

Via E-mail

September 9, 2014

President Dr. Roderick J. McDavis
Cutler Hall 108
Athens, Ohio 45701

president@ohio.edu

RE: Ohio University's legal obligations under Title VI and the First Amendment to protect advocacy for Palestinian rights.

Dear President McDavis,

I write to inform you of important developments concerning the United States Department of Education (DOE) and Ohio University's obligations under Title VI of the Civil Rights Act of 1964. Please see the attached legal advisory for more information. I urge you to share this note with your general counsel.¹

I understand that members of the Ohio University community, as on many campuses, are engaged in heated political debate surrounding the Israeli/Palestinian issue. I appreciate the September 4th statement you made emphasizing that, as "stewards of the public trust, we have a responsibility to encourage the free exchange of ideas."² My hope is that the attached information can support Ohio University in meeting this responsibility.

In August 2013, the DOE dismissed complaints against the University of California (UC) Berkeley, UC Santa Cruz, and UC Irvine, which had alleged, *inter alia*, that Jewish students who identify with the state of Israel are deprived of an equal education in violation of Title VI when exposed to student or faculty speech critical of Israel. In recent years, some organizations have relied on this problematic theory to pressure universities around the country to take punitive or censorial measures against faculty or students who express such viewpoints to avoid federal investigation.

DOE rejected the premises underlying these threats and complaints. At UC Santa Cruz, DOE found that, with respect to speaking events organized or sponsored by University departments featuring critics of Israeli policies, "[a]ll these events constituted (or would have constituted) expression on matters of public concern directed to the University community. In 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."³ At UC Berkeley, DOE determined that student events—like mock checkpoints and separation barriers—

¹Since the attached DOE decisions are unpublished, your general counsel may not be familiar with them.

²"President McDavis calls for civility following video", September 4 2014, available at <http://www.ohio.edu/compass/stories/14-15/9/President-Message-ALS.cfm>

³Letter from DOE to UC Santa Cruz, Aug. 19, 2013, re: Case No. 09-09-2145, available at <http://bit.ly/doeucsc>.

were “expression on matters of public concern” that “do not constitute actionable harassment.”⁴ Moreover, DOE concluded that some of the conduct complained of was based on political disagreements, not national origin or ethnicity.

The DOE decisions make it clear that **public universities violate the First Amendment when they stifle, burden, or otherwise censor student and departmental activities on the basis of the viewpoint expressed**, including in the context of the Israeli/Palestinian conflict. Such actions undertaken against expressive activities based on their viewpoint or content are strictly prohibited under the First Amendment.⁵ Worse, burdening speech in this manner undermines the purpose of a university (whether public or private), which is to expose students to a wide range of viewpoints.

DOE’s resolution of these cases should bolster your confidence in defending First Amendment values on your campus by refraining from interference—whether in the form of overt censorship or burdensome scrutiny—with student and faculty events based on their viewpoint on Israeli/Palestinian issues. For your convenience, we have attached DOE’s complete written decisions and a Legal Advisory summarizing the key determinations. We hope these documents will serve as a resource to your university when responding to pressure from advocacy organizations regarding student and faculty speech.

Should you have any questions or concerns, please feel free to contact me at [redacted]. Thank you for your time and consideration.

Sincerely,



Dima Khalidi

Cooperating Counsel with the Center for Constitutional Rights, Chicago

Attachments:

- 1. Legal Advisory Concerning Recent DOE Investigations at UC Irvine, UC Berkeley, and UC Santa Cruz**
- 2. UC Santa Cruz Dismissal Letter**
- 3. UC Berkeley Dismissal Letter**
- 4. UC Irvine Dismissal Letter**

⁴ Letter from DOE to UC Berkeley, Aug. 19, 2013, re: Case No. 09-12-2259, available at <http://bit.ly/doeucb>.

⁵ “[I]f there is a bedrock principle underlying the First Amendment,” the Supreme Court has said, “it is that the government [including publicly funded universities] may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quotations and citations omitted).

LEGAL ADVISORY¹

Date: October 25, 2013

From: Asian Americans Advancing Justice – Asian Law Caucus • Center for Constitutional Rights • Council on American-Islamic Relations, San Francisco Bay Area

In August 2013, the United States Department of Education's (DOE) Office of Civil Rights (OCR) closed three investigations into the University of California Berkeley, Irvine, and Santa Cruz opened under Title VI of the Civil Rights Act of 1964.² The investigations were prompted by complaints that Jewish students who identify with the State of Israel were deprived of an equal educational opportunity because campus events created a "hostile environment" by featuring criticism of United States foreign policy towards Israel/Palestine and criticism of Israel's policies towards the Palestinians.

