1. Hans Bader's first set of comments for the Commission's school-bullying briefing (first of two sets)

http://www.openmarket.org/2011/03/22/obama-administration-undermines-free-speech-and-due-process-in-crusade-against-harassment-and-bullying/

Obama Administration Undermines Free Speech and Due Process in Crusade Against Harassment and Bullying

by Hans Bader on March 22, 2011 ·

The Obama administration's recent push against "bullying" resulted in a letter to school officials that undermines both free speech and due process. On October 26, a political appointee in the Education Department sent a "Dear Colleague" letter to the nation's school boards claiming that many forms of homophobia and bullying violate federal laws against sexual harassment and discrimination. But those laws only ban discrimination based on sex or race — not bullying in general. The letter from the Assistant Secretary of Civil Rights Russlynn Ali defined "harassment" so broadly as to reach both speech protected by the First Amendment, and conduct the Supreme Court says does not legally qualify as harassment.

The letter left the incorrect impression with some reporters that federal statutes already ban bullying and sexual-orientation-based harassment. For example, Keen News Service reported that the Education Department "issued guidance to all school officials in October 2010, reminding them that federal law requires schools to take action against bullying," including "sexual harassment of LGBT students." The letter was part of the Obamas' PR campaign against bullying, that featured a "a high-visibility conference on bullying prevention March 10, with the President and first lady" and the introduction by Obama backers of "several LGBT-inclusive bills designed to address bullying of students."

In reality, there is no federal prohibition against bullying, and no federal statute prohibiting sexual orientation discrimination. Existing sexual harassment laws generally do not cover harassment aimed at gays based on their sexual orientation, as opposed to their gender — even if such harassment is sexual in nature. As the Supreme Court emphasized in *Oncale v. Sundowner Offshore Services* (1998), conduct is not sexual harassment "merely because the words used have sexual content"; instead, victims "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination 'because of'" a victim's "sex," such that "members of one sex are" treated worse than "the other sex."

Harassment is defined more narrowly in schools than workplaces by the Supreme Court. In places of employment, harassment need only be severe *or* pervasive enough to create a hostile environment in order to be illegal. A single, severe physical act can sometimes be enough.

But in schools, the legal definition is much narrower under the Supreme Court's decision in *Davis v. Monroe County Board of Education* (1999): to be actionable, sexual harassment must be

"severe" *and* "pervasive"; to be illegal, it has to be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school since "schools are unlike the adult workplace" and "children may regularly interact in a manner that would be unacceptable among adults." Furthermore, the requirement of both severity *and* pervasiveness means that a lawsuit cannot be based solely on a "single instance" of "severe" peer harassment.

The letter (sent on behalf of the Education Department's Office for Civil Rights) contradicts the Supreme Court's harassment definition, claiming that "harassment does not have to . . . involve repeated incidents" to be actionable, but rather need only be "severe, pervasive, or persistent" enough to detract from a student's educational benefits or activities. The letter takes aim at student speech even outside of school boundaries, arguing that harassment includes speech, such as "graphic and written statements" on the "Internet" and elsewhere.

The letter incorrectly equates homophobic harassment with sexual harassment forbidden by the sex discrimination law Title IX. It classifies as illegal "gender-based harassment" an example where "a gay high school student was called names (including anti-gay slurs and sexual comments) both to his face and on social networking sites." This sort of thing is precisly what most appellate courts have said does not constitute gender-based harassment. This disturbing "hypothetical" may be an actual recent ruling by the Office for Civil Rights, since its letter says that "each of these hypothetical examples contains *elements* taken from actual cases."

If the Office for Civil Rights (OCR) actually held a school district liable for harassment over this, then it has disregarded court rulings, not just about what constitutes harassment, but about how officials must respond to it. In this example, OCR says the school district is liable even though "the school responded to complaints from the student by reprimanding the perpetrators," which stopped "harassment by those individuals," because such discipline "did not, however, stop others from undertaking similar harassment of the student."

That flouts the Supreme Court's *Davis* decision, which said school districts aren't liable for harassment merely because it persists in a school, and are only liable if they are "deliberately indifferent" to harassment after they learn of it; they don't have to succeed in "purging schools of actionable peer harassment" or ensuring that all "students conform their conduct to" rules against harassment.

