Working with and through our State Associations, NSBA Advocates for Equity and Excellence in Public Education through School Board Leadership

VIA EMAIL AND USPS

December 7, 2010

Charlie Rose
General Counsel
United States Department of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Ave., S.W.
Washington, DC 20202

Re: "Dear Colleague" Letter Issued October 26, 2010

Dear Mr. Rose:

It was a pleasure speaking to you recently regarding the Department of Education's recent efforts on bullying. As you know, the National School Boards Association's (NSBA) shares the Department's deep concern for protecting students and is committed to helping school districts across the country develop and implement policies to address bullying and school climate.[1] NSBA, its member state associations of school boards, its 3,000-member Council of School Attorneys and school districts across the nation welcome guidance to address this very real problem. It is in this spirit of cooperation and common purpose that we write to express concern over the Department's "Dear Colleague" Letter (DCL) of October 26, 2010. As outlined in greater detail below, our fear is that absent clarification, the Department's expansive reading of the law as stated in the DCL will invite misguided litigation that needlessly drains precious

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[1] *See* NSBA publication, *Dealing with Legal Matters Surrounding Students' Sexual Orientation and Gender Identity* (2004), http://www.nsba.org/SecondaryMenu/COSA/Search/AllCOSAdocuments/DealingwithLegalMattersSurroundingStudentsSexualOrientationandGenderIdentity.aspx.

Among many policy statements expressing its commitment to safe, supportive learning environments, NSBA's Delegate Assembly has adopted the following:

Beliefs & Policies, Art. IV, § 2: NSBA believes that students must have safe and supportive climates and learning environments that support their opportunities to learn and that are free of abuse, violence, bullying, weapons, and harmful substances including alcohol, tobacco, and other drugs. NSBA urges federal, state and local governments, as well as parents, business and the community, to cooperate fully with local school boards to eliminate violence, weapons, and harmful substances in schools and to ensure safe, crime-free schools. NSBA urges local school boards to incorporate into their policies and practices approaches that encourage and strengthen positive student attitudes in, and relationship to, school.

Beliefs & Policies, Art. IV, § 2.7: NSBA supports state and local school board efforts to become more proactive in the elimination of violence and disruptive behavior at school, school-sponsored events, during school bus travel and while traveling to and from school. Such behavior, includes, but is not limited to physical violence, physical and verbal "bullying," disrespect of fellow students and school personnel, and other forms of harassment.

Beliefs & Policies, Art. IV, § 2.10: NSBA believes that all public school districts should adopt and enforce policies stating that racial, ethnic, and sexual harassment against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders. Such policies should include a complaint mechanism.....

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school resources and creates adversarial climates that distract schools from their educational mission. But, more importantly, our hope is that this conversation will lead to clarification of the Department's position as expressed in the DCL so that with a clear understanding of the requirements of the law school districts can develop and implement the best policies and procedures to keep students safe.

I. The DCL significantly expands the standard of liability set forth in *Davis v. Monroe County Board of Education.*

In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the U.S. Supreme Court laid out the standard for when school districts may be sued for damages related to peer harassment. The DCL veers significantly from the requirements set forth in *Davis*. In doing so, it significantly broadens school districts' obligations to recognize and respond to harassment.

Actual knowledge

The DCL deviates from *Davis* regarding the actual knowledge standard in at least two respects. First, *Davis* holds that school districts are liable only for harassment about which they had "actual knowledge."[2] In contrast, the DCL states that a school district is "responsible for addressing harassment incidents about which it ***knows or reasonably should have known***."(Emphasis supplied.)[3]

Second, the DCL seems to suggest that if harassment is out in the open, the school district has actual notice of it.[4] This conclusion is not supported by *Davis*, where the Court applied an actual knowledge standard even though the harassment was very much out in the open. In fact, in concluding the district had actual knowledge, the Court focused on the fact that the harassment had been *brought to the attention of the principal.*[5]

Nature and effect of harassment

Davis holds that only "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit" may result in

[2] "We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, *of which they had actual knowledge*, that is 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." 526 U.S. at 650 (emphasis added).

[3] Letter from Russlynn Ali, U.S. Dep't. of Educ. Assistant Secretary for Civil Rights to Colleagues: Harassment and Bullying at 2 (Oct. 26, 2010) (hereafter "Dear Colleague Letter").

