



May 9, 2024

VIA OVERNIGHT MAIL

Harvard President Alan M. Garder
Office of the President
Harvard University
Massachusetts Hall
Cambridge, MA 02138 USA

Re: Duty of School Leadership to Protect Jewish Students From a Hostile Campus Environment

Dear President Garder,

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in several significant cases involving the freedoms of speech and religion.¹ We write to raise the antisemitic harassment and violence that has effectively taken over many areas of your campus through an “encampment” and to remind you of your legal responsibilities. Please comply with your immediate, urgent responsibility to *stop* any antisemitic harassment on your campus so that you are not, by virtue of your standing, stature, and authority, *creating, contributing to, or tolerating* a hostile and harassing environment on campus.

As you know, Title VI of the Civil Rights Act of 1964 requires recipients of federal funding, including, in particular, educational institutions such as yours, to ensure their programs and activities are free from harassment, intimidation, and discrimination on the basis of race, color,

¹ See, e.g., *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school’s campus did not violate the Establishment Clause).

and national origin. 42 U.S.C. 2000d et seq. In a September 13, 2004, Dear Colleague letter,² the Department of Education Office for Civil Rights (OCR) clarified that their jurisdiction extends to antisemitism complaints to the extent that they implicate ethnic or ancestral bias. As the OCR policy directive explained, “[g]roups that 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.” *Id.* This application of Title VI to antisemitism has been confirmed in court as well. *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 354 (S.D.N.Y. 2014). Moreover, the Supreme Court has confirmed that Jewish individuals may bring racial discrimination claims. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (holding “that the Court of Appeals erred in holding that Jews cannot state a § 1982 claim against other white defendants”).

Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” 42 U.S.C. § 2000d. This duty encompasses a duty to protect students from a hostile educational environment. As the Department of Education has explained:

An educational institution has a duty to provide a nondiscriminatory environment that is conducive to learning. In addition to the curriculum, students learn about many different aspects of human life and interaction from school. The type of environment that is tolerated or encouraged by or at a school can therefore send a particularly strong signal to, and serve as an influential lesson for, its students.

Department of Education Investigative Guidance, 59 Fed. Reg. 11448, 11449 (Mar. 10, 1994). The Supreme Court has recognized that under Title IX, a university is required to regulate the conduct of other students to protect students from racial harassment. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643-44 (1999). A university has violated its responsibilities when it acts with deliberate indifference to conduct that is “so severe, pervasive, and objectively offensive that it denies its victims the equal access to education” that the statute is designed to protect. *Id.* at 652. The same principles of liability apply to Title VI. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (“Congress modeled Title IX after Title VI of the Civil Rights Act of 1964, and passed Title IX with the explicit understanding that it would be interpreted as Title VI was.”).

Courts have accordingly recognized that the obligations imposed on schools under Title VI include an obligation to protect students from discrimination and harassment. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 n.5 (3d Cir. 2001) (suggesting that Title VI hostile environment claims may lie); *see also Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 934 (10th Cir. 2003) (“[D]eliberate indifference to known instances of student-on-student racial harassment is a viable theory in a Title VI intentional discrimination suit[.]”); *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 584 (5th Cir. 2020); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033-34 (9th Cir. 1998); *Whitfield v. Notre Dame Middle Sch.*, 412 Fed. Appx. 517, 521 (3rd Cir. 2011).

² Kenneth L. Marcus, Deputy Assistant Sec’y for Enforcement, Office of Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), <https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>.

An educational facility is responsible for a racially hostile environment “if it has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment.” Department of Education Investigative Guidance, 59 Fed. Reg. at 11449. As the Department of Education has emphasized, “an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under title VI is premised on a recipient’s general duty to provide a nondiscriminatory educational environment.” *Id.* It further clarified, “the existence of a racially hostile environment that is created, encouraged, accepted, tolerated, or left uncorrected by a recipient also constitutes different treatment on the basis of race.” *Id.* at 11448.

The executive order, “Combating Anti-Semitism,” not only restated longstanding OCR policy that Jewish students are protected against antisemitism under Title VI; it stated that all federal agencies—including the Department of Education—should consider the International Holocaust Remembrance Alliance’s (IHRA’s) definition of antisemitism as guidance for their enforcement of Title VI.³ The Biden administration has repeatedly confirmed that this executive order remains binding policy for the Department. By signing the annual Title VI compliance form and accepting federal assistance, your school has accepted an affirmative obligation to ensure that *all* students, including Jewish students, have a harassment-free educational environment in which to learn. Under the IHRA definition, discriminating against or harassing a Jewish person because of a real or perceived connection to the State of Israel is antisemitic. Accordingly, it is your obligation to protect Jewish students from a racially hostile environment, including from a hostile environment that targets those students for their connection with Israel.

We want to remind you that the First Amendment does not protect any unlawful conduct, which includes trespassing, vandalism, harassment, assault, and the destruction of property. It does not protect someone who is making true threats, which the Supreme Court in *Virginia v. Black*, 538 U.S. 343 (2003), defined as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Id.* at 359. Nor does it protect intimidation, which is “a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 360. There is no First Amendment protection for speech that involves incitement, which the Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), explained includes speech that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Id.* at 447.

Here, it is important to address the meaning of “intifada” or “globalize the intifada” and other similar statements that have recently been made or chanted by students on campuses such as yours. “Intifada” is an Arabic word that translates to “uprising,” “shaking off,” or “rebellion.”⁴ Historically, it is tied to periods of intense violence against Israel by the terrorist organization Hamas,⁵ including the intifada from 1987-1990 and again in 2000-2005. Acts of violence, or

³ Executive Order 13899 of December 11, 2019 (84 FR 68779). That definition states, “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.”

