

**American Association of Jewish Lawyers and Jurists  
American Jewish Committee  
American Jewish Congress  
Anti-Defamation League  
B'nai B'rith International  
Hillel: The Foundation for Jewish Campus Life  
Institute for Jewish and Community Research  
Jewish Council for Public Affairs  
Jewish War Veterans of the United States of America  
Religious Action Center of Reform Judaism  
Scholars for Peace in the Middle East  
Union of Orthodox Jewish Congregations of America  
Zionist Organization of America**

March 16, 2010

The Hon. Arne Duncan  
Secretary  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202-1510

Re: Protecting Jewish Students Under Title VI of the Civil Rights Act of 1964

Dear Mr. Secretary:

In your thoughtful speech last week in Selma, Alabama, commemorating the 45<sup>th</sup> anniversary of the “Bloody Sunday” confrontation between law-enforcement officials and civil-rights marchers, you appropriately emphasized both the important mission of Title VI of the Civil Rights Act of 1964 and the critical nature of the work of the Department of Education’s Office for Civil Rights (OCR). We write to urge you to ensure that, in furtherance of that critical work, OCR interprets Title VI to protect Jewish students from anti-Semitic harassment, intimidation and discrimination.

This would not be a novel interpretation. Jewish students who were being threatened, harassed or intimidated on their campuses on the basis of their ethnic identity as Jews had legal recourse to redress these problems after OCR clarified its policy for enforcing Title VI in the fall of 2004. At that time, OCR announced that the agency would assert jurisdiction over claims alleging the harassment of Jewish students. In so doing, OCR looked to U.S. Supreme Court jurisprudence construing a 19<sup>th</sup> Century civil rights statute directed at racial discrimination and (in *dicta*) the Equal Protection Clause of the Fourteenth Amendment. The Court concluded that Jews were entitled to protection under that statute because, in the parlance of those times, “race” was understood to encompass what we today understand as “ethnicity” or “national origin.” Relying on

this precedent, OCR concluded that Title VI's broad protections against racial and ethnic discrimination should encompass anti-Jewish incidents.

This conclusion was mandated in light of repeated Supreme Court holdings that the scope of racial discrimination barred under Title VI is coextensive with that which is prohibited under the Equal Protection Clause, as well as the well-established principle that the scope of the 1866 Act's protection is commensurate with that of the Equal Protection Clause. To this extent, OCR was merely following binding Supreme Court precedent. At the same time, OCR's 2004 policy was also based on sound public policy; as OCR declared, it "cannot turn its back on victims of anti-Semitism on the grounds that Jewish heritage may include both religious and ethnic characteristics."

OCR's policy to protect Jewish students was buttressed by the conclusions of the United States Commission on Civil Rights, after the Commission held a hearing on campus anti-Semitism in November 2005. Finding that campus anti-Semitism is a "serious problem which warrants further attention," it recommended that "OCR should protect college students from anti-Semitic and other discriminatory harassment by vigorously enforcing Title VI."

OCR has since retreated from this much-needed policy. In 2007, in response to a complaint filed on behalf of Jewish students at the University of California, Irvine, which alleged severe, pervasive and persistent anti-Semitic harassment, intimidation and discrimination, OCR concluded that it lacked jurisdiction over many of the allegations of the complaint. At about that time, the Hon. Stephanie Monroe, then the Assistant Secretary of Education for Civil Rights, stated that OCR would not investigate allegations of anti-Semitic harassment unless the allegations included other forms of discrimination over which OCR has subject-matter jurisdiction.

The Hon. Russlynn Ali, Assistant Secretary Monroe's successor, echoed this position in a July 2009 letter to Congressman Brad Sherman of California. Assistant Secretary Ali stated that it is OCR's policy that Title VI does not cover anti-Semitic harassment, intimidation, and discrimination. In short, OCR has decided that it will no longer enforce Title VI in cases in which a Jewish student asserts racial or ethnic discrimination that takes place on the basis of the student's status as Jewish.