[4] "In some situations, harassment may be in plain sight, widespread, or well-known to students and staff, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on a school bus, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the school on notice." Dear Colleague Letter, *supra* note 3, at 2.

[5] "Moreover, the complaint alleges that there were multiple victims who were sufficiently disturbed by G.F's misconduct to seek an audience with the principal." *Davis*, 526 U.S. at 653.

liability for the school district.[6] The DCL, in contrast, states the following: "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 the school.***"(Emphasis supplied.)[7]

Davis' requirement that harassment must be "severe, pervasive, and objectively offensive" is much narrower than "severe, pervasive, or persistent." The DCL has converted the *Davis* cumulative standard that requires the presence of three elements--- severity, pervasiveness and objective offensiveness---into a standard where any of the three alone can constitute sufficient evidence for a hostile environment. Likewise, the DCL expands the second prong of *Davis'* hostile environment test by declaring that a hostile environment exists when the harassment "interfere[s] with or limit[s]" participation rather than "effectively bar[rring]" access to an "educational opportunity or benefit."

<u>Eliminate the harassment and ensure it does not recur</u>

The DCL states a number of times that school districts are required to eliminate harassment and the hostile environment it creates and to prevent it from occurring again.[8] In *Davis* the Court explicitly rejects the notion that school districts must remedy and prevent peer harassment: "The dissent mischaracterizes [the deliberate indifference] standard to require funding recipients to 'remedy' peer harassment . . . and to 'ensur[e] that . . . students conform their conduct to' certain rules . . . . Title IX imposes no such requirements. On the contrary, the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable."[9] In summary, *Davis* states that a school district's legal obligations to deal with harassment under Title IX are very limited; school districts need only respond to the harassment in a way that is not clearly unreasonable.

<u>Multiple remedial steps to systematically address a hostile environment</u>

The DCL repeatedly states that districts "need to" or are "required to"[10] take multiple remedial measures to "systematically"[11] address the harassment. Particularly in the race, color,

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[6] 526 U.S. at 633.
[7] Dear Colleague Letter, *supra* note 3, at 2.
[8] "A school's responsibility is to eliminate the hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur." Dear Colleague Letter, *supra* note 3, at 3-4. "If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring." Dear Colleague Letter, *supra* note 3, at 2-3.
[9] 526 U.S. at 648-49.
[10] "Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser." Dear Colleague Letter, *supra* note 3, at 3. "In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond. A school

or national origin examples the letter explains that it is not enough to recognize and respond to individual acts of harassment on an *ad hoc* basis. Instead, school district must recognize and respond to a "hostile environment" with a "systematic response"[12] "reasonably calculated to end the harassment and prevent its recurrence."[13]

As discussed above, according to the Supreme Court in *Davis*, school districts' only legal obligation to address harassment is to respond to it in a way that is not clearly unreasonable. *Davis* does not require that school districts take any of the particular steps suggested in the letter, much less all of them. For example, in *Davis* the Court concluded that the school board was deliberately indifferent because it "made no effort whatsoever either to investigate or to put an end to the harassment."[14] The Court did not find the school district deliberately indifferent because it failed to systematically respond to a sexually hostile environment by offering the plaintiff counseling, more adequately publicizing its sexual harassment policy, providing staff training on sexual harassment, etc.[15] Likewise, nothing in *Davis* suggests that some undefined threshold exists where responding to specific incidents of sexual harassment is not enough and instead school districts must implement a more "systematic" response to "end" a "hostile environment."

Significantly, none of the DCL's numerous suggestions of what school districts "should have done" to deal with harassment include reliance on an administrator's own education, experience, judgment, and personal knowledge of the students and school community involved when deciding how to deal with harassment and bullying. The professional judgment of educators is key to addressing the problem of bullying, a fact recognized by *Davis,* where the Court explicitly found that courts should not second-guess the judgment of school administrators in making disciplinary and remedial decisions related to harassment.[16]

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also may be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment. An effective response also may need to include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment (or wide dissemination of existing policies and procedures), as well as wide distribution of the contact information for the district's Title IX and Section 504/Title II coordinators." *Id.* "At a minimum, the school's responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems." *Id.*

[11] By failing to acknowledge the racially hostile environment, the school failed to meet its obligation to implement a more systemic response to address the unique effect that the misconduct had on the school climate. *Id.* at 4.