⁴ *Intifada, Palestinian-Israeli History*, BRITANNICA, <https://www.britannica.com/topic/intifada> (last updated Nov. 21, 2023).

⁵ FOREIGN TERRORIST ORGANIZATIONS, BUREAU OF COUNTERTERRORISM, U.S. DEP’T OF STATE, <https://www.state.gov/foreign-terrorist-organizations> (last visited Dec. 8, 2023).

“intifada,” include attacks on innocent civilians via car bombs,⁶ suicide bombers,⁷ and bus attacks.⁸ Now, calls for “intifada” and to “globalize the intifada” are connected to anti-Israel groups that support violence against Israel and its supporters around the world. In fact, pro-Hamas groups have posted maps on social media of locations around the world, including locations in New York City, that it claims are associated with “genocide” in Gaza. Student groups that chant or post these phrases on college campuses are actively calling for violence against anyone who supports or is perceived to support Israel, including Jewish students on those same campuses. They are specifically targeting your Jewish students for their Jewish identity and for their connection with the State of Israel. This is antisemitism. These statements are calls to kill Jews that are inherently in conflict with your Title VI obligations.

In particular, reports indicate that on your campus, students have been encamped since April 24 on the Harvard Yard.⁹ For thirteen days, the Harvard Yard was occupied by anti-Israel protests. “For 13 days, the University has let them.”¹⁰ These protestors even raised the Palestinian flag on the Harvard flagpole and chanted the antisemitic slogan, “From the river to the sea, Palestine will be free.”¹¹ It is only now, two weeks after this “occupation” began, that you have threatened to actually take action against these students for their misconduct.¹² Even after you have finally taken some initial action, students have indicated that the encampment would continue as part of the “student intifada” which has “engulfed the entire country.”¹³ A call for intifada is a call for violence against Jews, and it creates a hostile environment under Title VI.

The danger is real, and authorities must act quickly and decisively to immediately curb the violence and disruptive harassment of these encampments. Failing to do so will have disastrous results, not only for the Jewish community, but also for all Americans. As the late Chief Rabbi Jonathan Sacks once explained, “Antisemitism is the world’s most reliable early warning sign of a major threat to freedom. . . . It matters to all of us. Which is why we must fight it together.”

⁶ David Hoffman, *8 Killed, 40 Injured in Car Bomb Blast at Israeli Bus Stop*, THE WASHINGTON POST (Apr. 7, 1994), <https://www.washingtonpost.com/archive/politics/1994/04/07/8-killed-40-injured-in-car-bomb-blast-at-israeli-bus-stop/6feb4aef-1e8f-4d32-bfe5-79bf5d468760/>. *Suicide and Other Bombing Attacks in Israel Since the Declaration of Principles* (Sept 1993), ISRAELI MISSIONS AROUND THE WORLD, <https://embassies.gov.il/MFA/FOREIGNPOLICY/Terrorism/Palestinian/Pages/Suicide%20and%20Other%20Bombing%20Attacks%20in%20Israel%20Since.aspx> (last visited 16 Feb. 2023).

⁷ *Jerusalem Bombing*, NPR (Feb. 25, 1996), <https://www.npr.org/1996/02/25/1008898/jerusalem-bombing>.

⁸ Marjorie Miller & Mary Curtius, *20 Killed, 10 Injured in Jerusalem Bus Explosion*, LOS ANGELES TIMES, (Mar. 3, 1996), <https://www.latimes.com/archives/la-xpm-1996-03-03-mn-42559-story.html>.

⁹ Michelle N. Amponsah, *Protesters March To Harvard President Garber’s Home, Demand Start of Negotiations*, Harvard Crimson (May 7, 2024), <https://www.thecrimson.com/article/2024/5/7/harvard-palestine-march-to-garber-residence/#:~:text=Pro%2DPalestine%20students%20first%20mounted,of%20student%20arrests%20and%20suspensions>.

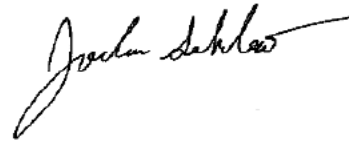
¹⁰ Julian J. Giordano, *Garber is Taking a Patient Approach to the Harvard Encampment. So Far, It’s Working*, Harvard Crimson (May 6, 2024), <https://www.thecrimson.com/article/2024/5/6/garber-patient-strategy-palestine-encampment/>.

¹¹ Madeline A. Hung, *Encampment Protesters Briefly Raise 3 Palestinian Flags Over Harvard Yard*, Harvard Crimson (Apr. 28, 2024), <https://www.thecrimson.com/article/2024/4/28/palestine-flag-harvard-yard/>.

¹² *Protesters Won’t Say if Harvard Encampment Will Continue as Garber Threatens Major Disciplinary Action*, Harvard Crimson (May 6, 2024), <https://www.thecrimson.com/article/2024/5/7/harvard-encampment-protesters-press-conference/>.

¹³ *Id.*

A university has a duty to provide a nondiscriminatory environment that is conducive to learning. Instead, the existence of these encampments on your campus have been fatal to any possibility of Jewish students learning on your campus. In many circumstances, they have been unable to attend class at all because their Jewish status renders them a target of attacks by these enactments. It is your obligation to redress this problem immediately so that your Jewish students are once again safe from harassment for their Jewish status. We demand your assurances that you will address these instances of antisemitism on your campus immediately or we will file a Title VI Complaint with the Department of Education.



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