DOE *rejected* these complaints, finding that such events "constitute[] expression on matters of public concern directed to the University community. **In 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.** In this context, the events that the complainants described do not constitute actionable harassment."³

Examples of Protected Speech

The Supreme Court has repeatedly recognized that speech on matters of public concern is entitled to the highest protection under the First Amendment.⁴ Public universities may violate the Constitution if they interfere with students and faculty engaging in such activities.⁵ In closing these three investigations, DOE determined that the following activities are examples of speech on matters of public concern that *do not* constitute actionable harassment under Title VI:

- Mock military checkpoints, whereby students don military costume to enact scenes from the Occupied Palestinian Territories, sometimes during a week of events called "Israeli Apartheid Week."⁶
- A professor in a World History course makes comments critical of Israeli military activities without discussing other political issues.⁷

¹ This advisory is intended for informational purposes only as a public service, and is not legal advice or a substitute for legal advice.

² DOE's determination letters in these three cases, explaining its legal findings, can be downloaded at the following URLs: UC Berkeley (<http://bit.ly/doeucb>); UC Santa Cruz (<http://bit.ly/doeucsc>); UC Irvine (<http://bit.ly/doeucirvine>).

³ See UC Santa Cruz and UC Berkeley determination letters. (Emphasis added.)

⁴ "[S]peech on matters of public concern...is at the heart of the First Amendment's protection." *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011) (quotations and citations omitted). "[I]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 1219 (quotations and citations omitted).

⁵ For additional legal background, please see an October 2011 letter from the National Lawyers Guild concerning universities' obligations to protect students' free speech rights at <http://bit.ly/nlgspeech>.

⁶ See UC Berkeley letter at 1, 3.

- Debates concerning university divestment from companies that support Israel's military in the Palestinian territories.⁸
- A film screening and panel discussion about Palestine featuring guest speakers and moderated by a University professor, with a University department's sponsorship.⁹
- A student-organized and University-sponsored "teach-in" called "Understanding Gaza" which featured only speakers perceived to be sympathetic to the Palestinian cause.¹⁰
- A University-sponsored program entitled "Costs of War on Israeli Society: Two Unheard Perspectives" and another one entitled "Truth and Consequences of Israel's Gaza Invasion."¹¹

Distinguishing Between Political Disputes and Racial/Ethnic Disputes

DOE determined that in many cases, student-on-student conduct in this context (like "unwelcoming looks," the use of curse words in heated arguments, the use of cameras at protests to record adversaries, and calling someone a "neo-con" or "Zionist") "was based on the student's political views," not "national origin,"¹² and thus, did not implicate Title VI.

DOE also considered a small number of allegations pertaining to specific acts of vandalism by unknown perpetrators expressing hatred of an identifiable group, like racially-charged graffiti in bathroom stalls and a swastika on a student's dorm room door. Although DOE OCR did not find Title VI violations in the particular circumstances of these cases, its treatment of the allegations suggests that, if a University is notified of such incidents, it should take prompt action to remedy it, including removing the graffiti and offering support services to affected students.

Important Takeaway Points

1. Criticism of a government's policies is not the same as harassment of students who identify with that government. It is not anti-Semitic or anti-Jewish to criticize Israel.
2. University departments have the right to sponsor panels, discussions, and other events featuring viewpoints critical of a government, including the Israeli government.
3. Universities must honor students' right to engage in expressive conduct on a subject of public concern, including theatrical events and demonstrations concerning the Israeli-Palestinian conflict.

⁷ *Id.*

⁸ *Id.*

⁹ See UC Santa Cruz letter at 1, 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² See UC Irvine letter at 3-6.

LEGAL ADVISORY¹

Date: October 25, 2013

From: Asian Americans Advancing Justice – Asian Law Caucus • Center for Constitutional Rights • Council on American-Islamic Relations, San Francisco Bay Area

In August 2013, the United States Department of Education's (DOE) Office of Civil Rights (OCR) closed three investigations into the University of California Berkeley, Irvine, and Santa Cruz opened under Title VI of the Civil Rights Act of 1964.² The investigations were prompted by complaints that Jewish students who identify with the State of Israel were deprived of an equal educational opportunity because campus events created a "hostile environment" by featuring criticism of United States foreign policy towards Israel/Palestine and criticism of Israel's policies towards the Palestinians.

DOE *rejected* these complaints, finding that such events "constitute[] expression on matters of public concern directed to the University community. **In 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.** In this context, the events that the complainants described do not constitute actionable harassment."³

Examples of Protected Speech

The Supreme Court has repeatedly recognized that speech on matters of public concern is entitled to the highest protection under the First Amendment.⁴ Public universities may violate the Constitution if they interfere with students and faculty engaging in such activities.⁵ In closing these three investigations, DOE determined that the following activities are examples of speech on matters of public concern that *do not* constitute actionable harassment under Title VI:

- Mock military checkpoints, whereby students don military costume to enact scenes from the Occupied Palestinian Territories, sometimes during a week of events called "Israeli Apartheid Week."⁶
- A professor in a World History course makes comments critical of Israeli military activities without discussing other political issues.⁷

¹ This advisory is intended for informational purposes only as a public service, and is not legal advice or a substitute for legal advice.

