every other movement to expand equality rights, has succeeded precisely because advocates vigorously exercised their First Amendment rights to protest, demonstrate, petition government, and speak freely, even to those to whom their message was unpopular, controversial, and often deeply offensive. To undermine that critical right is to put at risk the very equality goals anti-harassment regulations seek to enforce.

The following comments briefly sketch out hostile environment/harassment law, the history of regulatory activity on the subject, as well as First Amendment principles and leading court opinions. Together these materials suggest that it is not only possible but legally mandated for public institutions to recognize both students' right to free speech and their right to an educational environment free of invidious discrimination.

Legal Precedents: Hostile Environment

The Supreme Court has addressed the issue of discrimination resulting from harassment or a hostile environment on numerous occasions. The most is most fully developed in cases involving federal laws prohibiting discrimination in employment and education.

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), a case involving unwanted sexual advances of a supervisor toward a female employee, was the Court's first major pronouncement on the issue. The Court held that for "sexual harassment to be actionable [under federal employment discrimination law] it must be sufficiently severe or pervasive 'to alter the conditions of the [the victim's] employment and create an abusive working environment.'" *Id.* at 67. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993), another employment discrimination case alleging repeated, targeted and egregious forms of verbal harassment, reaffirmed the Court's approach in *Meritor,* but noted that offensive language alone is ordinarily insufficient to make out a hostile environment claim. Rather, "whether an environment is 'hostile' or 'abusive' can be determined only by looking at …the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id*. at 23. *See also Clark County School District v. Breeden*, 532 U.S. 268, 271 (2001) ("simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to" harassment), and *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

Cases asserting hostile environment harassment in education modified the approach taken in Title VII cases in significant ways. In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), a case alleging peer-to-peer harassment, the Court held that the school must have *actual knowledge* of harassment to which it is *deliberately indifferent*, and that the harassment must be so "severe, pervasive, *and objectively offensive,* that it effectively bars the victims's access to an educational opportunity or benefit." *Id*. at 633 (emphasis added). The opinion thus requires stronger evidence of the deleterious effects on individuals and explicitly requires that the harassment be judged by an objective standard that meets all three criteria ("severe, pervasive, *and* objectively offensive").

The Court further held that the "harassment must occur 'under' 'the operations of'" the school and "must take place in a context subject to the school district's control." *Id*. at 645. In observing that "harassment depends on a constellation of surrounding circumstances, expectations, and relationships," the Court noted that "schoolchildren may regularly interact in ways that would be unacceptable among adults." *Id*. at 675, 651. See also *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).

As other federal courts have recognized, the Supreme Court's decisions in this area have been carefully drawn to avoid potential conflicts with First Amendment rights. "There is of course no question that non-expressive, physically harassing *conduct* is entirely outside the ambit of the free speech clause…..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.'" *Saxe v. State College Area School District*, 240 F.3d 200, 206(3d Cir. 2001)(citation omitted).

The Office for Civil Rights (OCR) of the U.S. Department of Education has elaborated on these and other court cases in a series of statements on the meaning of hostile

environment sexual harassment issued as guidance for schools receiving federal funding. Its 1997 Guidance, issued after the *Meritor* and *Harris* decisions but prior to the Supreme Court decision in *Davis,* sstates: "Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors and other verbal, nonverbal or physical conduct of a sexual nature) … that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile of abusive educational environment." 62 Fed. Reg, 12033, 12038 (3/13/1997).

The Guidance goes on to state that "if the alleged harassment involves issues of speech or expression, a school's obligations may be affected by the application of First Amendment principles." *Id*. This point is emphasized later in the Guidance: "Title IX is intended to protect students from sex discrimination, not to regulate the content of speech….[T]he offensiveness of a particular expression …is not a legally sufficient basis to establish a sexually hostile environment ….[W]hile the First Amendment may prohibit the school from restricting the right of students to express opinions about one sex that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard." *Id*. at 12045-46. A Revised Sexual Harassment Guidance issued on Jan. 19, 2001, adds that schools "must formulate, interpret, and apply its rules so as to protect academic freedom and free speech." http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

OCR spelled the principle out in greater detail in a letter to school officials dated July 28, 2003:

> OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution. The OCR has consistently maintained that the statutes that it enforces are intended to protect students from invidious discrimination, not to regulate the content of speech….[Harassment] must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program…. OCR interprets its regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles. http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

More recently, in a letter to educators dated October 2010, OCR took a markedly different approach, defining harassment as follows:

> Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to be directed at a specific target, or involve repeated incidents. Harassment

> creates a hostile environment when the conduct 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.
> http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html

This definition, developed well after the decision in *Davis,* departs in significant ways from both Supreme Court language and prior statements issued by OCR. First, the definition of harassment in *Davis* requires that the conduct is "severe, pervasive, *and* objectively offensive," and that it "so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities."

