



January 13, 2016

Hon. Lamar Alexander  
Chair, Senate Committee on Health, Education, Labor, and Pensions  
428 Senate Dirksen Office Building  
Washington, DC 20510

Hon. Patty Murray  
Ranking Member, Senate Committee on Health, Education, Labor and Pensions  
428 Senate Dirksen Office Building  
Washington, DC 20510

Dear Senators Alexander and Murray:

As civil and human rights organizations, we urge the Senate Committee on Health, Education, Labor and Pensions to carefully examine Secretary of Education nominee Betsy DeVos' commitment to using federal civil rights law to foster educational environments free of discrimination and harassment, while also safeguarding the First Amendment-protected right to voice criticism of government policies, including foreign government policies.

Incidents of racism, xenophobia, Islamophobia, anti-Semitism, anti-Sikh and anti-Arab sentiment, and other forms of discrimination have spiked in recent weeks,<sup>1</sup> and it is incumbent on government officials at all levels of government to take action to ensure safety and security for all people, especially those vulnerable populations targeted by such attacks. The Department of Education (DOE) plays an important role in enforcing federal civil rights law. Title VI of the Civil Rights Act of 1964 prohibits discrimination and harassment on the basis of race, color, or national origin at educational institutions receiving federal funding. The DOE's Office for Civil Rights' (OCR's) interpretation of Title VI also prohibits discrimination against Jewish, Sikh, and Muslim students when the discrimination occurs "on the basis of actual or perceived ancestry or shared characteristics."<sup>2</sup>

OCR carefully enforces Title VI while also respecting First Amendment rights. We are concerned, however, that recent efforts to impose on OCR an overly broad and discredited definition of anti-Semitism violates First Amendment protections while diverting OCR's limited resources away from investigating important instances of discrimination against students, particularly students of color and immigrants.

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<sup>1</sup> See Southern Poverty Law Center, Update: 1,094 Bias-Related Incidents in the Month Following the Election, Dec. 16, 2016, <https://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election>.

<sup>2</sup> See Department of Education, Office for Civil Rights, Dear Colleague Letter, Oct. 26, 2010, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

The Anti-Semitism Awareness Act of 2016 raised important questions concerning the line between enforcing civil rights law while protecting First Amendment rights, as described in the enclosed letter. To clarify Ms. DeVos' interpretation of this line, we urge you to ask the following questions during her confirmation hearing:

- Do you agree with OCR's current interpretation that Title VI also prohibits discrimination against Jewish, Muslim, and Sikh students and members of other religious groups if the discrimination is on the basis of actual or perceived ancestry or shared characteristics?
- Do you agree that students' criticism of governments, government policies, and/or government human rights abuses is political speech protected by the First Amendment of the U.S. Constitution?
- Do you agree that expression of political viewpoints – including viewpoints supportive of Palestinian human rights – does not, standing alone, give rise to actionable harassment under Title VI?

As the movement for Palestinian rights continues to grow across the country, particularly on college campuses, the next Secretary of Education will almost certainly face pressure to punish or censor students organizing for justice in Palestine. Answers to the questions above will shine important light on how Ms. DeVos will respond to that pressure if confirmed as Secretary of Education.

Sincerely,

American-Arab Anti-Discrimination Committee  
Arab American Institute  
Jewish Voice for Peace  
Palestine Legal

Enclosure



December 5, 2016

Hon. Bob Goodlatte  
2309 Rayburn Office Building  
Washington, DC 20515

Hon. John Conyers, Jr.  
2426 Rayburn Office Building  
Washington, DC 20515

**Re: First Amendment concerns with Anti-Semitism Awareness Act**

Dear Rep. Goodlatte and Rep. Conyers:

As civil and human rights organizations committed to racial justice, we support your efforts to confront racism and bigotry on campuses across the U.S. However, we write to raise concerns with the Anti-Semitism Awareness Act (the Act), which directs the U.S. Department of Education (DOE) to consider a widely discredited re-definition of anti-Semitism<sup>3</sup> in assessing whether alleged violations of Title VI of the Civil Rights Act are “motivated by anti-Semitic intent.” This vague and overbroad re-definition conflates political criticism of Israel with anti-Semitism, infringing on constitutionally protected speech. The re-definition is especially detrimental to universities, where freedom of speech, critical inquiry, and unfettered debate are integral. The re-definition’s application to college campuses has even been repudiated by its original drafter, Kenneth Stern.<sup>4</sup>