² DOE's determination letters in these three cases, explaining its legal findings, can be downloaded at the following URLs: UC Berkeley (<http://bit.ly/doeucb>); UC Santa Cruz (<http://bit.ly/doeucsc>); UC Irvine (<http://bit.ly/doeucirvine>).

³ See UC Santa Cruz and UC Berkeley determination letters. (Emphasis added.)

⁴ "[S]peech on matters of public concern...is at the heart of the First Amendment's protection." *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011) (quotations and citations omitted). "[I]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 1219 (quotations and citations omitted).

⁵ For additional legal background, please see an October 2011 letter from the National Lawyers Guild concerning universities' obligations to protect students' free speech rights at <http://bit.ly/nlgspeech>.

⁶ See UC Berkeley letter at 1, 3.

- Debates concerning university divestment from companies that support Israel's military in the Palestinian territories.⁸
- A film screening and panel discussion about Palestine featuring guest speakers and moderated by a University professor, with a University department's sponsorship.⁹
- A student-organized and University-sponsored "teach-in" called "Understanding Gaza" which featured only speakers perceived to be sympathetic to the Palestinian cause.¹⁰
- A University-sponsored program entitled "Costs of War on Israeli Society: Two Unheard Perspectives" and another one entitled "Truth and Consequences of Israel's Gaza Invasion."¹¹

Distinguishing Between Political Disputes and Racial/Ethnic Disputes

DOE determined that in many cases, student-on-student conduct in this context (like "unwelcoming looks," the use of curse words in heated arguments, the use of cameras at protests to record adversaries, and calling someone a "neo-con" or "Zionist") "was based on the student's political views," not "national origin,"¹² and thus, did not implicate Title VI.

DOE also considered a small number of allegations pertaining to specific acts of vandalism by unknown perpetrators expressing hatred of an identifiable group, like racially-charged graffiti in bathroom stalls and a swastika on a student's dorm room door. Although DOE OCR did not find Title VI violations in the particular circumstances of these cases, its treatment of the allegations suggests that, if a University is notified of such incidents, it should take prompt action to remedy it, including removing the graffiti and offering support services to affected students.

Important Takeaway Points

1. Criticism of a government's policies is not the same as harassment of students who identify with that government. It is not anti-Semitic or anti-Jewish to criticize Israel.
2. University departments have the right to sponsor panels, discussions, and other events featuring viewpoints critical of a government, including the Israeli government.
3. Universities must honor students' right to engage in expressive conduct on a subject of public concern, including theatrical events and demonstrations concerning the Israeli-Palestinian conflict.

⁷ *Id.*

⁸ *Id.*

⁹ See UC Santa Cruz letter at 1, 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² See UC Irvine letter at 3-6.



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

AUG 19 2013

Carole E. Rossi
Chief Campus Counsel
University of California, Santa Cruz
200 Clark Kerr Hall
1156 High Street
Santa Cruz, California 95064

(In reply, please refer to OCR case no. 09-09-2145.)

Dear Ms. Rossi:

In a letter dated March 7, 2011, the U.S. Department of Education, Office for Civil Rights (OCR) notified you that it was opening for investigation a complaint against the University of California, Santa Cruz (University). The complaint alleged that Jewish students were subjected to a hostile environment in violation of Title VI of the Civil Rights Act of 1964, and that the University failed to respond appropriately and effectively to notice of the hostile environment.

First, the complaint alleged that an event in January 2009 entitled "A Pulse on Palestine," that included a film and a panel discussion between two external guest speakers that was moderated by a University professor created a hostile environment for Jewish students at the University. Second, the complaint alleged that a "teach in" entitled "Understanding Gaza," that was scheduled to take place in March 2009 "will undoubtedly be highly offensive and hurtful to many Jewish students on our campus." The complaint alleged that the teach-in will be a "one-sided politically motivated event, in which both speakers will undoubtedly vilify and demonize the Jewish State." After the complaint was filed, the complainant further alleged that the University's sponsorship of a program that was scheduled to take place in April 2010 entitled "Costs of War on Israeli Society: Two Unheard Perspectives" would be "deeply offensive and hurtful to many Jewish students on our campus." The complainant alleged that she sent a "strictly informational" e-mail to the University to make the University aware of the effect that an event, entitled "Truth and Consequences of Israel's Gaza Invasion," scheduled to take place on May 10, 2012 and sponsored by a student organization, would have on Jewish students. Finally, the complainant alleged that the University failed to respond promptly and effectively to several reported incidents concerning anti-Semitic graffiti on campus.

OCR enforces Title VI of the Civil Rights Act of 1964 and its implementing regulations. The regulations, at 34 C.F.R. §100.3(a) and (b), prohibit discrimination based on race, color or national origin by recipients of Federal financial assistance. Universities are

responsible under Title VI and the regulations for providing students with a nondiscriminatory educational environment. Harassment of a student based on race, color or national origin can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. Harassment against students who are members of a discrete religious group, including Jews, triggers a university's Title VI responsibilities when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices. A university also has responsibility under Title VI when its students are harassed based on their actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity. The University receives funds from the Department and is subject to Title VI and the regulations.