In contrast, the Letter merely requires the conduct to be "severe, pervasive, *or* persistent," leaving out the "objectively offensive" requirement, and indicating that any one of these will suffice to make a claim of hostile environment. Second, *Davis* states that harassing conduct must "undermine[s] and detract[s] from the victims' education experience [effectively denying them] equal access…." The Letter only requires that the conduct "interfere with *or* limit a student's ability to participate in or benefit from" the educational program. (Emphasis added.) The term "interfere with" is so open-ended as to include innocuous comments that are clearly protected speech, and makes the response of the hearer the critical issue, ignoring the requirement in *Davis* that the speech be "objectively offensive."

In addition, the statement that harassment may consist of "verbal acts and name-calling … that may be harmful or humiliating" could encompass precisely the kind of language that the Supreme Court has said is *not* harassment: "simple teasing, offhand comments, and isolated incidents (unless extremely serious)," *Clark*, 532 U.S. at 271 (citations omitted), or "mere utterance of an …epithet which engenders offensive feelings." *Meritor*, 477 U.S. at 67.

The Letter also states that a "school is responsible for addressing allegedly harassing incidents about which it knows or *reasonably should have known*." (Footnote omitted, emphasis added.) However, statement is contradicted both by the terms of federal law and Supreme Court opinions. The law requires that schools charged with a discriminatory harassment receive notice and an opportunity to correct the problem voluntarily. Thus, OCR may not limit or deny federal funding "until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 20 U.S.C. §1682. The Supreme Court has likewise made it clear that a Title IX action for damages requires proof that the school was "deliberately indifferent to sexual harassment, of which [it had] actual knowledge." *Davis*, 526 U.S. at 650.

Moreover, the recent OCR letter suggests that schools have an obligation to prevent harassing conduct through use of cell phones and the Internet, which introduces other obvious First Amendment speech and privacy problems. First, the Supreme Court in

Davis held that "the harassment must take place in a context subject to the school district's control," i*d.* at 660, but it is unclear whether school officials have any authority over private speech taking place off school property.

More important, the examples provided by OCR demonstrate the risk that schools implementing OCR's suggestions may well find themselves infringing on First Amendment rights. For example, the Letter refers to "overtly racist behavior (*e.g.* racial slurs)" as a component of racial harassment. However, students routinely use racially charged language, and even call each other by words that in another context might be construed as a "racial slurs." Some students might consider this evidence of a "racially hostile environment," but many would see it as an idiom widely accepted in certain situations.

The section on sexual harassment includes "making sexual comments, jokes or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating email or Web sites of a sexual nature." It is common, and even normal, for teenagers to joke about sex, to share stories and images, and to report rumors. Some may find this offensive, hurtful, and objectionable, but that does not mean the expression loses First Amendment protection, or that the behavior amounts to bullying or harassment.

While the examples provided by OCR involve complex fact patterns of which the quoted language is only part, singling out protected speech as a significant element of harassment is misleading and may well lead to schools unnecessary and inappropriate restrictions on student expression.

Students' First Amendment rights.

While school officials have considerable authority to regulate student speech in school, they do not have license to disregard the free speech rights of students. Speech codes in the college and university setting have routinely been struck down. See*, e.g., DeJong v. Temple University*, 537 F.3d 301 (3d Cir. 2008). Even in the high school setting, efforts to proscribe the kind of speech outlined in the Letter have been subjected to searching inquiry, and frequently found in violation of the First Amendment.

The decision in *Saxe v. State College Area School District*, 240 F. 3d 200 (3d Cir. 2001), is particularly instructive. The case involved a First Amendment challenge to an anti-harassment code which read, in pertinent part:

> Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.

> Harassment can include any unwelcome verbal, written or physical conduct which offends, denigrates, or belittles an individual…. Such conduct includes but is not limited to unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures…or the display or circulation of written material or pictures. *Id*. at 202-203.

The school argued that harassment "as defined by federal and state anti-discrimination statutes, is not entitled to First Amendment protection." *Id.* at 204. Then- Judge Alito, writing for the court, rejected this claim: "There is no categorical 'harassment exception' to the First Amendment's free speech clause. Moreover, the … policy prohibits a substantial amount of speech that would not constitute actionable harassment under either federal or state law." *Id.* He went on to note that "there is also no question that the 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." *Id.* at 206. The test for limiting such speech is whether or not it is likely to substantially disrupt the educational program. The court concluded that although there is "a compelling interest in promoting an educational environment that is safe and conducive to learning, [the school] fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under the Policy." *Id.* at 217. The unmistakable message is that if a school were to adopt rules implicitly required by the OCR's October 2010 letter, it could well be subject to suit for infringing students' free speech rights.

