More Smoke From FIRE
Tip of the Week authored by Daniel C. Swinton, Associate Executive Director, ATIXA

Last week, The Foundation for Individual Rights in Education (FIRE) continued its smoke and mirrors campaign pertaining to sexual assault policies and procedures on college campuses. Upon receipt of a letter from the Office of Civil Rights (OCR) explaining the nature and function of resolution agreements and OCR’s long-standing definition of sexual harassment, FIRE proclaimed victory declaring that OCR has altered its stance and backed away from the recent University of Montana Resolution Agreement. In its apparent rush for headlines and single-mindedness, we feel FIRE has again missed the mark. Our members have looked to us for answers, so let’s cut through the hyperbole and grandstanding to focus on fact and the primary issues. First, some background details may be helpful.

This past Spring, OCR and Department of Justice (DOJ) entered into a wide-ranging and detailed Resolution Agreement with the University of Montana. This letter has received significant attention in part because, in the letter summarizing its findings and investigation, OCR and DOJ referred to the Montana Agreement as a “Blueprint” for colleges and universities around the country. At the time, FIRE loudly cried foul because the Resolution Agreement defined sexual harassment as “unwelcome conduct of a sexual nature” – a definition with which FIRE vehemently disagrees – and FIRE felt that with such a broad definition as a “Blueprint,” free speech would be trampled. FIRE called it a “dangerous new speech code for colleges”.

Yet, as we’ve noted before, the definition FIRE cites with such disapproval is far from new – OCR used it over twelve years ago in its 2001 Revised Sexual Harassment Guidance, defining sexual harassment as “unwelcome conduct of a sexual nature” (p.2) - the identical definition it used in the Montana letter and Resolution Agreement. Accordingly, OCR has defined sexual harassment as “unwelcome conduct of a sexual nature” for over a decade, along with repeat assurances that it does not intend this definition as a limitation of free speech. OCR’s November 14th letter to FIRE reiterates the centrality of the 2001 Guidance in understanding what does and does not constitute a “hostile environment.” The 2001 Guidance remains in full effect and force today.

FIRE also proclaims that OCR is backing away from referring to the agreement between the University of Montana and OCR/DOJ as a “Blueprint.” In response to OCR’s recent letter, FIRE President Greg Lukianoff wrote, “Assistant Secretary Lhamon’s clear statement that the Montana agreement does not represent OCR or DOJ policy—meaning it’s not much of a ‘blueprint’—should come as a great relief to those who care about free speech and due process on our nation’s campuses.” FIRE is off-base; let’s take a look at what OCR actually said and put it in the context of the nature and function of resolution agreements.

Assistant Secretary Lhamon states in her letter, “It is also important to note that the Agreement in the Montana case represents the resolution of that particular case and not OCR or DOJ policy.” For decades, OCR has repeatedly stated that Resolution Agreements entered into with institutions are binding only upon the institution with whom the agreement was made. Stated differently, unlike the 2001 Guidance, institution-specific Resolution Agreements are only enforceable with and applicable to that institution. This is exactly what OCR told FIRE. FIRE’s Director of Legal and Public Advocacy, Will Creeley, however declares, “After a national outcry from concerned citizens and civil liberties groups this summer, OCR appears to be rethinking its ill-conceived attempt to deem vast swaths of student and faculty speech ‘sexual harassment.’ This is a welcome development.” In reality, OCR’s statement is simply a reiteration of longstanding OCR policy and practice. The 2001 Guidance remains in full effect, as does its definition of sexual harassment. OCR’s three letters to FIRE on this subject pointedly have not retracted this definition, despite Creeley’s assertions to the contrary.
What makes the Montana Resolution a Blueprint lies in understanding the term “blueprint,” which is a plan for a design. You can use a blueprint to build a house, or a Title IX compliance plan. But, more than one blueprint can result in a well-built house, just as OCR resolutions can provide varying, but effective, paths to compliance. OCR’s resolutions just a few years ago with Eastern Michigan University and Notre Dame College were published as models, as well. While each of these differs, all represent effective paths to address the particular compliance issues of the investigated campus. FIRE notes that OCR failed to follow its own blueprint by not applying the same standards in its recent SUNY resolution as it did with its Montana resolution. Different houses need different blueprints.

ATIXA has and will continue to recommend that colleges and universities use Resolution Agreements as guideposts to better understand how OCR interprets policies, procedures and compliance issues under Title IX. Indeed, the Dear Colleague Letter from April 4, 2011 was little more than a compilation of highlights from the previous ten years’ worth of resolution agreements. As Assistant Secretary Lhamon stated, such agreements are not a definitive statement of OCR policy, but in our experience, they help provide needed direction and understanding on many of the Title IX issues and challenges facing college and university campuses.

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