OCR has consistently maintained that the statutes and regulations that it enforces protect students from prohibited discrimination, and do not restrict the exercise of expressive activities or speech that are protected under the First Amendment of the U.S. Constitution. This is particularly relevant in the university environment where academic freedom fosters the robust exchange of ideas. OCR's 1994 guidance regarding harassment on the basis of race, color, or national origin stated that in determining whether a hostile environment existed, the inquiry looks at how the conduct would have adversely affected the enjoyment of some aspect of the recipient's educational program by a reasonable person, of the same age and race as the victim, under similar circumstances. (Racial Incidents and Harassment against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448, 11449 (1994)). However, the guidance cautioned that OCR does not "endorse or prescribe speech or conduct codes or other campus policies to the extent that they violate the First Amendment." (*Id.* at 11450, n.7.) In 2003, OCR issued a "Dear Colleague" letter clarifying OCR's enforcement standards in light of First Amendment protections.

In addressing allegations of harassment, OCR recognizes that in order to be prohibited by the statutes and regulations that OCR enforces, the harassment must include something beyond the mere expression of views, words, symbols or thought that a student finds personally offensive. The offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment. Under OCR's standards, in order to establish a hostile environment conduct must be sufficiently severe, persistent or pervasive as to limit or deny the student's ability to participate in or benefit from the educational program. This requires that conduct be evaluated from the perspective of a reasonable person in the alleged victim's position.

In its investigation, OCR carefully reviewed all of the available information with respect to the allegations, as well as additional allegations that were made after filing the OCR complaint. OCR reviewed the documentation and information that the University provided in response to OCR's data request. In addition, OCR sent a survey regarding students' experiences surrounding the 2009 "A Pulse on Palestine" event to 87 of the 91 students¹ who had signed a petition protesting the event in 2009. OCR received four

¹ The e-mail addresses of four students who signed the petition were illegible.

responses to the surveys: two responders stated that they believed that there was a hostile environment for Jewish students at the University, and two of the responders stated that they did not feel that there was a hostile environment for Jewish students at the University. In addition, OCR interviewed two of the responders² to the survey and one alumna who signed the petition, but did not respond to the survey. One student responder who was interviewed by OCR stated that he never felt discriminated against in any way by the University and that events at his residential college were very open and welcoming of different perspectives. Another student responder stated to OCR during an interview that she believed the campus had a “very strong community of Jewish students” and that in day to day interactions, including classes, there is an open dialogue that is not discriminatory. The alumna who was interviewed by OCR stated that when the University sponsored “A Pulse on Palestine” she felt “completely failed by my school” and stated that it was “hurtful” that the University would sponsor such events. In addition, OCR also reviewed a list provided by the University of the on-campus events and conferences related to Judaism, Israel, Palestine, and/or Islam that took place during the 2008-2009 academic year. A total of 42 events held: 27 were sponsored or co-sponsored by Jewish student groups or faculty; 15 were sponsored or co-sponsored by Muslim student groups or faculty.

Based on the results of its investigation, OCR is closing this complaint. The facts relevant to OCR’s determination and the reasons therefor are set forth below.

Of the four events alleged in the OCR complaint, “A Pulse on Palestine” and “Truth or Consequences of Israel’s Gaza Invasion” took place as scheduled. The two other events that were alleged to be harassing, “Understanding Gaza” and “Costs of War on Israeli Society: Two Unheard Perspectives,” were cancelled. All these events constituted (or would have constituted) expression on matters of public concern directed to the University community. In 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. In this context, the events that were described do not constitute actionable harassment.

With regard to the allegation concerning anti-Semitic graffiti on campus, OCR determined that once such graffiti was reported, the University took prompt action to investigate the circumstances and to remove the graffiti.

Accordingly, OCR is closing the complaint as of the date of this letter. This concludes OCR’s consideration of this complaint. OCR is notifying the complainant by concurrent letter.

This letter sets forth OCR’s determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR’s formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

² Two of the survey responders did not respond to OCR’s requests for interview.

Please be advised that the University may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personal information which, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

If you have any questions about this letter, please call our office at 415-486-5555.

Sincerely,



Zachary Pelchat
Team Leader



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

AUG 19 2013

Robert J. Birgeneau
Chancellor
Office of the Chancellor
200 California Hall # 1500
University of California at Berkeley
Berkeley, California 94720-1500

(In reply, please refer to case no. 09-12-2259.)

Dear Chancellor Birgeneau:

In a letter dated September 11, 2012, the U.S. Department of Education, Office for Civil Rights (OCR), notified you that it was opening for investigation a complaint against the University of California, Berkeley (University). The complaint alleged that peers subjected Jewish students at the University to a hostile environment on the basis of their national origin, and the University failed to respond promptly and effectively to notice of the hostile environment.