[12] *Id.*

[13] *Id.* at 6.

[14] 526 U.S. at 654.

[15] While lower courts have viewed school district favorably when they have, as appropriate, taken some or all of the steps discussed in the letter, the Supreme Court and lower courts have not required school districts to take any, much less, all of the steps listed in the letter to avoid Title IX liability.

[16] *Davis*, 526 U.S. at 648 ("In fact, as we have previously noted, courts should refrain from second-guessing the disciplinary decisions made by school administrators.").

Remedial demands

The DCL also implies that school districts may be required to respond to the remedial requests of parents whose child was the target of harassment, for example, by not requiring the target of harassment to change his or class schedule.[17] However, responding to the remedial demands of parents might not always be reasonable or even possible. More importantly, the Court in *Davis* rejected the notion that doing so is required under Title IX, stating: "Likewise, the dissent erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands."[18] Indeed, although the Supreme Court did not address this specific factual issue in *Fitzgerald v. Barnstable School Committee*,[19] the First Circuit had found the parents' Title IX claim to lack merit because the response of the school committee and the Superintendent to the reported harassment had been objectively reasonable.[20] There, the principal had suggested that the victim be transferred to another bus, but the parents had asked the perpetrator to be transferred, or that a monitor be placed on the bus; the Superintendent had not implemented the parents' requests.[21]

II. "Publicly labeling" an incident as harassment as a remedial measure, may violate the Family Educational Rights and Privacy Act (FERPA).

FERPA prohibits school districts from releasing personally identifiable information from student records unless school districts have received consent from parents or eligible students.[22] Personally identifiable information includes information that is linkable to a specific student that would allow a reasonable person in the school community, who does not have knowledge of the relevant circumstances, to identify the student with reasonable certainty.[23] The second example in the DCL, which involves anti-Semitic speech, states that remedial steps could have included "publicly labeling the incidents as anti-Semitic."[24] As the example is written, however, doing so might violate FERPA.

Presumably the incident where the ninth-grade students told the seventh-grade students "You Jews have all the money, give us some" is recorded in the ninth-grade students' disciplinary records, as they were disciplined. The facts of the example reveal that these statements likely are linkable to particular students. The specific perpetrators appear to be well

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[17] "Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed. For example, any separation of the target from an alleged harasser should be designed to minimize the burden on the target's educational program (*e.g.*, not requiring the target to change his or her class schedule)." Dear Colleague Letter, *supra* note 2, at 3.
[18] *Davis*, 526 U.S. at 648.
[19] 129 S.Ct. 788 (2009).
[20] *Id.* at 792.
[21] *Id.*
[22] 34 C.F.R. § 99.30.
[23] 34 C.F.R. § 99.3.
[24] Dear Colleague Letter, *supra* note 3, at 5-6

known; seventh grade students are now avoiding the locations where lockers of ninth grade students are located. In other words, in this example, the school district publicly announcing that some students stated that "You Jews have all the money, give us some" and that such a statement is anti-Semitic could result in revealing personally identifiable information from student records in violation of FERPA. [25]

III. The DCL only minimally acknowledges student First Amendment free speech rights.

The DCL expects school districts to respond to harassment by disciplining students (and taking other remedial measures) but only briefly mentions students' First Amendment free speech rights in footnote eight. School districts have a limited ability to discipline students for speech that occurs on-campus and off-campus. To be truly useful, these limitations should be discussed in greater detail.

Specifically, pursuant to Supreme Court precedent, school districts may discipline students within the limitations of First Amendment for on-campus, non-school sponsored speech in the following instances only: if the speech is likely to cause a "substantial disruption of or material interference with school activities"[26] or the speech collides with "the rights of other students to be secure and to be let alone;"[27] if the speech is "sexually explicit, indecent, or lewd;"[28] or if it "can reasonably be regarded as encouraging illegal drug use."[29] While no Supreme Court case has discussed a "true threat" in a school setting, presumably schools may also discipline students who make them.[30] Even so, as Justice (then Judge) Alito wrote in an opinion he authored while on the Third Circuit, harassing speech in a school setting (or elsewhere) isn't categorically denied First Amendment protection.[31] Likely for this reason, a number of state legislatures have attempted to define bullying and harassment in state statutes to include only speech for which the Supreme Court allows school district to discipline students.[32]

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[25] Some state anti-bullying statutes specifically require some level of confidentiality when addressing incidents of school bullying and harassment. The West Virginia anti-bullying statute requires each county board to establish a policy prohibiting harassment, intimidation or bullying, which must contain "A requirement that any information relating to a reported incident is confidential, and exempt from disclosure under the [West Virginia Freedom of Information Act]." W.Va. Code §18-2C-3(b)(10).

