



Via E-mail

November 4, 2014

Dr. John Kelly
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RE: Civility, freedom of expression, Title VI, and Israel/Palestine at Florida Atlantic University

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

– *Supreme Court Justice William O. Douglas*¹

In the university environment, exposure to... robust and discordant expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience.

– *U.S. Department of Education*²

Dear President Kelly:

We, the undersigned civil rights and community organizations, write to caution you against calls to censor or stifle political debate on your campus. Recently, expression about Israel, Palestine, and the United States' role in the Middle East has been a flashpoint for university administrators who have been asked to condemn certain viewpoints, monitor student expression or activism, and in some cases, to censor or punish students or faculty based on their opinions about these issues.

We acknowledge these situations sometimes present difficult questions given the deeply-held beliefs and passions of students, faculty, and community members. It is precisely in these circumstances, however, that university administrators must steward an open campus forum and be cognizant of “the dependence of a free society on free universities,” as the U.S. Supreme Court has said.³ Students and faculty have the right to voice objections to Israeli policies, just as they have the

¹ *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

² Letter from U.S. Department of Education to UC Santa Cruz, Aug. 19, 2013, re: Case No. 09-09-2145, available at <http://bit.ly/docucsc>.

³ *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957).

right to voice support. When core beliefs are contested and debated, university leaders must guarantee the conditions necessary for free debate on campus, and must assure students and faculty alike that expression on matters of public concern is not only tolerated, but invited. Debate, disagreement, and free expression, including protests, demonstrations, and other expressive activities, embody the highest values of a free university and a democratic society. We hope your university—through its policies, public statements, and actions—will treat freedom of speech not as a burden or a legal limitation, but rather, as a foundational value that enables searching scholarship and democratic governance. This letter offers legal guidelines to ensure that the expression of political views is not stifled by others inside and outside the campus community who disagree.

A. Expression of political viewpoints, standing alone, is not “harassment” and does not create a “hostile educational environment” under Title VI of the Civil Rights Act of 1964.

In recent years, some have alleged that expression criticizing the state of Israel or advocating for Palestinian human rights is identical to “harassment” or “intimidation” that “targets” and creates a “hostile educational environment” for Jewish students on campus on the basis of race or national origin in violation of Title VI of the Civil Rights Act of 1964.⁴

In the context of discussion about Israel and Palestine on campus, however, the U.S. Department of Education’s Office for Civil Rights (OCR) has emphatically rejected complaints conflating protected political speech with actionable harassment.⁵ To date, no such complaint has been sustained or found to have legal merit. Rather, they have demonstrated the following:

1. University departments, residential halls, and other university bodies may sponsor or fund events that feature speakers with critical opinions about the Israeli government or its policies and practices.

- **OCR Investigation of UC Santa Cruz:** A campus residential hall officially sponsored a film screening discussing Israel’s 2008-2009 war on Gaza and voicing criticism of the Israeli occupation. Upon investigation, OCR determined that the film screening “constituted (or would have constituted) expression on matters of public concern directed to the University community,”⁶ and thus was protected under the First Amendment.

⁴ We strongly object to the notion that any ethnic or religious group monolithically holds a single political opinion about this subject, as such complaints suggest. To the contrary, Jewish communities, like Christian, Muslim, and other communities, are diverse and are home to a spectrum of perspectives on this issue and others. To say that a criticism of the Israeli government is inherently an attack on Jewish students is to suggest that a criticism of the Vatican is an attack on Catholic students, or that a criticism of Saudi Arabia’s government is an attack on Muslim students. Under such logic, our freedom to discuss political issues or criticize political institutions would be severely curtailed.

⁵ A federal judge has also dismissed a lawsuit making similar allegations. *See Felber v. Yudof*, 851 F.Supp.2d 1182, 1188 (N.D. Cal. 2011) (“A very substantial portion of the conduct to which [the complainants] object [i.e., speech critical of Israel] represents pure political speech and expressive conduct, in a public setting, regarding matters of public concern, which is entitled to special protection under the First Amendment.”).