The complaint and the additional allegations that the complainants made after filing the complaint described five timely¹ incidents that they alleged created a hostile environment for Jewish students. First, the complaint alleged that mock military checkpoint demonstrations held on campus during Israeli Apartheid Week by Students for Justice in Palestine in 2012, created a hostile environment on the basis of national origin for Jewish students. Second, the complainants alleged that during a Survey of World History course, a professor offended a Jewish student when she commented on Israeli air strikes but did not discuss any other current political issues. Third, the complainants alleged that participants made statements against Jews during recent Associated Students Union of the University of California meetings to discuss a student senate bill resolution calling for the divestment of University funds from companies that support Israel's military in the Palestinian territories. Fourth, the complainants alleged that a Jewish student complained that someone defaced the sign on campus for Tikvah, a Jewish student organization. Finally, the complainants alleged that someone drew a swastika on a Jewish student's dormitory room door in December 2012.

OCR enforces Title VI of the Civil Rights Act of 1964 and its implementing regulations. The regulations, at 34 C.F.R. §100.3(a) and (b), prohibit discrimination based on race, color or national origin by recipients of Federal financial assistance. Universities are

¹ Section 106 of OCR's *Case Processing Manual* provides as follows: "OCR will take action only with respect to those complaint allegations . . . that have been filed within 180 calendar days of the date of the last act of alleged discrimination unless the complainant is granted a waiver under Section 107."

responsible under Title VI and the regulations for providing students with a nondiscriminatory educational environment. Harassment of a student based on race, color or national origin can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. Harassment against students who are members of a discrete religious group, including Jews, triggers a university's Title VI responsibilities when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices. A university also has responsibility under Title VI when its students are harassed based on their actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity. The University receives funds from the Department and is subject to Title VI and the regulations.

OCR has consistently maintained that the statutes and regulations that it enforces protect students from prohibited discrimination, and do not restrict the exercise of expressive activities or speech that are protected under the First Amendment of the U.S. Constitution. This is particularly relevant in the university environment where academic freedom fosters the robust exchange of ideas. OCR's 1994 guidance regarding harassment on the basis of race, color, or national origin stated that in determining whether a hostile environment existed, the inquiry looks at how the conduct would have adversely affected the enjoyment of some aspect of the recipient's educational program by a reasonable person, of the same age and race as the victim, under similar circumstances. (Racial Incidents and Harassment against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448, 11449 (1994). However, the guidance cautioned that OCR does not "endorse or prescribe speech or conduct codes or other campus policies to the extent that they violate the First Amendment." (*Id.* at 11450, n.7.) In 2003, OCR issued a "Dear Colleague" letter clarifying OCR's enforcement standards in light of First Amendment protections.

In addressing allegations of harassment, OCR recognizes that in order to be prohibited by the statutes and regulations that OCR enforces, the harassment must include something beyond the mere expression of views, words, symbols or thought that a student finds personally offensive. The offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment. Under OCR's standards, in order to establish a hostile environment conduct must be sufficiently severe, persistent or pervasive as to limit or deny the student's ability to participate in or benefit from the educational program. This requires that conduct be evaluated from the perspective of a reasonable person in the alleged victim's position.

In its investigation, OCR carefully reviewed all of the information that we found in our investigation of the allegations that occurred within 180 days of the date that the complainants filed the complaint. OCR sent letters to the leaders of seven Jewish student organizations inviting members to contact OCR if they observed the mock military checkpoint that occurred in Sproul Plaza in 2012. OCR interviewed the complainants, Jewish student witnesses provided by the complainants, and student witnesses who responded to letters OCR sent to University Jewish student

organizations. OCR also interviewed student witnesses who are members of Students for Justice in Palestine and who contacted OCR when they heard about the investigation. In addition, OCR observed three of the days during the Israel Peace and Diversity Week that took place on the University's campus from March 3-9, 2013, including a "Peace Rally" when students held a counter-demonstration involving a cardboard box cut out and painted to look like a bus, which read "Segregated Bus" and "No Palestinians."

Based on the results of its investigation, OCR is closing this complaint. The facts relevant to OCR's determination and the reasons therefor are set forth below.

OCR has determined that the first three allegations in the complaint describe events that constituted expression on matters of public concern directed to the University community. In 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. In this context, the events that the complainants described do not constitute actionable harassment.

With regard to the fourth allegation, OCR's investigation determined that the alleged defacement of the Tikvah sign was not reported. The University had no record of the incident and the student witnesses who were interviewed by OCR did not corroborate the complainants' allegation that the incident had been reported to the University; they further informed OCR that the organization fixed the sign after it was defaced. With regard to the fifth allegation, the complainants informed OCR that the student did not report the incident; the student removed the swastika herself after she discovered it. Accordingly, the fourth and fifth allegations do not state claims because the University neither knew nor reasonably should have known about the alleged harassing events.