[26] *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 514 (1969).

[27] *Id.* at 508.

[28] *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 684 (1986).

[29] *Morse v. Frederick,* 551 U.S. 393, 397 (2007).

[30] *Watts v. United States*, 394 U.S.705 (1969).

[31] *Saxe v. State College Area School District*, 240 F.3d 200, 210 (3d Cir. 2001) (holding that a school district's anti-harassment policy was unconstitutionally overbroad).

[32] *See, e.g.,* N.C. GEN. STAT. § 115C-407.5 (2009) (bullying or harassing behavior must (1) place a student or school employee in actual and reasonable fear of harm to his or her person or damage to his or her property; or (2) create or is certain to create a hostile environment by substantially interfering with or impairing a student's educational performance, opportunities, or benefits).

Bullying and harassment that takes place over the internet or through other electronic communication often occurs entirely off-campus. The DCL, however, fails to discuss the fact that disciplining students for speech is even more difficult when the speech occurs off-campus. None of the Supreme Court cases discussing disciplining students for speech contemplate whether school districts can discipline students for off-campus speech. Only one federal circuit to date has definitely ruled whether and when a school district may discipline students for off-campus, internet speech.[33] Nevertheless, a number of the examples in the DCL (sexual harassment, gender-based harassment) presume that school districts can and must consider off-campus speech when disciplining students.

IV. By suggesting that school officials will be responsible for identifying race and gender-based harassment that overlaps conduct falling outside of the Department's enforcement areas, the DCL creates a legal climate ripe for federal suits against school districts.

The DCL provides several examples in which school officials "should have" recognized overlapping discrimination based on categories protected by federal anti-discrimination laws enforced by the Department. In the examples provided, school officials should have been able to recognize that harassment based on *sexual orientation* (not enforced by the Department) may also constitute harassment based on *gender* (enforced by the Department) if the harassers are emphasizing sex-based stereotypes.[34] Similarly, building administrators should have known that harassment based on *religion* (not enforced by the Department) may also constitute harassment based on *actual or perceived shared ancestry or ethnic characteristics* (enforced by the Department).[35] While it is important for school officials to act on any incident of bullying or harassment, these kinds of nuanced legal distinctions create confusion that detracts from an understanding of the requirements of the law.

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[33] *See Wisniewski v. Board of Education of the Weedsport Center School District*, 494 F.3d 34 (2d Cir. 2007) (applying *Tinker*'s substantial disruption test to off-campus speech that was "reasonably foreseeable" to come on-campus). The Third Circuit will also rule on this issue shortly. *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *rehearing en banc granted, opinion vacated* (Apr. 9, 2010) (involving off-campus internet harassment of a school administrator; decided in favor of the district); *Layshock v. Hermitage School District*, 593 F.3d 249 (3d Cir. 2010), *rehearing en banc granted, opinion vacated* (Apr. 9, 2010) (involving off-campus internet harassment of a school administrator; decided in favor of the student).

[34] "The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under title IX to investigate and remedy overlapping sexual harassment or gender-based harassment." Dear Colleague Letter, *supra* note 3, at 8.

[35] "[G]roups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (*e.g.*, Muslims or Sikhs)." *Id.* at 5.

Harassment based on gender

Federal courts have recognized a cognizable claim under Title IX of sexual harassment based on failure to conform to gender stereotypes.[36] As a practical matter, however, the DCL asks administrators to tease out legal distinctions that may or may not affect an investigation of a bullying or harassment incident. The DCL seems to suggest that if the harassment is based solely on sexual orientation rather than gender or gender-based stereotypes, the remedial steps listed in the letter may not be required and schools should treat the incident(s) as "simple" bullying. This is an extremely difficult determination for teachers and building administrators to make, and may be a distinction without a difference, as many state civil rights laws and school district anti-bullying policies prohibit bullying *and* harassment based on sexual orientation.[37]

Harassment based on national origin

The DCL provides the example of anti-Semitic conduct that may also constitute harassment based on perceived shared ancestry or ethnic characteristics (i.e., race or national origin). The example raises two difficult questions for school districts.

