



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

August 27, 2018

Susan B. Tuchman, Esq.
Zionist Organization of America
4 East 34th Street
New York, New York 10016

Rutgers University - OCR Case No. 02-11-2157

Dear Ms. Tuchman,

This letter responds to your appeal, dated September 29, 2014, of the US Department of Education, Office for Civil Rights' (OCR) July 31, 2014 determination regarding the above-referenced complaint you filed against Rutgers University (the University).

In your complaint, you alleged that the University discriminated on the basis of national origin (Jewish ancestry/ethnicity), in violation of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100 (Title VI), by failing to respond appropriately to a complaint filed on April 6, 2011, alleging that students were subjected to harassment and different treatment because of their national origin. Specifically, you alleged that you complained to the University that Jewish students were harassed and treated differently in the following manner: the Outreach Coordinator for the University's Center for Middle East Studies harassed a Jewish student (the Student) by (a) physically threatening him in November 2009, and (b) posting anti-Semitic comments about him on Facebook on December 9, 2010 (Allegation 1); other students harassed the Student by posting threatening comments about him on Facebook on or about January 31, 2011 (Allegation 2); and a student group called "Belief Awareness Knowledge and Action" (BAKA) treated Jewish students differently by charging an admission fee for an event only to Jewish and pro-Israel students on or about January 29, 2011 (Allegation 3).

As stated in OCR's July 31, 2014 letter of findings (LOF), OCR investigated your complaint, determined that there was insufficient evidence of discrimination on the basis of national origin with respect to all three allegations, and closed your case. You then timely appealed this determination on September 29, 2014. Familiarity with this record is assumed.

In your appeal, you make several arguments, which have been carefully reviewed and considered. For the reasons stated below, I have decided to vacate the LOF's analysis insofar as it suggests that there was not any evidence to corroborate that Jewish students were treated differently by being charged an admission fee for an event on or around January 29, 2011, and concludes that there was insufficient evidence to substantiate your allegation that the University failed to respond appropriately to student complaints regarding such allegedly discriminatory imposition of the admission fee at the event.

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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.

With respect to Allegation 3, for example, there is no dispute that at some point just before the January 29 event, a decision was made to impose a \$5 admission fee. The LOF states, at page 9, that OCR “found no evidence that BAKA students had any involvement in the decision to impose the fee, or treated any individuals differently based on national origin with respect to collecting the fee.” In a footnote to this sentence, the LOF refers to an email purportedly written by a BAKA student volunteer stating that the volunteer was instructed to waive the fee for those who appeared supportive of the event, but indicates that OCR did not credit the veracity of the email due to its having been redacted for confidentiality reasons, and therefore accorded it no evidentiary value. The record shows that a student witness who received the email also described the context of the email to OCR in an interview, and that the email states that an event organizer had stated that the admission fee needed to be imposed because “150 Zionists just showed up,” although “if someone looks like a supporter, they can get in for free.”

Title VI prohibits discrimination on the basis of race, color, or national origin; it does not address discrimination on the basis of political opinions. An individual’s pro-Israel viewpoint itself – or, for that matter, any viewpoint on the policies of the state of Israel, the Israeli-Palestinian conflict, or related issues – is not protected by Title VI.¹ However, as OCR has repeatedly indicated previously, discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics – which may include discrimination against Jewish or Muslim students – is discrimination on the basis of national origin or race in violation of Title VI.² In determining whether students face discrimination on the basis of actual or perceived Jewish ancestry, we rely where appropriate upon widely established definitions of anti-Semitism. The International Holocaust Remembrance Alliance (IHRA) working definition is widely used by governmental agencies, including the U.S. Department of State, and is used by OCR as well. It provides as follows:

Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.

Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:

- Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.
- Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective—such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.
- Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.

¹ The extent to which the expression of such opinions is otherwise protected by the First Amendment or other principles of law is beyond the scope of this letter. While OCR does not enforce the First Amendment, OCR has made clear that it will interpret the laws and regulations it does enforce, including those that prohibit discriminatory harassment, consistent with the First Amendment. See Dear Colleague Letter dated July 28, 2003, available at <https://www2.ed.gov/print/about/offices/list/ocr/firstamend.html>. It is not necessary to delve into the complexities of such issues on the present facts, however; suffice it to say for now that OCR’s enforcement activity will not prohibit what the First Amendment allows or what Title VI does not proscribe.

² See Dear Colleague Letters dated October 26, 2010 (“Harassment and Bullying”), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> & September 13, 2004 (“Title VI and Title IX religious Discrimination in Schools and Colleges”) available at <https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>.

- Denying the fact, scope, mechanisms (e.g., gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (The Holocaust).
- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
- Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.
- Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.
- Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.
- Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.
- Drawing comparisons of contemporary Israeli policy to that of the Nazis.
- Holding Jews collectively responsible for actions of the state of Israel.