Accordingly, OCR is closing the complaint as of the date of this letter. This concludes OCR's consideration of the complaint. OCR is notifying the complainants by concurrent letter.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and it should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainants may have the right to file a private suit in federal court whether or not OCR finds a violation.

Federal regulations prohibit the Recipient from retaliating against the complainants or from intimidating, threatening, coercing, or harassing the complainants or anyone else because the complainants filed a complaint with OCR or because the complainants or anyone else take part in the complaint resolution process.

Under the Freedom of Information Act, it may be necessary to release this document and related records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

If you have any questions about this letter, please call our office at 415-486-5555.

Sincerely,



Zachary Pelchat
Team Leader

cc: Christopher M. Patti, Esq.
Chief Campus Counsel



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

AUG 19 2013

Dr. Michael V. Drake
Chancellor University of California, Irvine
The Chancellor's Office
510 Administration
Irvine, CA 92697-1900

(In reply, please refer to OCR case number 09-07-2205)

Dear Chancellor Drake:

In a letter dated April 25, 2008, the U.S. Department of Education, Office for Civil Rights (OCR), notified you that it was opening for investigation a complaint against the University of California, Irvine (University). The complaint alleged that Jewish students were harassed and subjected to a hostile environment, on the basis of their national origin, with respect to the following incidents:

1. *Hostility toward a student who just completed her freshman year because she is Jewish and pro-Israel.*
2. *Harassment of a student reporter as she attempted to interview Muslim Student Union (MSU) guest Ward Churchill in May 2007 during "Holocaust Memorial Week." Specifically, a Muslim student repeatedly pushed a camera in the student reporter's face. The student filed a complaint with the University, but was not satisfied with the University's response.*
3. *Harassment by a University student of a rabbi visiting the campus in May 2007 for an "Israel: Apartheid Resurrected" event. Specifically, the student cursed at the rabbi and asked him, "Don't you have somebody's money to steal?" Nearby students, including at least one Jewish student, heard the comment.*
4. *Harassment of a Jewish student at an MSU-sponsored event on May 16, 2007. Specifically, another student called the Jewish student a "whore" and a "slut" and repeatedly used the word "f---" while yelling at her. The individual allegedly yelled at other students present, calling them "animals."*
5. *Coercion and intimidation of a student by MSU students following his attempt to film an MSU event in May 2007.*
6. *A University administrator harassed a Jewish student based on her national origin by calling her a "troublemaker" after she complained to him about an allegedly harassing incident.*
7. *At the MSU's request, the University prevents the recording of MSU-sponsored speakers, even ejecting students who attempt to make such recordings from events.*

8. *The University has failed to discipline MSU members for disseminating false information that inflames hatred for Jews and Israel, despite Jewish students complaining that the falsehoods violate University codes of conduct. Specifically, during May 2007's "Israel: Apartheid Resurrected" week, the MSU distributed flyers attributing, allegedly falsely, an anti-Israel statement to Nelson Mandela.*
9. *During spring 2007 events, the University failed to stop MSU members from displaying "UC" on t-shirts and flyers containing anti-Israel sentiments, for example, t-shirts reading, "UC Intifada: How You Can Help Palestine." The University did not respond to Jewish students' complaints that such uses violate University policies that prohibit the use of the University's name, insignia and seal, for political purposes and activities.*

OCR enforces Title VI of the Civil Rights Act of 1964 and its implementing regulations. The regulations, at 34 C.F.R. §100.3(a) and (b), prohibit discrimination based on race, color or national origin by recipients of Federal financial assistance. Universities are responsible under Title VI and the regulations for providing students with a nondiscriminatory educational environment. Harassment of a student based on race, color or national origin can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. Harassment against students who are members of a discrete religious group, including Jews, triggers a university's Title VI responsibilities when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices. A university also has responsibility under Title VI when its students are harassed based on their actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity. The University receives funds from the Department and is subject to Title VI and the regulations.

OCR has consistently maintained that the statutes and regulations that it enforces protect students from prohibited discrimination, and do not restrict the exercise of expressive activities or speech that are protected under the First Amendment of the U.S. Constitution. This is particularly relevant in the university environment where academic freedom fosters the robust exchange of ideas. OCR's 1994 guidance regarding harassment on the basis of race, color, or national origin stated that in determining whether a hostile environment existed, the inquiry looks at how the conduct would have adversely affected the enjoyment of some aspect of the recipient's educational program by a reasonable person, of the same age and race as the victim, under similar circumstances. (Racial Incidents and Harassment against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448, 11449 (1994). However, the guidance cautioned that OCR does not "endorse or prescribe speech or conduct codes or other campus policies to the extent that they violate the First Amendment." (*Id.* at 11450, n.7.) In 2003, OCR issued a "Dear Colleague" letter clarifying OCR's enforcement standards in light of First Amendment protections. In addressing allegations of harassment, OCR recognizes that in order to be prohibited by the statutes and regulations that OCR enforces, the harassment must include

something beyond the mere expression of views, words, symbols or thought that a student finds personally offensive. The offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment. Under OCR's standards, in order to establish a hostile environment conduct must be sufficiently severe, persistent or pervasive as to limit or deny the student's ability to participate in or benefit from the educational program. This requires that conduct be evaluated from the perspective of a reasonable person in the alleged victim's position.

