



Massachusetts

April 29, 2024

**Via Email and U.S. Mail**

Office for Civil Rights  
Region 1, Boston Office  
United States Department of Education  
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**Re: Title VI and Free Expression on College Campuses**

Dear Officials of the Region 1 Department of Education Office for Civil Rights:

The basic mission of the ACLU of Massachusetts is to protect and promote the freedoms of liberty and equality enshrined in the federal and Massachusetts constitutions and cognate statutes. That mission includes protecting freedom of speech in the Commonwealth of Massachusetts and combatting discrimination in the provision of educational and other services.

We are aware that your Office has received several Title VI complaints alleging antisemitic, anti-Israeli, anti-Muslim, anti-Palestinian, and/or anti-Arab hostile environments at several institutions of higher learning in Massachusetts. We wholeheartedly support the Department of Education Office for Civil Rights (“OCR”) investigating and resolving complaints that students or others are being subjected to hostile environments or otherwise being discriminated against on campus because of their race, national origin or other traits protected under civil rights laws.

We write now to encourage you — particularly in these times of contention regarding events in the Middle East and pressure from Congress and others to address allegations of antisemitism and Islamophobia — to take steps to ensure that investigations and enforcement actions do not chill or encroach on the exercise of free expression by students or other members of educational communities. Freedom from discrimination and freedom of expression can and must go hand in hand.<sup>1</sup>

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<sup>1</sup> We recommend to you the open letter published on April 26, 2024 by the National office of the American Civil Liberties Union, which provides guidance to colleges and universities about upholding free expression while complying with Title VI. <https://www.aclu.org/news/free-speech/open-letter-to-college-and-university-presidents-on-student-protests>.

*Legal Background*

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance. “While Title VI does not apply to discrimination based solely on religion,” OCR has interpreted it to extend to discrimination against individuals who are members of a “discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics.”<sup>2</sup> OCR may hold an educational institution responsible for a “hostile environment” based on student-on-student harassment if such harassment “is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from” an educational opportunity and the institution had actual or constructive notice of the hostile environment and “failed to take prompt and effective steps” to combat it.<sup>3</sup> Whether student-on-student harassment amounts to a hostile environment depends on the totality of the circumstances, which includes the age of the persons involved.<sup>4</sup>

OCR has long recognized that Title VI must be applied consistently with the free speech principles enshrined in the First Amendment.<sup>5</sup> These constitutional limitations apply to Title VI actions pertaining to both public and private educational institutions.<sup>6</sup> Accordingly, this letter addresses how Title VI must be enforced, at public and private colleges and universities alike, in a manner that does not infringe protected speech.

Freedom of expression must be vigorously protected on college campuses. The college environment is a vital “marketplace of ideas.”<sup>7</sup> Indeed, “[t]he vigilant protection of

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<sup>2</sup> Dear Colleague Letter from Russlynn Ali, Assistant Secretary for Civil Rights (October 26, 2010), available at <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201010.html>.

<sup>3</sup> Dear Colleague Letter from Catherine Lhamon, Assistant Secretary for Civil Rights (August 24, 2023), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230824.pdf>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (“OCR’s regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution. ... [T]he statutes [OCR] enforces are intended to protect students from invidious discrimination, not to regulate the content of speech.”).

<sup>6</sup> *Id.* (“There has been some confusion arising from the fact that OCR’s regulations are enforced against private institutions that receive federal-funds. Because the First Amendment normally does not bind private institutions, some have erroneously assumed that OCR’s regulations apply to private federal-funds recipients without the constitutional limitations imposed on public institutions. OCR’s regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses.”).

<sup>7</sup> *Healy v. James*, 408 U.S. 169, 180 (1972) (under First Amendment, colleges and universities may not suppress speech or student group activities because of disagreement with viewpoint; schools have a “heavy burden” to justify restrictions based on well-grounded forecasts of actual disruption). *See also*, *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1129 (11th Cir. 2022); Letter from OCR to U.C.

constitutional freedoms is nowhere more vital than in the community of American schools.”<sup>8</sup> Through learning to formulate and express their own views, students learn to think for themselves and to experience firsthand the fundamental precept that “in our constitutional constellation . . . no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>9</sup> By being exposed to ideas they may not hear at home and viewpoints with which they may disagree — and even be offended by — students learn the values of being open to new ideas and of tolerating a diverse range of views and are better prepared to participate in a democratic society.<sup>10</sup>

Political speech — including criticism or praise of governmental action either domestic or foreign — is “at the core of what the First Amendment is designed to protect.”<sup>11</sup> It is also “a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys.”<sup>12</sup> Viewpoint discrimination is particularly pernicious because “[a] law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government’s benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.”<sup>13</sup>