A more recent opinion, authored by Judge Posner of the Seventh Circuit, struck down a school policy prohibiting "negative comments" about homosexuality, stating that "a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality." *Zamecnik v. Indian Prairie School Dist. #204,* 636 F.3d 874, 876 (7th Cir. 2011). Without evidence that the school had "a reasonable belief that it faced a threat of substantial disruption," the speech restriction could not be justified. Such disruption cannot result from the response of the listeners: "retaliatory conduct by persons offended" by the speech in question does not provide grounds for suppressing the speech; otherwise, "free speech could be stifled by the speaker's opponents…."

If suppressing speech in the school setting raises constitutional questions, even more concerns exist with regard to efforts to regulate speech outside the school setting. While law on this issue is not yet well established, the Third Circuit issued a cautionary warning in a pair of recent decisions holding that disciplining students for off-campus, online speech violated the students' free speech rights. See, *Blue Mountain School District v. J.S.,* 630 F.3d 915 (3rd Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (Jan. 17, 2012) (finding that it was not "reasonably foreseeable that [the student's] speech would create a substantial disruption.") That court went even further in *Layshock v. Hermitage School Dist.*, 650 F.3d 205, 216 (3rd Cir. 2011): "It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."

Conclusion

Efforts to prevent bullying and harassment are critical, but the existence of one problem does not provide license to ride roughshod over students' constitutional rights. The protection of students can – and must – be achieved without infringing the very rights we teach our children are the basis of our democracy. OCR got it right in 1997: "while the First Amendment may prohibit the school from restricting the right of students to express opinions … that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard." The harms inflicted by bullying and harassment are matters that can and should be taught in school; school officials already have informal and formal means of enforcing appropriate codes of conduct in school. Encouraging school officials to disregard their First Amendment obligations and the need to maintain schools as an environment for exploring opinions and ideas – even upsetting and offensive ones - will only create confusion, instigate litigation, and generally interfere with the ability of educators to do their job.

Efforts to prevent bullying and harassment can instead focus on positive educational and support programs, which are likely to be more successful in the long run than punitive approaches and will not exact the high price of restricting students' other fundamental rights.

"Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and … inflict great pain…. [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 562 U.S. ___, ___ (2011). http://www.supremecourt.gov/opinions/10pdf/09-751.pdf.

Even hateful speech can provide "teachable moments." Students need all the instruction and guidance schools can give them to deal with these most sensitive and challenging issues, which they encounter both in and out of school.

NCAC Backgrounder

Hate Speech in Schools

One of the thorniest issues in recent years has been the question of restricting "hate speech" in schools. Schools must provide access to education on a non-discriminatory basis, prevent harassment that interferes with their educational mission, and socialize students to live and work in a diverse community – and they must do all these things while recognizing that the right of free speech sometimes means the right to say things that are offensive to others.

Discrimination in education is addressed, at the federal level, by Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. These laws impose on public schools the responsibility to insure that educational opportunities are provided on a non-discriminatory basis.

To rise to the level of discrimination, objectionable speech must create a "hostile environment." Under Supreme Court decisions, discrimination occurs only when harassment is so severe, persistent, amd pervasive that it creates a hostile or abusive educational environment and adversely affects a student's ability to benefit from an education program. Age and maturity of students is also relevant. The Department of Education (DOE) Office of Civil Rights, for example, explains that "a kiss on the cheek by a first grader does not constitute sexual harassment."

"A comment by one student to another that she has a nice figure [or] a request for a date…even if unwelcome" does not constitute harassment. Federal law makes it clear that "Title IX is intended to protect students from … discrimination, not to regulate the content of speech…. [O]ffensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a … hostile environment." Under current Supreme Court standards, the "mere utterance of an ethnic or racial epithet which engenders offensive feelings" is not sufficient to make a hostile environment claim.

Notwithstanding these guidelines, many schools penalize and suppress speech because it might be offensive to others. On the one hand, this is understandable, as schools strive to socialize students and prepare them to live in a democratic diverse community. However, these policies can go too far. Suppressing speech and ideas, by imposing a political orthodoxy, destroys candor, hampers students in working through their own ideas and disagreements, and undermines the ability of students to understand one another. In addition, it can impede the educational program.

When school policies suppress campus speech because it might be offensive, parents and students will likely fail to understand why they should read books with "offensive" language. Ironically, African-American authors, such as James Baldwin, Claude Brown, Maya Angelou, Alice Walker, Toni Morrison, Malcolm X, Richard Wright, and others, are most often challenged on grounds that they *might* give offense. And if derogatory

speech can be suppressed, why not news stories, cartoons, poems, and other material dealing with issues of race, ethnicity, gender, or other sensitive topics.

Eliminating discrimination in education is of the highest priority. Accomplishing this without creating an educational culture repressive of speech and ideas – including those that are sometimes objectionable – is obviously one of the public schools' most delicate, and important, tasks. Schools that have tried to avoid claims of harassment and discrimination by suppressing "offensive" speech have sometimes found the approach divisive, counterproductive, and expensive, in the case of First Amendment challenges. Schools may be better off doing what they do best – focusing on education, teaching about the First Amendment, discrimination, and the tools of civil dialogue.