Incidents of racism, xenophobia, Islamophobia, anti-Semitism, anti-Arab sentiment, and other forms of discrimination have spiked in recent weeks,<sup>5</sup> and it is incumbent on lawmakers at

<sup>3</sup> Defining Anti-Semitism, Fact Sheet, Special Envoy to Monitor and Combat Anti-Semitism, U.S. Department of State, <http://www.state.gov/j/drl/rls/fs/2010/122352.htm>.

<sup>4</sup> Kenneth Stern, Should a major university system have a particular definition of anti-Semitism, Jewish Journal, June 22, 2015, [http://www.jewishjournal.com/opinion/article/should\\_a\\_major\\_university\\_system\\_have\\_a\\_particular\\_definition\\_of\\_anti\\_semit](http://www.jewishjournal.com/opinion/article/should_a_major_university_system_have_a_particular_definition_of_anti_semit).

<sup>5</sup> Publication, Ten Days After: Harassment and Intimidation in the Aftermath of the Election, Southern Poverty Law Center, November 29, 2016, <https://www.splcenter.org/20161129/ten-days-after-harassment-and-intimidation-aftermath-election>.

all levels of government to take action to ensure safety and security for all people, especially those vulnerable populations targeted by such attacks. The Act does not achieve this goal. Instead of combatting the sources of recent spikes in anti-Semitism in a meaningful way, this bill aims to censor First Amendment-protected advocacy for Palestinian rights. It invites the DOE and universities to violate free speech principles by discriminating against certain viewpoints and chilling one side of an important political debate. For reasons set forth below, we urge you to drop consideration of this bill.

### **I. Lawmakers must take meaningful action to counter racism, xenophobia, Islamophobia, anti-Semitism, and other forms of discrimination**

Incidents of harassment and intimidation against black people, immigrants, Muslims, Jewish people, LGBT people, and women in the U.S. have skyrocketed since the election. The Southern Poverty Law Center (SPLC) recorded over 900 such incidents in the ten days following the election. Some examples include:

- Immigrant students have been taunted and bullied by classmates chanting “build the wall!”
- Eighth graders on a Colorado school bus told a Latino student, “Not only should Trump build a wall, but it should be electorcuted [sic] and Mexicans should have to wear shock collars.”
- In Las Vegas, a white man punched two black men and attempted to assault a black woman, after which he shouted “Donald Trump!” and “White Power!”
- In Nashville, a white man harassed a woman in a hijab, yelling “[b]e prepared to go back to your country with ISIS.... Donald Trump will kick all of your ass back where you came from.”
- In Vermont, members of a synagogue found swastikas drawn on the temple’s front door.<sup>6</sup>

Since many incidents go unreported, the SPLC’s report likely represents just the tip of the iceberg.

In this context, it is crucial for lawmakers at all levels of government to take meaningful action to address the concerns of members of targeted communities. Lawmakers can, for example, take steps to ensure the DOE has the resources it needs to investigate such incidents on university campuses.

Instead of addressing the real problems of rising anti-Semitism and other forms of racism and discrimination, however, proponents of the Act are exploiting the moment to pass legislation aimed at stifling and suppressing the First Amendment right to dissent and to criticize Israeli government policies on university campuses.<sup>7</sup> Instead of investigating the types of abuses documented in the SPLC report, the DOE will be directed to investigate the content of film screenings, academic panels, and lectures that are critical of Israeli government policies.

It is not the DOE’s role to be political thought police. The DOE’s duty is to investigate incidents of harassment and discrimination on campus. Empowering the DOE to fulfill that duty is more important than ever.

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<sup>6</sup> Id.

<sup>7</sup> See, e.g., Anti-Defamation League (@ADL\_National), Twitter (Dec. 2, 2016 12:05 PM), [https://twitter.com/ADL\\_National/status/804778450074697728](https://twitter.com/ADL_National/status/804778450074697728).

