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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

July 17, 2013

Mr. Morton A. Klein, National President
Ms. Susan B. Tuchman, Esq., Director, Center for Law and Justice
Zionist Organization of America
Jacob and Libby Goodman ZOA House
4 East 34th Street
New York, New York 10016

Mr. Kenneth L. Marcus
President and General Counsel
The Louis D. Brandeis Center for Human Rights Under Law
1776 I Street, N.W., Suite 900
Washington, DC 20006

Dear Mr. Klein, Ms. Tuchman and Mr. Marcus:

On behalf of the Office for Civil Rights (OCR) at the U.S. Department of Education (the Department), thank you for your letter of May 2, 2013 to me, as well as your earlier letters of December 12, 2012 to U.S. Secretary of Education Arne Duncan, and of March 21, 2013, to Arthur Zeidman, Regional Director of OCR's San Francisco office regarding complaints filed by your organization against the University of California, Irvine, nos. 09-05-2013 and 09-07-2205. I am pleased to reply to these letters.

Let me begin by recognizing that we share a common goal. No one should have to participate in a school environment in which he or she is subjected to harassment, physically assaulted or threatened, or otherwise in fear for his or her safety. The Department and OCR are firmly committed to ensuring that the civil rights of all students, including Jewish, Arab and Muslim students, are protected when they face harassment that creates a hostile environment.

I understand your frustration with the length of time you have been waiting for resolution of your complaints. Complaint no. 09-05-2013 was closed in 2007 based on multiple grounds. You have appealed that decision, and your appeal is under consideration. Regarding Complaint no. 09-07-2205, OCR has undertaken an investigation, and is working to conclude that case as soon as possible. OCR is reviewing the arguments you have raised in your appeal, and will consider all relevant facts and arguments as it completes the investigation of the open complaint, including those you have raised in your correspondence.

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The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

In addition, you raised questions about how OCR evaluates a claim of anti-Semitic harassment under Title VI. Without opining on the merits of either complaint, I wish to take this opportunity to convey and reaffirm some of the important principles that govern these, and other, complaints regarding alleged hostile environments on college campuses.

Under Title VI of the Civil Rights Act of 1964, institutions that receive financial assistance from the Department may not discriminate on the basis of race, color, and national origin. Congress has vested other federal agencies, including the U.S. Department of Justice, with responsibility to enforce federal laws expressly prohibiting religious discrimination in educational institutions. And OCR will investigate race, color, and national origin discrimination that is commingled with allegations of religious discrimination. Thus, as OCR indicated in its September 13, 2004 Dear Colleague Letter on religious discrimination, “[g]roups that may face discrimination on the basis of shared ethnic characteristics may not be denied the protection of our civil rights laws on the ground that they also share a common faith.” (Dear Colleague Letter, Title VI and Title IX Religious Discrimination in Schools and Colleges, Sept. 13, 2004.)

OCR’s 2010 Dear Colleague Letter on harassment and bullying reaffirmed OCR’s commitment to ensure the right of all students, including students of all religious backgrounds and beliefs, to be free from race, color, national origin, disability, and sex discrimination, including harassment that creates a hostile environment, in our schools, colleges, and universities. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents in order to create a hostile environment. Instead, harassment creates a hostile environment when it is sufficiently serious as to limit or deny a student’s ability to participate in or benefit from an educational program. In determining whether harassment has created a hostile environment, OCR considers the conduct in question from both a subjective and objective perspective. Specifically, OCR’s standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim’s position, considering all the circumstances, including the alleged victim’s age. If an educational institution knows or reasonably should know about harassment that creates a hostile environment, it must take prompt and effective steps reasonably calculated to end such harassment, eliminate any hostile environment, and prevent such harassment from recurring. It is the institution’s failure to act promptly and effectively that constitutes the violation of federal law.

That 2010 Letter specifically states that “harassment against students who are members of any religious group triggers a school’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.” (2010 Letter p. 5 (footnote omitted).) The letter also states that a school “has responsibilities 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.” In considering such issues, OCR is careful to differentiate between harassment based on an individual’s real or perceived national origin, which is prohibited by

Title VI, as compared to offensive conduct based on an individual's support for, or opposition to, the policies of a particular nation, which is not.

OCR has also made it clear that the laws and regulations it enforces protect students from prohibited discrimination, and are not intended to restrict the exercise of any expressive activities or speech protected under the U.S. Constitution. Therefore, OCR has consistently maintained that when schools work to prevent and redress discrimination, they must respect the free speech rights of students, faculty, and other speakers.

OCR's commitment to preventing unlawful harassment in a manner consistent with the free speech rights guaranteed by the Constitution has been reiterated many times. OCR's 2010 Letter noted: "Some conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression," and referred readers to OCR's July 28, 2003 Dear Colleague Letter on the First Amendment for more information on "the First Amendment's application to harassment." (2010 Letter p.2 n.8.) The 2003 Letter stated unequivocally that "schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech."

To be clear, as the 2010 Letter confirmed, harassing conduct can take many forms, including verbal acts and name-calling, and graphic and written statements. But, as the 2003 Letter stated, in order to constitute unlawful harassment, it is not enough that a person find the expression personally offensive. Rather, the conduct must create a hostile environment, as I discussed above.

These standards reflect longstanding OCR policies. For example, 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).) In examining whether an institution acted promptly and effectively in response to a racially hostile environment, OCR's investigation would include the review of any applicable anti-harassment policies or grievance procedures. (*Id.* at 11450.) The guidance further stated that development and dissemination of a policy prohibiting racial harassment and the provision of a grievance procedure are possible elements of an institution's appropriate responsive action. (*Id.* at 11450.) But 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.) Indeed, while the guidance recognized that verbal statements or other forms of expression can create a racially hostile environment (*id.* at 11449), the guidance also stated that "in cases in which verbal statements or other forms of

expression are involved, consideration will be given to any implications of the First Amendment.” (*Id.* at 11448, n.1.)

OCR will endeavor to resolve both cases you have written about with dispatch. In doing so, OCR will continue to uphold both the principle that recipients of federal funds must provide a nondiscriminatory educational environment with respect to race, color and national origin, among other bases, and the principle that they must do so without impinging on the right of free speech that is fundamental both to the American tradition and to the role of the university within that tradition.

Sincerely,

A handwritten signature in cursive script, appearing to read "Seth Galanter".

Seth Galanter
Acting Assistant Secretary
Office for Civil Rights
U.S. Department of Education