The European Monitoring Centre on Racism and Xenophobia's (EUMC's) working definition of anti-Semitism is substantially similar to this definition and the definitions used by the U. S. Department of State.

While weighing the credibility of evidentiary sources is important, altogether disregarding the information reflected in the above-referenced email and accompanying witness information was erroneous. Whether or not BAKA or another group that was involved in the operation of the event decided to initiate the fee,³ the email and accompanying witness information provide at least some evidence that such decision was motivated by the sudden appearance of "150 Zionists." It is not known how the event organizers defined the term "Zionist," but the characterization of a large number of people as such – "150 Zionists" – who "just showed up" could have been based at least partially on a visual assessment, as opposed to individually polling all 150 such unexpected arrivals as to their views on the policies of the state of Israel. In other words, the visual perception of the presence of "150 Zionists" referenced in the email could have been rooted in a perception of Jewish ancestry or ethnic characteristics common to the group. In cases such as this, it is important to determine whether terms such as "Zionist" are actually code for "Jewish."

Further, even if motivated solely by a desire to stack the audience with those who supported the event planners' political opinions (or, conversely, to filter out those who disagreed with those opinions), the email states by its very terms that appearance was the means used to determine whether a *waiver* of the fee necessitated by the presence of a large group of "Zionists" (however conceived) was appropriate. In addition, it is important to determine whether the conduct related to Israel is motivated by anti-Semitism. There is no indication that the Regional Office undertook such an analysis. The reports of some students not granted a fee waiver that their appearance reflected Jewish identity (e.g., by wearing a kippah) invites an inference that such Jewish-identifying appearance was used as a signal of the lack of ideological support.⁴ In short, there was at least some evidence that event organizers treated some students differently by charging the admission fee based on their appearance of Jewish ancestry/ethnic characteristics. Thus, the LOF's suggestion that there was not any evidence to corroborate that premise was inaccurate, and vacating that analytical finding is necessary.

³ For purposes of the hostile environment analysis here, it is immaterial whether the alleged harassing activity – the imposition of the fee – was conducted by a group of student peers or a third party outside group, either of which would have been arguably accountable to the University in the context of these facts.

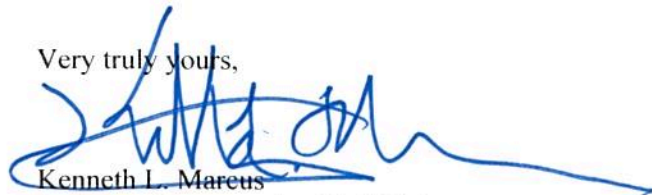
⁴ Some Jewish students also claimed that they attempted to join BAKA at the event in order to qualify for a fee waiver, but were unsuccessful.

OCR's error in disregarding the email and related information echoed the University's failure to consider the same information when students attempted to bring it to the University's attention. The LOF states, at p. 10, that the University informed OCR that the students who complained "did not provide specific information to support that they were not permitted to enter the event because they were Jewish." However, the student who received the email told OCR that the University did not allow him and his fellow students to bring the BAKA student volunteer who sent the email to a meeting with University staff to discuss their complaints regarding the imposition of the fee at the event. The student also reported that he and his fellow students were not able to discuss the email or otherwise present their position at the meeting. Assuming *arguendo* that Jewish students were indeed treated differently at the event and that the University had notice of the same, the University would be obligated to take appropriate responsive action, including action to eliminate any hostile environment against Jewish students that exists. Given the relevance of the email to the question of different treatment as discussed above, the failure to consider such information when presented, if proven, would fall short of an appropriate response to student complaints of harassment made to the University regarding the event. Thus, it is likewise appropriate to vacate the conclusion in the LOF that there was insufficient evidence to substantiate that the University failed to respond appropriately to individual complaints regarding the January 29 event.

The decision to vacate the analytical conclusions described above does not mean that the facts as presented in the record establish a violation. At this point in time, it is unknown whether or not OCR's investigation, absent the errors identified above, would have revealed sufficient (i.e. preponderating) evidence that the imposition of the admission fee at the January 29 event was discriminatory on the basis of national origin and that the University's response to the same resulted in a hostile environment in violation of Title VI. Thus, in light of my decision on this appeal, OCR New York will re-open this case to reassess the evidence obtained during the investigation of the case in light of the definition of anti-Semitism and examples cited above to determine whether a hostile environment on the basis of national origin or race existed at the University for students of actual or perceived Jewish ancestry or ethnic characteristics. In addition, the investigation will also determine whether a hostile environment on the basis of national origin or race currently exists at the University for students of actual or perceived Jewish ancestry or ethnic characteristics.

This concludes OCR's consideration of your appeal. Staff from OCR New York will contact you if any additional information is needed. You may have the right to file a private suit in federal court, regardless of OCR's determination.

Very truly yours,



Kenneth L. Marcus
Assistant Secretary for Civil Rights