It is especially important to hold to these principles when confronted with controversial or divisive speech that is not politically popular. Indeed, some of the Supreme Court’s most important First Amendment cases arose from speech that was highly controversial at the time — including protests of the Vietnam War and the draft, desecration of the American flag, and the picketing of a soldier’s funeral with signs stating “God Hates the USA” among other messages.<sup>14</sup> Protection of even

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Berkeley (August 19, 2013), OCR Case No. 09-12-2259, available at <https://s3.amazonaws.com/cms.ipressroom.com/401/files/202308/DOE.OCR.pdf> [hereinafter “U.C. Berkeley Letter”] (noting that First Amendment protections are “particularly relevant in the university environment where academic freedom fosters the robust exchange of ideas”).

<sup>8</sup> *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

<sup>9</sup> *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>10</sup> *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2431 (2022).

<sup>11</sup> *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion).

<sup>12</sup> *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, J., concurring in part and in judgment).

<sup>13</sup> *Id.* at 253–54.

<sup>14</sup> *Tinker v. Des Moines*, 393 U.S. 503 (1968) (protesting the Vietnam War); *Cohen v. California*, 403 U.S. 15 (1971) (wearing a jacket labeled “Fuck the Draft”); *Texas v. Johnson*, 491 U.S. 397 (1989) (burning the American flag); *Snyder v. Phelps*, 562 U.S. 443 (2011) (picketing a soldier’s funeral).

unpopular speech is critical to our democracy and is what separates our country from totalitarian regimes.<sup>15</sup>

Accordingly, federal courts considering Title VI and antidiscrimination policies adopted by educational institutions have recognized that when schools attempt to apply such policies to speech made to the campus community on matters of public concern, they risk violating free speech guarantees. For instance, the Eleventh Circuit recently noted that issues of overbreadth may be presented where discriminatory harassment policies encompass “core political speech,” including statements such as “affirmative action is deeply unfair,” “illegal immigration is dangerous,” and “the Palestinian movement is anti-Semitic.”<sup>16</sup> And, in an opinion penned by then-Judge Alito, the Third Circuit cautioned:

There is of course no question that non-expressive, physically harassing *conduct* is entirely outside the ambit of the free speech clause. But 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. 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.<sup>17</sup>

Similarly, the district court in *Felber v. Yudof* concluded that a Title VI claim alleging an antisemitic hostile environment at the University of California at Berkeley could not be applied to stifle student speech that was pro-Palestinian and opposed to the government of Israel.<sup>18</sup> The “centerpiece” of the complaint’s allegations involved “Apartheid Week,” an event organized by student groups in “an effort to compare the policies of the State of Israel with those of South Africa between 1948 and 1993.”<sup>19</sup> Activities included distributing leaflets in a central campus plaza, operating information tables in the plaza, and setting up mock “check points” to simulate the experience of passing through check points in the West Bank.<sup>20</sup> The court dismissed the Title VI claim in part because “a very substantial portion of the conduct to which plaintiffs object represents pure political speech and expressive conduct, in a public setting, regarding matters of public concern, which is entitled to special protection

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<sup>15</sup> *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

<sup>16</sup> *Speech First, Inc. v. Cartwright*, 32 F.4th at 1125.

<sup>17</sup> *Saxe*, 240 F.3d at 206 (internal citations and quotations omitted).

<sup>18</sup> 851 F. Supp. 2d 1182 (N.D. Cal. 2011).

<sup>19</sup> *Id.* at 1184.

<sup>20</sup> *Id.*

under the First Amendment.”<sup>21</sup> The court further explained that the plaintiffs were “attempting to draw an untenable line that would remove from protection signs and publications that are critical of Israel and supportive of Hamas and Hezbollah.”<sup>22</sup> The Court held that the fact that the “protestors’ signs may have contained language that plaintiffs believe was inflammatory, offensive, or untrue” did not remove them from the realm of protected speech.<sup>23</sup> And the court concluded that the “plaintiffs have not alleged facts showing that they were denied access to the University’s educational services in any meaningful sense.”<sup>24</sup>

Consistent with the principles set forth in the case law above, OCR has interpreted Title VI and associated regulations to define student-on-student harassment as “something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.”<sup>25</sup> In other words, “the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR.”<sup>26</sup>

Accordingly, in investigating and resolving Title VI complaints filed against several University of California campuses,<sup>27</sup> OCR has appropriately concluded that political speech critical of Israel — for instance, anti-Israel statements distributed on flyers during an “Israel: Apartheid Resurrected” event organized by a student group<sup>28</sup> — constitutes “expression on matters of public concern directed to the University community” and further, that “[i]n the university environment, exposure to such robust and discordant expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience.” Thus, such political speech, standing alone, is not “actionable harassment.”<sup>29</sup>

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<sup>21</sup> *Id.* at 1188 (citing *Snyder v. Phelps*, 131 S.Ct. 1207, 1219 (2011)).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (citing *Snyder*, 131 S.Ct. at 1217).

