

Department of Education Issues Guidance for Title VI Compliance in Response to Increased Complaints

By Susan D. Friedfel & Philip M. Duclos

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Meet the Authors



Susan D. Friedfel

Principal
914-872-8027
Susan.Friedfel@jacksonlewis.com



Philip M. Duclos

(Du-clo)
Associate
949-885-1360
Philip.Duclos@jacksonlewis.com

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In response to increases in discrimination complaints, the Department of Education Office of Civil Rights (OCR) issued a [Dear Colleague Letter: Protecting Students from Discrimination, such as Harassment, Based on Race, Color, or National Origin, Including Shared Ancestry or Ethnic Characteristics](#) on May 7, 2024.

Although a Dear Colleague Letter (DCL) does not have the force of law or create new legal standards, this DCL provides useful guidance for compliance with Title VI of the Civil Rights Act of 1964.

OCR emphasizes in the DCL that protections under Title VI extend to characteristics of shared ancestry, ethnicity, and nationality, such as Islam, Judaism, Hinduism, Sikhism, Arab, Israeli, Palestinian, or South Asian. All educational facilities receiving federal financial assistance must comply with Title VI. Because Title VI does not protect students from discrimination based solely on religion, OCR does not address such complaints, although the Department of Justice may address certain claims of religious discrimination involving public schools.

The DCL emphasizes two legal frameworks used by courts and OCR to determine whether schools have engaged in discrimination violating Title VI: hostile environment and differential treatment. Further, it discusses relevant First Amendment considerations.

First, OCR notes that schools have several tools for responding to a hostile environment that do not restrict First Amendment rights. For example, schools can (1) communicate opposition to stereotypical, derogatory opinions, (2) provide counseling and support for students affected by harassment, or (3) take steps to establish a welcoming and respectful school campus. The DCL emphasizes that while schools may be constrained in responding where speech is involved, they still have appropriate tools for fulfilling their legal obligations. Elementary and secondary schools have more leeway to regulate student speech as compared to colleges and universities, OCR advises.

Second, OCR notes that schools have an obligation to (1) take prompt and effective steps, reasonably calculated to (a) end harassment, (b) eliminate hostile environments and their effects, and (c) prevent recurring harassment, where (2) the school has actual or constructive notice of a hostile environment that is (3) based on race, color, or national origin. OCR measures hostility both objectively and subjectively to determine whether it limits or denies a person's ability to participate in or benefit from an educational program or activity. Harassment may exist even where an individual is not individually targeted. OCR examines both the pervasiveness and severity of the harassment.

The DCL includes many factual scenarios that would result in OCR investigation, including (1) swastikas drawn on the whiteboard of a Jewish student's dorm room door, along with negative stereotypes and epithets, also posted as comments on her social media; (2)

protestors of an Israeli filmmaker’s screening chanting epithets about Jewish people, haranguing Jewish attendees, defacing the sponsoring student organization’s building with swastikas; (3) students using slurs and negative stereotypes about Jewish students, accusing them of supporting genocide solely on the basis that the students are perceived to be Jewish; (4) dozens of students surrounding Arab students and calling them “terrorists” and “jihad supporters,” causing them to suspend their student organization’s meetings; (5) counter-protestors shouting such things as “terrorist” and “second Nakba” at Jewish, Arab, Muslim, and other students who gathered to “show solidarity with Gaza.” In each of these examples, the college or university has an obligation to take action beyond merely issuing statements supporting peaceful protest and condemning violence, telling complaining students that “college is difficult and things are tense,” condemning vandalism of school property, or only meeting with the complaining student.

Third, OCR notes that it will investigate allegations of differential treatment and evaluate whether the school (1) limited or denied educational services, benefits, or opportunities to students of a protected class by treating them differently than other students, (2) can provide a legitimate, nondiscriminatory explanation for different treatment, and (3) used its explanation as a pretext for discrimination.

Examples of different treatment resulting in OCR investigation include (1) disciplining Somali Muslim students more harshly than their white peers based on fears that they present greater safety concerns; (2) professors grading Jewish students more harshly than non-Jewish students out of disdain for negative stereotypes of Jewish students; (3) refusal to investigate allegations of national origin discrimination from students who are Kurdish, Hmong, or from other stateless ethnic groups based on the improper view that protections against national origin discrimination only extend to discrimination based on a specific nationality; or (4) ignoring allegations of national origin harassment from Sikh students while investigating similar allegations made by Greek Orthodox, Chaldean, or Coptic Christians.

Finally, OCR notes that while speech against a particular country’s policies or practices is protected by the First Amendment, targeting those critiques against people associated with or from that country may implicate Title VI. Professors and students criticizing Israeli, Saudi, or Indian governments, for example, may not target Israeli, Jewish, Saudi, Muslim, Indian, or Hindu students.

OCR emphasizes that all students are entitled to school environments free from discrimination, whether they are Jewish, Israeli, Muslim, Arab, Palestinian, Sikh, Hindu, or South Asian.

If you have any questions or need any assistance with this new guidance from the OCR, please reach out to a Jackson Lewis attorney to discuss.

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