



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 timely<sup>1</sup> 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

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<sup>1</sup> 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,

A handwritten signature in black ink, appearing to be 'ZPA', with a long horizontal line extending to the right.

Zachary Pelchat  
Team Leader

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