<sup>24</sup> *Id.* (explaining many of the alleged “acts occur[ed] years before plaintiffs ever enrolled at UC Berkeley, and/or on different campuses entirely”).

<sup>25</sup> 2003 Dear Colleague Letter, *supra* n.4. OCR also expressly stated that its definition of “harassment” does not “encompass[] all offensive speech regarding sex, disability, race or other classifications.” *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See U.C. Berkeley Letter; Letter from OCR to U.C. Santa Cruz (August 19, 2013), OCR Case No. 09-09-2145, available at [https://news.ucsc.edu/2013/08/images/OCR\\_letter-of-findings.pdf](https://news.ucsc.edu/2013/08/images/OCR_letter-of-findings.pdf) [hereinafter “U.C. Santa Cruz Letter”]; Letter from OCR to U.C. Irvine (August 19, 2013), OCR Case No. 09-07-2205, available at [https://ccrjustice.org/files/OCR-UCIrvine\\_Letter\\_of\\_Findings\\_to\\_Recipient.pdf](https://ccrjustice.org/files/OCR-UCIrvine_Letter_of_Findings_to_Recipient.pdf) [hereinafter “U.C. Irvine Letter”].

<sup>28</sup> U.C. Irvine Letter at 6.

<sup>29</sup> Santa Cruz Letter; U.C. Berkeley Letter; U.C. Irvine Letter.

*Application of Principles*

We appreciate OCR’s historical commitment to ensuring that Title VI is applied consistently with the First Amendment, which is reflected in the decisions discussed above. We urge OCR to remain true to this commitment, especially during times when campus speech issues are highly controversial and subject to great national scrutiny. We thus ask OCR to make clear to the public and to the colleges and universities subject to Title VI investigations that these investigations are not intended to and will not be used to suppress political speech.

In particular, we urge OCR — and the colleges and universities against whom complaints are pending or threatened — not to take or encourage steps that lead to suppression or chilling of core political speech. Such speech includes phrases reportedly used in recent political demonstrations, such as “From the River to the Sea, Palestine will be free,” “Wipe Gaza off the map,” “Israel is an apartheid state/engages in genocide,” “No excuse for terrorism,” “A land without a people for a people without land,” or “No Ceasefire.” These statements — no matter how perceived by some listeners — are protected speech and cannot categorically be proscribed pursuant to Title VI.<sup>30</sup>

Similarly, OCR should not encourage or allow schools to deny or rescind recognition of student groups on the grounds that such groups organized demonstrations in which such statements are made. Lack of recognition often means that students in these groups — including those who have personally engaged in no sanctionable conduct — are denied the right to hold demonstrations on campus and may result in suppression of core political speech based on the viewpoints expressed.<sup>31</sup>

Schools may of course enforce, in an even-handed manner, reasonable content and viewpoint neutral time, place, and manner requirements as to where and when demonstrations or other expressive activities can occur. Schools also may take proportionate and reasonable action against individual students who violate those rules or engage in harassment of another student as defined above. Moreover, schools can provide supports to students who feel adversely impacted by other students’ speech, such as counseling, forums for the sharing of views, and educational opportunities about the history and experiences of various peoples to inform greater understanding. But schools must allow students to engage in political speech — even

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<sup>30</sup> For similar reasons, we urge OCR not to apply the International Holocaust Remembrance Alliance’s working definition of antisemitism, which defines core political speech — namely, criticism of the state or government of Israel — as per se antisemitic. See Letter from the ACLU to Secretary Cardona, *Reject Definitions of Anti-Semitism that Encompass Protected Speech* (February 6, 2024), available at <https://www.aclu.org/documents/reject-definitions-of-anti-semitism-that-encompass-protected-speech>.

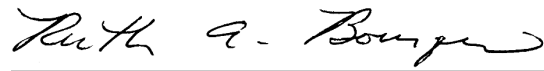
<sup>31</sup> See *Healey, supra*.

if such speech is deeply troubling to some other students. Rather, they are upholding the highest values of our Nation enshrined in the First Amendment.

Finally, we urge OCR to complete its investigations as expeditiously as possible, lest the pendency of such investigations unduly chill speech — and opportunities to learn from one another at our colleges and universities, which are designed for this very purpose.

Please do not hesitate to contact us if you have any questions or would like to discuss these matters.

Sincerely,



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