In its investigation, OCR interviewed the complainant and each of the students identified by the complainant as witnesses for each of the allegations. OCR also carefully reviewed all documentation and information provided by the complainant and the University.

Based on the results of the investigation, OCR is closing the complaint. The facts relevant to OCR's determination and the reasons therefor are set forth below.

- 1. Hostility toward a student who just completed her freshman year because she is Jewish and pro-Israel.*

In her interview with OCR, the witness described a relationship with Muslim students who lived in her dormitory so contentious that she felt compelled to move to a new residence during the spring 2007 semester. According to the student, the animosity stemmed from the student's objection to the Muslim students' protests at a lecture that Daniel Pipes delivered on campus and the Muslim students' reactions to her objection. The student stated that she had been friends with the Muslim students until she learned of their protest, at which point she stopped talking to them. The Muslim students responded by ceasing communication with her. This situation ultimately led to a confrontation between the student and the Muslim students, during which she called them anti-Semitic and they called her a racist. Subsequently, the student and her mother requested that the student be moved to a new dormitory; the request was granted. These facts do not support a conclusion that the student was harassed because of her national origin; rather, they demonstrate that the conflict was related to the different political views of the participants.

The student also stated that she perceived general hostility toward herself and Jewish students at anti-Israel events, but did not describe any specific conduct other than "unwelcoming looks." This allegation fails to state a claim of unlawful harassment as "unwelcoming looks," without more, are not sufficiently serious to establish that college students were subjected to a hostile environment.

The student further stated that an unknown person smashed a pumpkin placed outside her campus apartment on which she had carved "shalom"; she stated that she did not report the smashing of the pumpkin to the University. This allegation fails to state a claim because there is no evidence that the pumpkin was smashed because of the

student's national origin; furthermore, there is no evidence that the University knew or reasonably should have known about the incident.

2. *Harassment of a student reporter as she attempted to interview MSU guest Ward Churchill in May 2007 during "Holocaust Memorial Week." Specifically, a Muslim student repeatedly pushed a camera in the student reporter's face. The student filed a complaint with the University, but was not satisfied with the University's response.*

The student informed OCR that students belonging to MSU often positioned cameras in the faces of individuals with pro-Israel or politically conservative views as a tactic to intimidate them, and surmised she was targeted during the event that took place in May 2007 because she was wearing a t-shirt reading "I love Israel." She stated that, although she was born in Israel, she did not think students on campus knew that she was Israeli, or even that she was Jewish. However, she stated that she believed that she was commonly recognized as pro-Israel, and believed she was targeted because of this. This allegation fails to state a claim because there is insufficient evidence that the student was subjected to unlawful harassment because of her national origin; rather, the evidence supports the conclusion that the alleged harassment was based on the student's political views.

3. *Harassment by a University student of a rabbi visiting the campus in May 2007 for an "Israel: Apartheid Resurrected" event. Specifically, the student cursed at the rabbi and asked him, "Don't you have somebody's money to steal?" Nearby students, including at least one Jewish student, heard the comment.*

OCR interviewed two students identified by the complainant as witnesses to this incident. These students understood the statement to the rabbi to be a slur against Jews, and stated that Jewish students who overheard the comment were offended. Although offensive, this statement is not sufficiently serious as to deny or limit students' ability to participate in or benefit from the University's program.

4. *Harassment of a Jewish student at an MSU-sponsored event on May 16, 2007. Specifically, another student called the Jewish student a "whore" and a "slut" and repeatedly used the word "f---" while yelling at her. The individual allegedly yelled at other students present, calling them "animals."*

The student informed OCR that she felt the alleged harasser singled her out because she was wearing a pro-Israel t-shirt, and because he heard her express disagreement with statements of an MSU guest who was speaking when the incident occurred. As stated by the student subjected to the alleged harassment as well as witnesses to the incident interviewed by OCR, the student was targeted because she was perceived to be pro-Israel. This allegation fails to state a claim because there is insufficient evidence

that the student was subjected to unlawful harassment because of her national origin; rather, the evidence supports the conclusion that the alleged harassment was based on the student's political views. Furthermore, even if the witness had alleged that these comments constituted sexual harassment, they were not sufficiently serious as to deny or limit the student's ability to participate in or benefit from the University's program.