⁶ Letter from U.S. Department of Education to UC Santa Cruz, *supra* 2.

Example: In March 2014, a professor at San Francisco State University (SFSU) spoke at an extramural event convened by the College of Ethnic Studies. The professor reported on a research trip to Palestine, criticized the Israeli occupation, shared progress on a collaborative agreement with Palestinian universities, and expressed support for the academic boycott of Israel. A California organization with different views urged the University to investigate “whether faculty behavior... is compromising the campus climate for Jewish and Israeli students.” SFSU President Leslie Wong issued a strong statement in support of the professor, noting “San Francisco State University will continue to respect academic freedom, and we will not censor our scholars nor condone censorship by others.”⁷

2. **Students are free to engage in creative activism that is addressed to the broader campus community and relates to an issue of public concern.**

- **OCR Investigation of UC Berkeley:** Students staged a “mock checkpoint” where they theatrically enacted an Israeli military checkpoint, dramatizing the interaction between Israeli soldiers and Palestinian civilians in the Occupied Palestinian Territory while wearing imitation military uniforms and holding toy firearms. Upon investigation, OCR determined these activities were “expression on matters of public concern” that “do not constitute actionable harassment.”⁸
- **Example:** Activities like “mock eviction notices” in residential halls, addressed to the campus community generally, are also protected forms of expression. In April 2014, Northeastern University suspended a student group which distributed mock eviction notices to raise awareness about home demolitions in the Occupied West Bank. Northeastern University, however, reversed course after public criticism from community groups and the Center for Constitutional Rights, the ACLU of Massachusetts, and the Foundation for Individual Rights in Education.⁹ Allegations that similar actions at Rutgers University, New York University, and your own Florida Atlantic University also targeted Jewish students were investigated and found to be baseless.¹⁰

⁷ See Statement of President Leslie Wong, Jun. 19, 2014, available at <http://bit.ly/sfsultr>.

⁸ Letter from U.S. Department of Education to UC Berkeley, Aug. 19, 2013, re: Case No. 09-12-2259, available at <http://bit.ly/doesuch>.

⁹ See, e.g., Matt Rocheleau, *Suspension of pro-Palestinian student group at Northeastern stirs debate*, BOSTON GLOBE, Mar. 14, 2014, available at <http://www.bostonglobe.com/metro/2014/03/13/suspension-pro-palestinian-student-group-northeastern-stirs-debate/fzDKNCtFeRyKLXTPxbRIHO/story.html>; Peter Bonilla, *Free speech concerns swirl around Northeastern University's suspension of pro-Palestinian group*, THE FIRE, Mar. 14, 2014, <http://www.thefire.org/free-speech-concerns-swirl-around-northeastern-universitys-suspension-of-pro-palestinian-group/>.

¹⁰ See Seth Augenstein, *Rutgers students who made 'mock-eviction' protest cleared of bias accusation*, THE STAR-LEDGER, Nov. 14, 2013, http://www.nj.com/middlesex/index.ssf/2013/11/rutgers_students_who_made_mock-eviction_protest_cleared_of_bias_accusations.html; Phan Nguyen, *Bait-and-switch anti-Semitism: NYU SJP accused of targeting*

No doubt, harassment or intimidation of any student on the basis of race, color, or national origin triggers Title VI obligations. However, as the U.S. Department of Education has stated, mere expression of political viewpoints, whether through pamphlets, theater, demonstrations, or otherwise, does not, standing alone, give rise to a Title VI violation simply because some may find it offensive.¹¹ To the contrary, a public university risks violating students' constitutional rights if it censors or chills protected expression.¹² Individual administrators also risk being held financially and personally liable for violating clearly established First Amendment rights.¹³ Private universities, too, risk undermining an environment that fosters open debate and critical thinking, ideals that most institutions of higher education profess.

