ALLIANCE DEFENDING
FREEDOM
FOR FAITH. FOR JUSTICE.

June 13, 2013

VIA U.S. MAIL & FACSIMILE (406) 243-2797

President Royce C. Engstrom
Office of the President
University Hall 109
University of Montana
Missoula, Montana 59812

Re: Protecting Students' Constitutional Rights in Light of the Resolution Agreement Between the University of Montana and the U.S. Departments of Justice and Education

Dear President Engstrom:

We represent a broad coalition of religious, conservative, and independent student and faculty organizations on public university campuses nationwide. Our organizations write to express our serious concern about the Resolution Agreement and Letter of Findings (collectively, the "Agreement") entered into by the University of Montana (UM), the U.S. Department of Justice (DOJ), and the U.S. Department of Education (DOE) regarding the handling of sexual assault and harassment cases on the Missoula campus. We stand against sexual assault and harassment on campus, and our student and faculty members are those who are least likely to commit sexual assault or harass people. But our groups also have a particular concern with protecting freedom of speech on campus, because we are often discriminatorily denied the right to speak freely.

The Agreement requires UM to enact an overbroad and vague anti-harassment policy that will violate the constitutional rights of students. The harassment definitions and disciplinary procedures are the focus of our letter. While public universities must protect students from sexual assault and harassment, the Agreement ignores binding precedent defining harassment and restricts too much protected speech and academic freedom. We urge you to proceed carefully in drafting your new harassment policies, lest you expose UM to legal liability for violating students' rights.

I. Broad Harassment Policies at Public Universities, Like the One Mandated by the Agreement, Violate the Constitution.

There "is no categorical 'harassment exception' to the First Amendment's Free Speech Clause." *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.)). "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010). In fact, from "1791 to the present, . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations." *Id.* at 1584 (internal quotation marks and citations omitted). Thus, speech is protected, unless it constitutes obscenity, incitement, or fighting words. *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2733 (2011).

Despite these guarantees, our coalition knows all too well that for more than twenty years, public universities have attempted to regulate student and faculty speech through unconstitutional speech codes.[1] A speech code is the common term for public college regulations that prohibit speech the Constitution protects. Designed to broadly prohibit so-called "offensive" or "harassing" communications, these codes have chilled free speech at campuses from coast to coast. Facially vague and overbroad, they deter untold thousands of students and faculty at public universities from speaking freely on critical issues of race, gender, sexuality, and religion. Arbitrarily enforced, they tend to become weapons of the dominant political culture, wielded against dissenters in an effort to replace the "marketplace of ideas" with an ideological monopoly.

From the inception of speech codes at public universities in the 1980s, courts have uniformly rejected them, both facially and as-applied. See *See McCauley v. Univ. of V.I.*, 618 F.3d 232 (3d Cir. 2010) (holding unconstitutional student conduct code that was applied to student alleged to have harassed another student who accused his friend of rape); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (enjoining sexual harassment policy); *Saxe*, 240 F.3d 200 (striking down overbroad antiharassment regulations in Pennsylvania public high school); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996) (finding college sexual harassment policy vague as-applied to professor's speech); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (holding discriminatory harassment policy unconstitutionally vague); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (holding public university violated the First Amendment when it punished students for creating a hostile educational environment after they conducted an "ugly woman contest"); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining student conduct code that mandated civility); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004) (enjoining overbroad university speech code that prohibited "threats,

[1] *See, e.g.*, Azhar Majeed, *Defying the Constitution The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481, 486 (2009).

insults, epithets, ridicule, or personal attacks" by students); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of overbroad "cultural diversity and racism" policy statement); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (ruling that policy prohibiting discriminatory epithets was overbroad and vague); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining overbroad and vague discrimination and harassment speech code); *Booher v. Bd. of Regents, N. Kentucky Univ.*, No. 96-135, 1998 U.S. Dist. LEXIS 11404, at *1 (E.D. Ky. July 22, 1998) (finding Northern Kentucky University's "sexual harassment policy facially invalid under the First Amendment due to vagueness and overbreadth"); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip opinion) (finding private university's speech policies unconstitutionally overbroad under California's Leonard Law).