## II. The re-definition of anti-Semitism endorsed by the Act is not appropriate for the university setting and risks violating the First Amendment

The Act purports to address rising anti-Semitism on college campuses, but a close reading reveals that its true purpose is to silence campus advocacy for Palestinian rights and censor any criticism of Israeli government policies. The Act would direct the DOE to consider the State Department's re-definition of anti-Semitism when determining whether alleged violations of Title VI of the Civil Rights Act are motivated by anti-Semitism. Much of that re-definition is uncontroversial and aligns with a traditional understanding of the term.<sup>8</sup> But the re-definition, which was originally drafted – and subsequently discarded – by a European Union agency,<sup>9</sup> radically departs from that understanding with its listing of examples of “Anti-Semitism Related to Israel,” known as the “three D’s”: “demonizing Israel,” “applying a double standard to Israel” and “delegitimizing Israel.”<sup>10</sup> This codifies the false conflation of anti-Semitism with political speech critical of Israeli policies. This approach is inappropriate, especially for universities that value and are obligated to protect academic freedom and First Amendment-protected speech.

### a. Applying the re-definition of anti-Semitism in the U.S. violates the First Amendment

The State Department's anti-Semitism re-definition is not binding law in the United States and is used for the limited purpose of “monitoring and combatting acts of anti-Semitism and anti-Semitic incitement *that occur in foreign countries.*”<sup>11</sup> It does not apply domestically, and is not used by any other U.S. government agency. Adoption of the re-definition on campuses or elsewhere in the U.S. is a violation of the First Amendment, and requiring DOE to consider the re-definition is tantamount to inviting DOE to violate the First Amendment.

Any consideration of the re-definition should alert lawmakers to the constitutional quandary it poses, and makes clear why such a definition *cannot* be used domestically. By requiring DOE to consider, for example, whether someone who demands Israel's compliance with international law asks the same “of any other democratic nation,” the Act unconstitutionally discriminates based on viewpoint and compels speech in violation of the First Amendment (despite Sec. 5 of the Act which claims that it shall not be construed to infringe on First Amendment protected rights). Moreover, an Act requiring the DOE to enter such a morass of viewpoint-based distinctions would chill and invite punishment of constitutionally protected speech.

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<sup>8</sup> For example, the State Department's re-definition begins: “Anti-Semitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.” Merriam-Webster defines anti-Semitism as, “Hostility toward or discrimination against Jews as a religious, ethnic or racial group.”

<sup>9</sup> The European Union Monitoring Centre (EUMC), where this description first appeared in 2005 as the result of lobbying efforts by Israel-aligned groups, meant it to be only a “guide for data collection.” (See Seth Berkman, “Anti-Semitism Fight Hinges on Definition,” *Forward*, September 25, 2012, <http://forward.com/articles/163105/anti-semitism-fight-hinges-on-definition/?p=all>). It was ultimately discarded even for that limited use due to objections from European organizations. In 2013 it was removed from the agency's website altogether, over protests by Israeli officials and U.S.-based Israel advocacy groups. (JTA, “EU drops its 'working definition' of anti-Semitism,” *The Times of Israel*, Dec. 5, 2013, <http://www.timesofisrael.com/eu-drops-its-working-definition-of-anti-semitism/>).

<sup>10</sup> Defining Anti-Semitism, *supra* note 1.

<sup>11</sup> See 22 U.S.C. § 2731(b) (emphasis added).

In addition, the part of the re-definition that identifies “Anti-Semitism as it relates to Israel” is so broad and vague that it would encompass any and all criticism of Israel. What is a “double standard” with regards to criticism of Israel and how and by whom will it be judged? How many additional countries are students and professors required to criticize when they criticize Israel, and what degree or depth of criticism are they required to make in order to avoid applying a “double standard” to Israel? How would the university define “delegitimizing” or “demonizing” Israel?