B. There is no “civility” exception to the First Amendment.

The use of the vague and highly subjective concept of “civility” has been at the center of a number of recent campus controversies. For example, University of California, Berkeley Chancellor Nicholas B. Dirks faced criticism in September 2014 after issuing a statement pitting “civility” against “freedom of speech.” Not only did faculty respond fiercely, but the Chancellor’s statement was roundly rejected in the pages of the Wall Street Journal,¹⁴ the Los Angeles Times,¹⁵ Inside Higher Education,¹⁶ Salon,¹⁷ the Chronicle of Higher Education,¹⁸ and the Washington Post,¹⁹ forcing him to backtrack in a subsequent clarification.²⁰

Jews, or not, MONDOWEISS, Apr. 25, 2014, <http://mondoweiss.net/2014/04/semitism-accused-targeting>. See, also, Statement from Vice President of Student Affairs at Florida Atlantic University, Dr. Charles Brown, available at http://www.fau.edu/explore/homepage-stories/Dr_Charlesbrown.php (“[W]e have found no evidence that the postings were intended to target or intimidate individuals of any particular religion, national origin or faith.”).

¹¹ As OCR notes, “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.” Letter from U.S. Department of Education to UC Berkeley, *supra* 8 at 2.

¹² OCR has stated it will not, in its enforcement of anti-discrimination laws, exceed the boundaries of the First Amendment for either private or public universities. See Dear Colleague Letter from U.S. Department of Education, July 28, 2003, <http://www2.ed.gov/about/offices/list/ocr/firstamend.html> (“OCR’s regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses.”).

¹³ See, e.g., *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) (denying qualified immunity to government officials who investigated and chilled speech protected under First Amendment).

¹⁴ Greg Lukianoff, *Free speech at Berkeley-so long as it’s ‘civil’*, WALL STREET JOURNAL, Sep. 8, 2014, <http://online.wsj.com/articles/greg-lukianoff-free-speech-at-berkeleyso-long-as-its-civil-1410218613>.

¹⁵ Michael Hiltzik, *Free speech, civility, and how universities are mixing them up*, LOS ANGELES TIMES, Sep. 9, 2014, <http://www.latimes.com/business/hiltzik/la-fi-mh-free-speech-civility-20140909-column.html>.

¹⁶ Colleen Flaherty, *The problem with civility*, INSIDE HIGHER ED, Sep. 9, 2014, <https://www.insidehighered.com/news/2014/09/09/berkeley-chancellor-angers-faculty-members-remarks-civility-and-free-speech>.

¹⁷ David Palumbo-Liu, *Civility is for suckers: Campus hypocrisy and the ‘polite behavior’ lie*, SALON, Sep. 10, 2014, http://www.salon.com/2014/09/10/civility_is_for_suckers_campus_hypocrisy_and_the_polite_behavior_lie/.

¹⁸ Peter Schmidt, *Please for civility meet cynicism*, CHRONICLE OF HIGHER EDUCATION, Sep. 10, 2014, <http://chronicle.com/article/Pleas-for-Civility-Meet/148715/>.

¹⁹ Eugene Volokh, *Free speech and civility at universities*, WASHINGTON POST, Sep. 9, 2014, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/09/free-speech-and-civility-at-universities/>.

²⁰ Ken White, *Follow-up: U.C. Berkeley Chancellor Nicholas Dirks Gets Free Speech Right This Time*, POPEHAT, Sep. 12, 2014, <http://www.popehat.com/2014/09/12/follow-up-u-c-berkeley-chancellor-nicholas-dirks-gets-free-speech-right-this-time/>.