Put simply, "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180 (1972). But the terms of the Agreement mandate such a broad and vague definition of "harassment" that it suffers from the same constitutional defects as the speech code cases reported above.

II. The Harassment Policy Mandated by the Agreement Is Unconstitutionally Overbroad.

The "First Amendment needs breathing space and [policies] attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). "A regulation of speech may be struck down on its face if its prohibitions are sufficiently overbroad – that is, if it reaches too much expression that is protected by the Constitution." *DeJohn*, 537 F.3d at 314.

The Agreement requires UM to create a new policy that "broadly define[s]" sexual harassment as "*any* unwelcome conduct of a sexual nature,"[2] which "can include . . . other verbal . . . conduct."[3] These operative terms are substantially overbroad and encompass speech and behavior that is perfectly legal and innocuous. Courts around the country have struck down similar policies.

For example, in *DeJohn v. Temple University*, the Third Circuit struck down a sexual harassment policy that prohibited "all forms of sexual harassment" including "expressive" and "visual" conduct. 537 F.3d at 305. The court found the policy overbroad and subjective because it "could conceivably be applied to cover any speech" "the content of which offends someone." *Id.* at 317. "This could include 'core' political and religious speech, such as gender politics and sexual morality." *Id.*

---

[2] Letter from Anurima Bhargava, U.S. Dep't of Justice, et al., to Royce Engstrom, President of Univ. of Mont., et al. (May 9, 2013), at 8, *available at* http://www.justice.gov/crt/about/edu/documents/montanaletter.pdf (emphasis added).
[3] *Id.* at 4.

Building on this precedent, the Third Circuit later struck down portions of a university student code of conduct that were used to punish a student for his alleged harassment of an individual who accused his friend of rape. *McCauley*, 618 F.3d 232. The university charged the student with committing an act that "injures, frightens, demeans, degrades or disgraces any person," including sexual harassment. *Id.* at 237. The Third Circuit noted the lower court properly found this policy overbroad, and also enjoined enforcement of other student code provisions that banned speech which causes "offensive" or "emotional distress." *Id.* at 247-52.

Similarly, in *Dambrot v. Central Michigan University*, the Sixth Circuit held that a university's discriminatory harassment policy, which prohibited "any intentional, [or] unintentional" "verbal, or nonverbal behavior," was substantially overbroad. 55 F.3d at 1182. The court called the policy's language "sweeping" and "seemingly drafted to include as much and as many types of conduct as possible." *Id.* The Agreement is similar in its requirement that UM "broadly define" sexual harassment as "any unwelcome conduct."

Finally, in *Doe v. University of Michigan*, a federal district court ruled that a discriminatory harassment policy that banned "any behavior, verbal or physical" that "creates an intimidating, hostile or demeaning environment for educational pursuits" was unconstitutionally overbroad. 721 F. Supp. at 856. The fact that administrators "saw no First Amendment problem" with investigating students for innocuous violations of the policy demonstrated the policy's overbreadth. *Id.* at 865.

While the Agreement's harassment standard is derived from the Title IX administrative enforcement standard and the Title IV injunctive standard,[4] that does not render it constitutional. *See, e.g., UWM Post*, 774 F. Supp. at 1177 ("Since Title VII is only a statute, it cannot supersede the requirements of the First Amendment."); *Booher*, 1998 U.S. Dist. LEXIS 11404, at *22 (finding the same with respect to Title IX). The Agreement's ban on "any unwelcome conduct," including "verbal conduct," is unconstitutional because, as the Supreme Court has reiterated, "much political and religious speech might be perceived as offensive to some," *Morse v. Frederick*, 551 U.S. 393, 409 (2007), but it is still protected speech.