Requiring the DOE to consider this re-definition in its investigation of Title VI complaints essentially puts DOE officials and university administrators in the position of violating free speech rights. Indeed, the DOE’s Office for Civil Rights (OCR) has already affirmed in four separate cases—after conducting lengthy investigations of alleged harassment of Jewish students based on student and faculty advocacy for or academic engagement on Palestinian rights issues—that expression of political viewpoints does not, standing alone, give rise to actionable harassment under Title VI simply because some may find it offensive.<sup>12</sup>

To the contrary, OCR, in addressing the importance of diverse viewpoints and expression on college and university campuses,<sup>13</sup> noted that the activities described in the harassment complaints:

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.<sup>14</sup>

If DOE is required to investigate the content of political speech by members of the campus community who advocate for Palestinian rights to determine whether it is “demonizing,” “delegitimizing” or applying “double standards” to Israel, as the State Department’s re-definition of anti-Semitism would require, it will essentially be applying a political litmus test to speech, and thus violating the First Amendment.

Administrators, who have a duty to mitigate racially-hostile environments, would also be pressured to respond to speech and advocacy critical of Israel that Israel advocacy groups already regularly claim meets the criteria laid out in the re-definition. Under the mistaken illusion that it is appropriate to penalize such speech and advocacy, administrators may end up violating First Amendment rights. This could expose universities and well-intentioned administrators to liability.<sup>15</sup>

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<sup>12</sup> As DOE notes, “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.” Letter from U.S. Department of Education to UC Berkeley, Aug. 19, 2013, re: Case No. 09-12-2259, available at <http://bit.ly/doeuch>.

<sup>13</sup> DOE OCR has stated it will not, in its enforcement of anti-discrimination laws, exceed the boundaries of the First Amendment for either private or public universities. See Dear Colleague Letter from U.S. Department of Education, July 28, 2003, <http://www2.ed.gov/about/offices/list/ocr/firstamend.html> (“OCR’s regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses.”).

<sup>14</sup> See UC Santa Cruz and UC Berkeley DOE determination letters, <http://bit.ly/doeuch> (Berkeley) and <http://bit.ly/doeucsc> (Santa Cruz).

<sup>15</sup> Indeed, courts have held that speech addressing public issues – such as Palestine/Israel – rests on the highest rung of the hierarchy of First Amendment values. (*see* *Carey v. Brown*, 447 U.S. 455(1980)). Attempts by a government body or a public university to silence one side of the conversation – by claiming that opposition to the state of Israel is anti-Semitic, for example – is contrary to First Amendment principles.

Further, adoption of the re-definition would almost certainly have a chilling effect on constitutionally-protected speech and academic inquiry. Students, professors, and researchers will inevitably act in ways to avoid review of their activities and avoid the specter of being accused of or labeled with anti-Semitism for their political speech activities.

**b. The re-definition of anti-Semitism is destructive to universities that value unfettered speech**

The State Department's re-definition brands critics of Israeli policies and advocates for Palestinian human rights as anti-Semitic by blurring the important distinction between criticism of Israel as a nation-state and anti-Semitism. It does so by denying the legitimacy of widely shared criticism of Israel's policies and practices on which such advocacy is based and claiming that such criticism is instead motivated by hatred of Jewish people.

In addition to inviting unconstitutional actions, it is especially inappropriate for Congress to impose on the DOE a definition of anti-Semitism that encompasses criticism of Israel because of the essential role that academic freedom and unfettered debate play in our nation's universities. The U.S. Supreme Court has recognized the importance of this role, stating that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."<sup>16</sup>

The State Department re-definition would silence legitimate opinions and perspectives, and would impose standards on universities that undermine their commitments to academic freedom and inquiry. Would a mock-checkpoint on a campus quad, aimed at raising awareness about Israeli checkpoints, be considered demonizing? Would a lecture on Israel's violations of international law be considered delegitimization? Would a legal panel on the constitutional right to engage in boycotts for Palestinian rights be considered a double standard? This is the type of inquiry the DOE will be required to enter into if the Act becomes law.

The University of California (UC) and other universities have already been pressured to adopt, and ultimately rejected the anti-Semitism definition endorsed by the Act due to free speech concerns.<sup>17</sup> Israel advocacy organizations pushed for its adoption in March 2015, causing outcry from free speech advocates<sup>18</sup> across the political spectrum, from media,<sup>19</sup> students,<sup>20</sup> graduate student instructors,<sup>21</sup> and Jewish<sup>22</sup> and other civil rights organizations.<sup>23</sup> Jewish

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<sup>16</sup>Keyishian v. Board of Regents, 385 U.S. 589 (1967).