5. Coercion and intimidation of a student by MSU students following his attempt to film an MSU event in May 2007.

The student informed OCR that he was videotaping a speech given in May 2007 by a speaker invited to campus by the MSU when several members of the MSU told him to stop filming. He stated that he was photographed twice by an MSU student with members of the MSU following the event. The witness stated that he is not Jewish and that he had never had any contact with these individuals prior to the event. He further stated that he believed that the reason he was singled out by the members of the MSU was because he was filming. A University administrator witnessed this incident and informed the student that he was not permitted to film the event. The student stated that he subsequently filed an anonymous complaint with the University in which he complained that he was not permitted to film the MSU event; he stated that he did not know whether the University investigated his complaint.

The student also described an incident in May 2008. According to the student, because he and his brother were filming the audience at another MSU event, an MSU member charged at and threatened his brother. At the same event, an MSU member blocked the student's path and took pictures of him. The student also described additional instances of antagonism by MSU members when he attempted to film subsequent events. However, because some MSU members had called him a "Zionist" and a "neo-con," the student stated that he believed that they perceived him to be a supporter of Israel and of students who supported the state of Israel. Although the University's Director of Student Conduct witnessed the incident involving the student and his brother, and invited the student to file a complaint, the student did not do so.

These allegations fail to state a claim because the facts demonstrate that the student was the subject of the alleged harassing incident in May 2007 not because of his national origin but rather because of his filming activities and, in the May 2008 and the later events, because of his perceived support for the state of Israel and for students who were supporters of the state of Israel.

6. A University administrator harassed a Jewish student based on her national origin by calling her a "troublemaker" after she complained to him about an allegedly harassing incident.

The student, who is the subject of Allegation Two above, informed OCR that she had a history of actively condemning pro-terrorist and academically dishonest events, blogging about campus events and complaining to administrators about on-campus treatment of

Jewish students, pro-Israel students and students perceived to be pro-Israel. The specific alleged disparaging statement made about her by the administrator was, according to the complaint, in response to the student's objection to an MSU student putting a camera in her face. As discussed under Allegation Two, the student stated to OCR that she believed that this incident occurred because she is pro-Israel. This allegation fails to state a claim because there is insufficient evidence that the student was subjected to unlawful harassment because of her national origin; rather, the evidence supports the conclusion that the alleged harassment was based on the student's political views.

7. *At the MSU's request, the University prevents the recording of MSU-sponsored speakers, even ejecting students who attempt to make such recordings from events.¹*

The complainant informed OCR that she did not know of any student groups other than the MSU that have requested that the University prevent the recording of their events or speakers. Because there is no evidence that the University treated any other similarly-situated student groups differently (i.e., by denying their requests to prevent recording of their events and ejecting students who attempt to make such recordings), there is no basis to infer that the University's actions constituted unlawful discrimination against Jewish students on the basis of their national origin.

8. *The University has failed to discipline MSU members for disseminating false information that inflames hatred for Jews and Israel, despite Jewish students complaining that the falsehoods violate University codes of conduct. Specifically, during May 2007's "Israel: Apartheid Resurrected" week, the MSU distributed flyers attributing, allegedly falsely, an anti-Israel statement to Nelson Mandela.*

The distribution of flyers by MSU members expressing allegedly false and inflammatory anti-Israel information during "Israel: Apartheid Resurrected" week in May 2007 constituted expression by MSU members on matters of public concern directed to the University community. In 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. In this context, the event described by the complainant does not constitute actionable harassment.

9. *During spring 2007 events, the University failed to stop MSU members from displaying "UC" on t-shirts and flyers containing anti-Israel sentiments, for example, t-shirts reading "UC Intifada: How You Can Help Palestine." The University did not respond to a Jewish student's complaint that such use*

¹ The complainant acknowledged that the University has changed its practice since OCR opened this complaint.

violates University policies that prohibit the use of the University's name, insignia and seal, for political purposes and activities.

OCR's investigation revealed that the student reporter who was the subject of Allegation Two above sent an e-mail to the University's Director of Student Conduct on May 30, 2007, in which she complained about the use of "UC" on t-shirts and flyers that contained anti-Israel sentiments and cited the University policy that she believed that the MSU had violated. The Director responded to the student reporter on May 31, 2007, acknowledging her complaint and stating, "This e-mail is to verify that I have received your complaint and that we will look into this matter regarding the use of the university name."

This allegation does not state a claim because there is no evidence that the University's alleged failure to enforce its policies was based on discrimination that is prohibited by Title VI.

OCR is closing the complaint as of the date of this letter and will notify the complainant by concurrent letter.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and it should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

OCR routinely advises recipients of Federal funds and public education entities that Federal regulations prohibit intimidation, harassment or retaliation against those filing complaints with OCR and those participating in the complaint resolution process. Complainants and participants who feel that such actions have occurred may file a separate complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Page 8 – (09-07-2205)

If you have any questions about this letter, please call our office at 415-486-5555.

Sincerely,

A handwritten signature in dark ink, appearing to be 'ZP', followed by a long horizontal line extending to the right.

Zachary Pelchat
Team Leader