The Agreement also requires UM to eschew a reasonableness standard in the new sexual harassment policy. In fact, it criticizes UM's former policy for "improperly suggest[ing] that the conduct does not constitute sexual harassment unless it is objectively offensive."[5] According to DOJ and DOE, objectivity is "not the standard to determine whether conduct was" sexual harassment. But the Departments' assertions do not accurately reflect the various courts' decisions to the contrary. In *DeJohn*, the Third Circuit held that a

---

[4] *Id.* at 9.
[5] *Id.*

much narrower sexual harassment policy than the one proposed by the Agreement was unconstitutional even though it contained an "objective" standard, because it "does not necessarily follow that speech which effects an unreasonable interference with an individual's work justifies restricting another's First Amendment freedoms." 537 F.3d at 319. While a university has a compelling interest in preventing actual harassment, "unless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core protected speech." *Id.* at 319-20. Thus, a harassment policy lacking an objective standard for evaluation of the speech and conduct will violate students' rights.

Even more troubling, DOJ and DOE instruct UM to exclude a severity and pervasiveness standard in the new policy. The Agreement condemns UM's former policy because it "incorrectly implies that sexual harassment must be both 'severe *and* pervasive' to establish a hostile environment."[6] Instead, DOJ and DOE claim the policy may prohibit only "severe *or* pervasive" harassment.[7] The difference between these standards is the restriction of more protected speech.

According to the Supreme Court, to avoid conflict with other constitutional rights, schools are only responsible for deliberate indifference to sexual harassment, of which they have actual knowledge, that 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.*" *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (emphasis added). The Court noted, however, that even this standard may be too strict in a college setting. "A university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy, and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims." *Id.* at 649 (citing *id.* at 667-68 (Kennedy, J., dissenting)); *see also McCauley*, 618 F.3d at 242 ("Public university administrators are granted *less leeway* in regulating student speech than are public elementary or high school administrators.") (emphasis in original). The Court's majority was responding to the dissent's valid concern that a less strict standard will restrict protected speech. Indeed,

> a university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment. A number of federal courts have already confronted difficult problems raised by university speech codes designed to deal with peer sexual and racial harassment. *See, e.g., Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (C.A.6 1995) (striking down university discriminatory harassment policy because it was overbroad, vague, and not a valid prohibition on fighting words); *UWM Post, Inc. v. Board of Regents of Univ. of Wis. System*, 774 F. Supp. 1163 (E.D.Wis.1991)

---

[6] *Id.* (emphasis in original).
[7] *Id.* (emphasis in original).

> (striking down university speech code that prohibited, inter alia, "discriminatory comments" directed at an individual that "intentionally ... demean" the "sex ... of the individual" and "[c]reate an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity"); *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D.Mich.1989) (similar); *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (C.A.4 1993) (overturning on First Amendment grounds university's sanctions on a fraternity for conducting an "ugly woman contest" with "racist and sexist" overtones). The difficulties associated with speech codes simply underscore the limited nature of a university's control over student behavior that may be viewed as sexual harassment.

Id. at 667-68 (Kennedy, J., dissenting). While DOJ and DOE may contend their administrative enforcement standards allow a broader definition of harassment, the First Amendment does not. In *DeJohn*, the Third Circuit followed *Davis* and held that "unless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core protected speech." 537 F.3d at 320. The Agreement's rejection of a severe, pervasive, and objectively offensive standard exposes UM to liability for restricting protected speech.

III. The Harassment Policy Mandated by the Agreement Is Unconstitutionally Vague.

A university policy is unconstitutionally vague when persons "of common intelligence must necessarily guess at its meaning." *Broadrick*, 413 U.S. at 607. Vague policies violate the First Amendment in three ways. First, they fail to provide "fair warning" as to what is permitted and prohibited. *Cohen*, 92 F.3d at 972 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)). Second, they "delegate basic policy matters to low level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* And, third, they discourage the exercise of First Amendment freedoms. *Id.*