Even in workplaces, where institutions are liable for mere "negligence" regarding harassment, they aren't liable for harassment that continues after the institution takes steps "reasonably calculated" to prevent harassment — such as when workers stubbornly engage in harassment for which other employees have already been properly disciplined, as a federal appeals court ruled in *Adler v. Wal-Mart* (1998). Indeed, an employer sometimes defeats liability even where there was no discipline at all, if it was unclear whether the accused employee was guilty, given the due-process implications of a ruling to the contrary.

Essentially, the Education Department has turned harassment law upside down, making schools more liable for harassment than employers, when the courts intended that they be less liable.

The letter also suggests that it doesn't matter if speech was not "aimed at a specific target" in determining whether it was "harassment." This stretches harassment law well beyond its existing boundaries even in the workplace, potentially banning a vast range of speech that a listener overhears and objects to. Workers have tended to lose lawsuits claiming "harassment" over speech not aimed at them (as in the California Supreme Court's 2006 decision in *Lyle v. Warner Brothers Television Productions*), although there are occasional exceptions to this rule. The courts recognize that "the impact of such 'second-hand' harassment is obviously not as great as harassment directed toward" the complainant herself.

Banning such speech also creates enormous free-speech problems. Recently, the Ninth Circuit Court of Appeals cited the First Amendment in dismissing a racial harassment lawsuit by a university's Hispanic employees against a white professor over his racially-charged anti-immigration emails. In its ruling in *Rodriguez v. Maricopa County Community College* (2010), the court noted that the messages were not "directed at particular individuals" but rather aimed at "the college community" as a whole.

Even if the Office for Civil Rights were merely trying to impose workplace rules on students, rather than going well beyond that, that would still raise troubling First Amendment issues. Courts have repeatedly struck down campus harassment codes modeled on workplace "hostile-environment" harassment guidelines. (Three examples being the Sixth Circuit's ruling in *Dambrot v. Central Michigan University* and the Third Circuit's rulings in *DeJohn v. Temple University* (2008) and *Saxe v. State College Area School District* (2001).) As the Ninth Circuit's Rodriguez decision noted, "there is no categorical 'harassment exception' to the First Amendment's free speech clause."

Contradicting the federal courts, the letter says that after harassment occurs, action must be aimed at students as a group, not just the individual perpetrators. Following harassment, it claims, schools "may need to provide training or other interventions not only for the perpetrators, but also for the larger school community." Even if the school puts a stop to the harassment by disciplining the harassers, the letter claims it may still be liable if it does not take "systemic" and and "comprehensive" actions like harassment training for the student body. Moreover, if bullying constitutes sexual harassment, the letter claims the school may be liable even if it sternly disciplines the bully, if it "failed to recognize" and "acknowledge that the bullying also constituted sexual harassment."

Courts have rejected such overly-expansive notions of liability even in the workplace. For example, if an employer succeeds in stopping harassment, it will generally defeat liability, even if not all of the harassers — much less workers in general — are required to attend harassment training, and even if the employer takes action under "general" misconduct rules, not a "separate, written" harassment policy, as cases like *Spicer v. Virginia* illustrate. The mandates spelled out in the Office for Civil Rights' letter are novel ones I have not previously encountered, even though I litigated educational discrimination cases for years, and once worked for the Office for Civil Rights itself.

If the Office for Civil Rights (OCR) succeeds in goading school officials into punishing students for constitutionally-protected speech through its overreaching letter, it should be held legally

liable for any resulting censorship. OCR was once held to have violated the First Amendment through an overly expensive interpretation of "discrimination" in *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board* (1978). The Klan sought to meet during non-school hours in an empty classroom, the way other groups were permitted to do by the school district. But it was barred from doing so by the school district, acting under pressure from the Office for Civil Rights, which argued that its presence would be illegal racial discrimination. The courts held that both the school district and OCR had violated the Klan's free-speech rights.

The Education Department has apparently learned little from that case. Its officials have sometimes wrongly suggested that speech that is far less bigoted than Klan activity can constitute racial or sexual harassment. Back in 1994, the Education Department's General Counsel, Judith Winston, refused to rule out the possibility that criticism of affirmative action could constitute racial harassment when questioned by Stuart Taylor of the Legal Times. She did so despite the fact that courts have repeatedly held that criticizing institutions' affirmative action policies is not racial harassment, but rather is protected by the First Amendment and the anti-retaliation provisions of federal civil-rights laws).