<sup>17</sup> See UC Drops Consideration of State Department Anti-Semitism Definition, Palestine Legal, July 22, 2015, <http://palestinelegal.org/news/2015/7/22/uc-drops-consideration-of-state-department-anti-semitism-definition>.

<sup>18</sup> Will Creely, State Department's Anti-Semitism Definition Would Likely Violate First Amendment on Public Campuses, Foundation for Individual Rights in Education, May 22, 2015, <https://www.thefire.org/state-departments-anti-semitism-definition-would-likely-violate-first-amendment-on-public-campuses/>.

<sup>19</sup> Editorial, How far should UC go with an anti-Semitism policy, Los Angeles Times, July 16, 2015, <http://www.latimes.com/opinion/editorials/la-ed-anti-semitism-20150716-story.html>.

<sup>20</sup> Letter, Students ask Janet Napolitano not to endorse conflation of anti-Semitism with critique of Israel, SJP West, June 29, 2015, <http://sjpwest.org/2015/06/29/students-ask-janet-napolitano-not-to-endorse-conflation-of-anti-semitism-with-critique-of-israel>.

<sup>21</sup> UAW Letter to Janet Napolitano, UC Student Workers Union – UAW Local 2865, July 6, 2015, <http://www.uaw2865.org/uaw-letter-to-president-napolitano/>.

<sup>22</sup> Action alert, Tell UC President Napolitano and the UC Regents: criticizing Israel is not anti-Semitic, Jewish Voice for Peace, [http://org.salsalabs.com/o/301/p/dia/action3/common/public/?action\\_KEY=18000](http://org.salsalabs.com/o/301/p/dia/action3/common/public/?action_KEY=18000).

<sup>23</sup> Palestine Legal, Jewish Voice for Peace, National Lawyers Guild, and the Center for Constitutional Rights sent a letter to Janet Napolitano and the UC Regents outlining First Amendment concerns with the State Department's re-definition of anti-Semitism. The letter is available at

commentators,<sup>24</sup> including – as mentioned above – the definition’s original drafter, Kenneth Stern, repudiated its use on a college campus.<sup>25</sup> We urge you to similarly reject this measure.

### **III. Conclusion**

We appreciate the importance of addressing allegations of anti-Semitism on campus and elsewhere. But the Act’s misguided reliance on the rejected re-definition of anti-Semitism fails to give universities the proper tools to fight anti-Semitism and other forms of discrimination. Instead, it will encourage the DOE and universities to infringe on free speech and academic freedom on campus, in violation of the First Amendment. We urge you to drop consideration of this bill and, instead, engage in meaningful efforts to address the alarming rise in anti-Semitic, racist, anti-Muslim, anti-Arab, anti-immigrant, anti-women, and anti-LGBT incidents and other forms of discrimination that have been fueled by increasing tolerance for such bigotry. This bill will only intensify targeting of already vulnerable communities that are exercising their constitutional rights to speak out for Palestinian rights. It will ultimately undermine civil liberties on campuses, while failing to address or hold accountable the sources of the alarming incidents of bigotry that are occurring on campuses and elsewhere.

Sincerely,

**Dima Khalidi**  
Director  
Palestine Legal

**Natasha Bannan**  
President  
National Lawyers Guild

**Rebecca Vilkomerson**  
Executive Director  
Jewish Voice for Peace

**Sue Udry**  
Executive Director  
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Defending Dissent Foundation

**Kristin Szremski**  
Director of Media and Communications  
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U.S. Campaign for Palestinian Rights

**Samer Khalaf**  
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American-Arab Anti-Discrimination Committee

**Kate Gould**  
Legislative Representative for Middle East Policy  
Friends Committee on National Legislation

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<http://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/558abe8ae4b050f36b381190/1435156106563/COPLetterAntiSemitismFinal.pdf>.

<sup>24</sup> See, e.g., Jay Michaelson, Why U. of California Should Dump “Three D” Definition of Anti-Semitism, The Forward, July 22, 2015, <http://forward.com/opinion/312358/why-u-of-california-should-dump-three-d-definition-of-anti-semitism/>.

<sup>25</sup> Kenneth Stern, supra note 2.