Policies that lack such clarity have been routinely struck down by courts, because what is "unwelcome" or "offensive" varies from one person to another. In *Dambrot*, the Sixth Circuit held the discriminatory harassment policy was unconstitutionally vague because it did not provide fair warning of what speech will violate the policy and delegated to university officials the task of defining what is "offensive." 55 F.3d at 1184. "Though some statements might be seen as universally offensive, different people find different things offensive." *Id.* To avoid being void for vagueness, policies must contain precise definitions of what is prohibited so that students have sufficient notice of what expression is subject to the policies. But these policies may not discriminate based on the content or viewpoint of speech. The Agreement does not provide any definitions of its operative ban on

"unwelcome" speech. It is so undefined that students, let alone administrators charged with its enforcement, will differ as what constitutes a violation, and UM is left with the enormous, and unbridled, administrative burden of policing what is and is not actionable harassment. Free speech will suffer in the end.

IV. The Harassment Policy Mandated by the Agreement Violates Students' Due Process.

The Due Process Clause "forbids arbitrary deprivations of liberty." *Goss v. Lopez*, 419 U.S. 565, 574 (1975). "At the very minimum, therefore, students facing suspension . . . must be given some kind of notice and afforded some kind of hearing." *Id.* at 579. Only when students present a "continuing danger to persons or property" may they be immediately suspended from school. *Id.* at 582. But a hearing must immediately follow the suspension. *Id.* at 582-83.

The Agreement provides that "a university must take immediate steps to protect" a party complaining of harassment, even "taking disciplinary action against the harasser" before investigation of the complaint begins.[8] But the Agreement fails to require UM to show "continuing danger to persons or property," or to provide notice and a hearing immediately following the disciplinary action. As one commentator noted already, this is "reminiscent of Alice in Wonderland's 'sentence first, verdict afterwards.'"[9] But UM should note that in the Ninth Circuit a mere investigation into clearly protected activity violates the Constitution. *See White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (holding U.S. Department of Housing and Urban Development investigation into protected activity violated First Amendment). The Agreement requires UM to violate students' due process.

V. Conclusion

There is no question that UM should protect students from actual harassment, but it can do so and comply with the First Amendment under a severe, pervasive, and objectively offensive standard. The Agreement's broad definition of harassment, however, fails to protect real victims. Their cries for help will be drowned out by frivolous complaints of insults, teasing, jokes, and other clearly protected activity. In the end, that leaves speech chilled and victims without justice.

Our coalition is all too familiar with restrictive campus speech codes and the danger they pose to the "marketplace of ideas." *Healy*, 408 U.S. at 180. A public university should

---

[8] *Id.* at 6.

[9] George Will, *"Alice in Wonderland" Coercion*, HUMAN EVENTS, May 25, 2013, http://www.humanevents.com/2013/05/25/alice-in-wonderland-coercion/ (quoting Hans Bader).

invite robust debate and dialogue on every conceivable issue, be open to the widest possible array of ideas and views, and adopt policies that encourage the fullest possible exercise of First Amendment freedoms. The Agreement violates that mandate.

Very truly yours,

Kevin H. Theriot, Senior Counsel
Director of Education Project
David J. Hacker, Senior Legal Counsel
ALLIANCE DEFENDING FREEDOM

Ron Robinson
President
YOUNG AMERICA'S FOUNDATION

Peter Wood
President
NATIONAL ASSOCIATION OF SCHOLARS

Kristan Hawkins
President
STUDENTS FOR LIFE OF AMERICA

Rick Schenker
President
RATIO CHRISTI

Gary Holtz
North American Coordinator
CAMPUS BIBLE FELLOWSHIP INTERNATIONAL

Bill Gilles
National Director
COLLEGIANS FOR A CONSTRUCTIVE TOMORROW

Jason Hoyt
President & Chief Operating Officer
BETA UPSILON CHI, INC.

cc: Patrick Flaherty
Flaherty Law Office
1026 First Avenue South
Great Falls, Montana 59401
Local Counsel

Tim Fox
Montana Attorney General
Department of Justice
P.O. Box 201401
Helena, Montana 59620-1401