First, while schools recognize the importance of eliminating all forms of harassment, and often specifically list religion as a characteristic with heightened status under state civil rights law, it is not clear that the conduct can be assumed to be based on national origin/race/ethnicity, when it is – at least explicitly – based on religion. Second, the case law indicates that a school district could be found to have intentionally discriminated based on race or ethnicity, and therefore liable under Title VI, only if the *Davis* standard is met.[38] Lower courts have recognized that the *Davis* deliberate indifference standard applies in cases alleging race-based harassment.[39]

The DCL suggests a standard well beyond the *Davis* deliberate indifference standard, as discussed above, thereby making nearly every teasing/bullying incident with a sexual orientation or religious component eligible for the letter's remedial measures. The numerous steps

[36] *See Theno v. Tonganoxie Unified Sch. Dist. No. 454*, 377 F.Supp.2d 952 (D. Kansas 2005)(rational trier of fact could infer that plaintiff was harassed because he failed to satisfy his peers' stereotyped expectations for his gender); *Montgomery v. Independent Sch. Dist. No. 709*, 109 F.Supp.2d 1081 (D. Minn. 2000) (complaint stated Title IX same-sex harassment claim under gender stereotyping theory where plaintiff did not meet his peers' stereotyped expectations of masculinity).

[37] *See* Chicago Public Schools Comprehensive Non-discrimination, Title IX and Sexual Harassment policy, *infra* notes 42 and 43.

[38] *Bryant v. Independent School District No. I-38,* 334 F.3d 928 (10th Cir. 2003) (plaintiff alleging intentional race discrimination must allege and show that the district: (1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by the school).

[39] *See Williams v. Port Huron Area Sch. Dist. Bd of Educ.*, 2010 WL 1286306 (2010) (noting federal court precedent and finding that a school district can be liable under Title VI for student on student racial harassment, and that the deliberate indifference standard applies).

suggested in the letter, though well advised in many instances and well intended in most, may not be legally required.

V. Clarifying the legal standards, exercising federal administrative restraint and recognizing judicial deference to school officials in compliance with local policy and state law is the best way to stem bullying and harassment.

At latest count, 44 states have anti-bullying statutes in place. These statutes require school districts to adopt anti-bullying policies, often with specified components, including procedures.[40] The statutory definition of bullying often includes or references "harassment and intimidation" to encompass a wide range of behavior. Most statutes note that bullying *can be* based on characteristics otherwise protected by law, but *need not* be to constitute prohibited conduct. At least one state, Missouri, specifically prohibits school districts from listing protected categories.[41]

Many school districts have at least two sets of policies and procedures that address bullying and harassment. Chicago Public Schools, for instance, has in its Student Code of Conduct, an anti-bullying statement with a definition of "bullying behaviors."[42] The district also has a Comprehensive Non-discrimination, Title IX and Sexual Harassment policy that covers categories protected by federal and state law, including religion and sexual orientation. [43]

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[40] NSBA State Anti-Bullying Statutes table, http://www.nsba.org/MainMenu/SchoolLaw/Issues/Safety/Resources/Table.aspx

[41] "Each district's antibullying policy shall be founded on the assumption that all students need a safe learning environment. Policies shall treat students equally and shall not contain specific lists of protected classes of students who are to receive special treatment. Policies may include age appropriate differences for schools based on the grade levels at the school. Each such policy shall contain a statement of the consequences of bullying." V.A.M.S. 160.775(3.).

[42] CPS 705.5 – Student Code of Conduct for 2010-2011 school year, http://policy.cps.k12.il.us/documents/705.5.pdf.

[43] CPS 102.8 – Comprehensive Non-discrimination, Title IX and Sexual Harassment policy, http://policy.cps.k12.il.us/documents/102.8.pdf.