The General Counsel of the National School Boards Association argues that the OCR letter also violates student privacy rights.

2. Hans Bader's second set of comments for the Commission's school-bullying briefing (2nd of two sets)

http://washingtonexaminer.com/blogs/opinion-zone/2011/03/free-speech-casualty-obamas-overzealous-campaign-against-bullying

Free speech is a casualty in Obama's campaign against bullying

By: Hans Bader 03/22/11 12:03 PM
Special to the Examiner

The topic of bullying is in vogue, and Obama is taking advantage of that.

"President Barack Obama has acknowledged he was taunted as a child over his big ears and unusual name, as he opened a White House summit on preventing bullying" a few days ago. Meanwhile, Administration officials are trying to stretch the federal law against sex discrimination, Title IX, to outlaw bullying aimed at gay and lesbian youth, although the Administration has no statutory basis for doing so.

In essence, as I explain over at Minding the Campus, they have invented a federal law against bullying of gay youth, although Congress has yet to pass a ban on either homophobia or bullying. To do this, they have so stretched the definition of sexual harassment as to create a serious conflict with the First Amendment and federal court rulings, as I explain in greater detail at this link.

Federal law doesn't ban bullying as such – that is a matter addressed by state law. All states ban assault and battery, and some states have laws specifically aimed at bullying in the schools.

If the federal government were to criminalize bullying in general, that would violate limits on federal power, and federalism principles. (The Supreme Court struck down the Gun-Free School Zones Act as beyond Congress's power under the Interstate Commerce Clause in *United States v. Lopez* (1995), and it invalidated part of the Violence Against Women Act in *United States v. Morrison* (2000), in which the defendant was accused of committing rape in a student dormitory).

If schools turn a blind eye to bullying based on race or sex, that can sometimes violate federal law by constituting racial or sexual harassment, under the Supreme Court's ruling in *Davis v. Monroe County Board of Education* (1999) – but only if school officials are "deliberately indifferent" to its occurrence after having "actual knowledge" of it, and only if the bullying is *both* severe "*and*" pervasive.

In its zeal to invent a remedy for bullying of LGBT youth, the Obama Administration has shredded each of these limits on school liability for harassment. It also says that schools must

take "systemic" responses that harm innocent students, like putting the entire student body through sensitivity training in some cases where only a few students were proven to be perpetrators.

In her recent letter to school officials, Assistant Secretary for Civil Rights Russlynn Ali took aim at student speech that occurs entirely outside of school, arguing that sexual and racial harassment include speech, such as "graphic and written statements" on the "Internet" and elsewhere. "Education Department officials are threatening school principals with lawsuits if they fail to monitor and curb students' lunchtime chat and evening Facebook time for expressing ideas and words that are deemed by Washington special-interest groups to be harassment of some students," reports Neil Munro at the *Daily Caller*, in a recent news story, "Fed Instructs Teachers to Facebook Creep Students."

This meddling beyond school boundaries raises serious questions of administrative overreaching and invasion of students' personal lives. The Education Department has little statutory basis for this meddling, since court rulings like *Lam v. University of Missouri* (1997) have typically rejected harassment claims against schools based on individuals' conduct – even serious misconduct like "off-campus assaults" -- outside of school.

The Supreme Court's *Davis* decision expressly based school officials' liability in the fact that they have substantial control over students during school hours, and found the school district potentially liable only because "the misconduct" in that case had occurred "during school hours and on school grounds." It conditioned its ruling on the school district's "custodial" and "tutelary" power over students during school hours, and expressly limited its "liability to circumstances wherein" the school district "exercises substantial control over both the harasser and the context in which the known harassment occurs."

Schools lack such broad control over students' speech outside of school, such as on Facebook or on the Internet. Moreover, the First Amendment applies with added force to students' speech outside of school, meaning that vulgar speech that is banned in school may be protected speech when it occurs away from school, as cases like *Klein v. Smith* (1986) illustrate.

In the interests of full disclosure, I should note that (1) I once worked as an attorney for the Education Department's Office for Civil Rights, which sent the very letter I criticize above; and (2) I was one of the attorneys for the prevailing defendant in a Supreme Court case I cite above, United States v. Morrison.