We urge you to review OCR's change in policy for enforcing Title VI. To Jewish students, the narrowed policy means that they must endure a hostile educational environment because the law, while protecting other ethnic and racial groups, offers them no protection—even when intimidation or harassment is directed at them based on ethnic, as opposed to religious, identity. The government's message to campus perpetrators of anti-Semitic harassment, intimidation and discrimination is that they may continue to do what they are doing, because colleges and universities have no legal obligation to respond to their hateful conduct. As to colleges and universities, OCR's narrowed policy for enforcing Title VI has given the green light not to respond to anti-Semitism, even when it threatens and intimidates Jewish students, because there will be no legal consequences for schools that do not redress the problem.

This unfair and unjust result is no hypothetical matter. Anti-Semitic incidents remain a problem on some U.S. campuses. The Anti-Defamation League (ADL) conducts an annual audit of anti-Semitic incidents in the United States, and reported that in 2008, the number of anti-Jewish incidents on campuses nationwide increased from those reported the previous year. For example, at the University of North Dakota in Grand Forks, a student was reportedly harassed by fellow students with anti-Semitic slurs and was shot with a pellet gun. At the University of California, Santa Cruz, a building was vandalized with anti-Semitic graffiti alleging that Jews were behind the 9/11 attacks. It is fair to assume that the actual number of anti-Semitic incidents is higher than what this audit revealed, since harassment and intimidation often go unreported.

At times, anti-Semitic conduct amounting to intimidation, harassment and discrimination is manifested not by overt anti-Semitic expression, but instead by anti-Israel and anti-Zionist sentiment that crosses the line into anti-Semitism. We recognize that much vehemently anti-Israel and anti-Semitic speech can—and should—be protected First Amendment activity. This is as it should be in a nation that values freedom of speech. For that reason, there is a high bar before any speech or conduct can amount to legally actionable harassment.

Nevertheless, conduct that threatens, harasses or intimidates particular Jewish students to the point that their ability to participate in and benefit from their college experience is impaired should not be deemed unactionable simply because that conduct is couched as “anti-Israel” or “anti-Zionist.” It is also the case that harassment or intimidation that holds Jewish students responsible for the acts of other Jews, or of Israel, is better understood as ethnic or “national origin” discrimination than as religious discrimination. As the U.S. Commission on Civil Rights noted in its 2006 report, “[a]nti-Semitic bigotry is no less morally deplorable when camouflaged as anti-Israelism or anti-Zionism.”

We urge you to clarify that the Office for Civil Rights has clear authority to investigate and remedy instances of harassment and intimidation against Jewish students. We ask that you issue a clear and unequivocal statement that a Jewish student is entitled to the protections of Title VI (i) when he or she is targeted in a school setting for speech or conduct based on the victim’s ethnic or “national origin” identity as a Jew that is severe, pervasive or persistent enough to create a hostile environment for a reasonable person similarly situated to the victim, or (ii) where, under the circumstances, speech or conduct creates an actionable hostile environment even where the complainant was not the target of the offensive or harassing conduct. We ask also that you issue a directive that OCR will vigorously enforce the law to ensure that Jewish students are protected against such anti-Semitic harassment, intimidation and discrimination.

We would welcome the opportunity to meet with you to discuss this matter. In the coming days, a representative of our group will be in touch with your office to seek to schedule such a meeting. In the meantime, if you or your representative wishes to contact us, please be in touch with Richard Foltin, American Jewish Committee, at 202-

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785-5463 or [foltinr@ajc.org](mailto:foltinr@ajc.org), or Susan Tuchman, Zionist Organization of America, at  
212-481-1500 or [stuchman@zoa.org](mailto:stuchman@zoa.org).

Respectfully submitted,

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cc: The Hon. Russlynn Ali  
The Hon. Thomas Perez