The Broward County Public Schools in Florida, similarly have an Anti-Bullying Policy, http://www.browardschools.com/schools/pdf/bully/Anti-BullyPolicy%205.9.pdf, which encompasses a wide range of behavior, including harassment based on characteristics protected by federal laws, but also categories such as religion and sexual orientation. The district has a separate policy to address the requirements for discrimination against defined federal and state/local protected categories of persons, Nondiscrimination Policy Statement, http://www.broward.k12.fl.us/sbbcpolicies/docs/P4001.001.pdf. Sexual harassment is defined, as is "discriminatory harassment":

> Discriminatory harassment other than sexual, shall be defined as physical or verbal conduct based on race, color, national origin, religion, age, disability, marital status, or gender directed toward an individual when the conduct:
> 1. has the purpose or effect of creating an intimidating, hostile or offensive academic or working environment;
> 2. has the purpose or effect of substantially or unreasonably interfering with an individual's academic or work performance;
> 3. has the purpose or effect of demeaning or otherwise disrespecting the dignity of an individual in the academic or work environment; or
> 4. adversely affects an individual's academic or employment opportunities.

Likewise, most state education agencies have model policies, many of which are required by statute. The Michigan Board of Education has adopted a model policy that prohibits both bullying and harassment, but defines them separately.[44] "Harassment" is defined using the *Davis* standard: the conduct "adversely affects the ability of a pupil to participate in or benefit from the school district's educational programs or activities because the conduct, as reasonably perceived by the pupil, is so severe, pervasive, and objectively offensive as to have this effect." [45]

With a clarifying document, the Department could recognize the multiple standards under which school districts must operate as they attempt to comply with all applicable bullying and harassment laws. The clarification would provide accurate legal standards regarding school officials' responsibilities with respect to harassment, noting that courts have recognized the *Davis* deliberate indifference standard.

The clarification would note that the multiple remedial measures suggested in the DCL provide one view of best practices in this area. The document should note, however, that a single, *effective* remedial measure will meet the legal standard.

VI. Conclusion

It is our hope that through this letter, we have addressed what we see as some unintended legal and practical challenges arising from the DCL. First, the expansive position on what conduct constitutes "harassment" protected by federal civil rights laws and what remedial measures are legally required will unnecessarily complicate investigations and possibly expose school districts to liability beyond that envisioned by the Supreme Court. Second, the DCL may arm plaintiffs' attorneys hoping to sue school districts based on similarly expansive views of the law. Third, the DCL does not recognize, as courts have, that educators must enjoy professional

[44] Michigan State Board of Education model policy on bullying and harassment, http://www.michigan.gov/documents/mde/SBE_Model_AntiBullying_Policy_Revised_9.8_172355_7.pdf.
The Wisconsin Department of Public Instruction model bullying policy, http://dpi.wi.gov/sspw/doc/modelbullyingpolicy.doc states that bullying may be motivated by an actual or perceived characteristic, including gender identity, sexual orientation, or religion. It provides a brief list of remedial measures;

> If it is determined that students participated in bullying behavior or retaliated against anyone due to the reporting of bullying behavior, the school district administration and school board may take disciplinary action, including: suspension, expulsion and/or referral to law enforcement officials for possible legal action as appropriate. Pupil services staff will provide support for the identified victim(s).

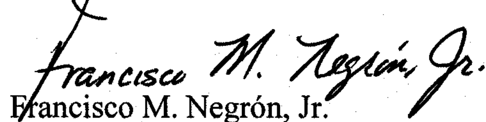
The Delaware Department of Education model policy on bullying, http://www.doe.k12.de.us/infosuites/students_family/climate/files/Bully%20Prevention%20Policy%20Template.pdf includes intentional acts that have the effect of (among other effects) ". . . creating a hostile, threatening, humiliating or abusive educational environment due to the pervasiveness or persistence of actions or due to a power differential between the bully and the target; or interfering with a student having a safe school environment that is necessary to facilitate educational performance, opportunities or benefits . . ." The policy provides examples of different types of bullying, and a list of eleven "formative" activities to address the bully in lieu of or in addition to discipline, (counseling, reparation to victim, psych evaluation, behavior management program).
[45] *Id.*

deference to address the educational environments in their schools using their unique expertise and knowledge of individual students.

We appreciate the opportunity to comment on the DCL and reiterate NSBA's strong support for our common purpose to keep schools safe for all students. We look forward to working with you to develop guidance and resources to help schools understand the requirements of the law in maintaining safe learning environments, and, specifically, in responding effectively to bullying and harassment.

NSBA stands ready to work in partnership with the Department on this and other issues of importance to our members, and to the nation's public school children.

Sincerely,



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