Courts are also hostile to the concept of “civility” at public universities, regularly holding that punishment for “incivility” violates the First Amendment. For example, in 2006, San Francisco State University opened an investigation into whether a student organization—the College Republicans—violated the Student Code of Conduct by failing to be “civil” in its interactions with others on campus. After its members stomped on flags of Hamas and Hezbollah at a campus rally, students complained the act was not “civil” because the flags also depict the Arabic word for God. The University initiated disciplinary proceedings, but did not ultimately sanction the group. Nevertheless, the College Republicans sued SFSU in federal court for unconstitutionally chilling its speech through an investigation. The College Republicans prevailed; in his ruling, federal magistrate Judge Wayne D. Brazil made clear that requiring “civility” on campus at threat of investigation or sanction is unconstitutional:

[A] regulation that mandates civility easily could be understood as permitting only those forms of interaction that produce as little friction as possible, forms that are thoroughly lubricated by restraint, moderation, respect, social convention, and reason. The First Amendment difficulty with this kind of mandate should be obvious: the requirement “to be civil to one another” and the directive to eschew behaviors that are not consistent with “good citizenship” reasonably can be understood as prohibiting the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause.²¹

Courts have also rejected attempts to regulate the “uncivil” behavior of university faculty. In one case, a professor was awarded \$125,000 in attorney’s fees after prevailing under the First Amendment when the university punished him for uncivil speech with “violent overtones.”²² The court found his behavior, though “adolescent, insulting, crude and uncivil,” was nevertheless protected under the First Amendment.²³

Because the concept of “civility” is so elastic, it risks being applied unfairly and selectively on the basis of political disagreement; indeed, it has recently been deployed to castigate students or faculty members who express criticism of the Israeli occupation. For example, in August, the University of Illinois Urbana-Champaign terminated the tenured appointment of Professor Steven Salaita, who had offered his commentary about atrocities in Gaza on Twitter. Donor complaints prompted university administrators and Trustee members to terminate him after describing his

²¹ See, e.g., *College Republicans at San Francisco State University v. Reed*, 523 F.Supp.2d 1005, 1019 (N.D. Cal. 2007).

²² See *Bauer v. Sampson*, 261 F.3d 775, 783 (9th Cir. 2001).

²³ In *Bauer, id.*, Irvine Valley College, a community college in southern California, disciplined a professor for comments he made criticizing the college’s administration like:

1. “I, for one, have etched the name of [the university president] and others of her ilk on my permanent shit list, a two-ton slate of polished granite which I hope to someday drop in [another administrator’s] head.”
2. At a public meeting, a university administrator had stated that the people in the room were “the very best people in the district.” The professor commented, “In a room like that, no decent person could resist the urge to go postal.”
3. The professor published a “fantasy description of a funeral” for a university trustee, at which other administrators were asphyxiated by “a lurid gas emanating from the Great Man’s [the deceased] gaping mouth.”

Id. at 780. The university’s policies defined prohibited “workplace violence” as including “making written, physical, or visual contact with verbal threats or violent behavior overtones.” *Id.* at 782. The court struck down the regulation as facially vague and overbroad under the First Amendment, and reversed the discipline against the professor. *Id.*

comments as “uncivil.” The university now faces a boycott endorsed by nearly 6,000 academics, the condemnation of the American Association of University Professors,²⁴ and other consequences, including the prospect of litigation.

At Ohio University, the student government president parodied the “Ice Bucket Challenge” by enacting a “Blood Bucket Challenge” to draw attention to recent atrocities in Gaza. After outcry from people who disagreed with the student’s point of view, Ohio University authorities condemned the student by invoking the concept of “civility.” Dozens of faculty members responded in an open letter noting that “[d]ramatic nonviolent actions – draft-card burnings, lunch-counter sit-ins, and even self-immolations – capture public attention and spark reactions in an effort to create public debate and social change.”²⁵ Because the student’s expression is clearly protected under the First Amendment, university administrators’ public condemnation was inappropriate and runs the risk of chilling student expression on matters of public concern.

* * *

We hope this letter will bolster your confidence that democratic norms and firm legal principles require upholding the paramount ideals of freedom of speech and academic freedom on your campus, even in the face of great public outcry or pressure about the expression of contentious views by students and faculty. When universities succumb to pressure rather than uphold these foundational principles, Arab, Muslim, and other students who hold these views are disproportionately affected and intimidated into silence.

Please feel free to forward this letter to your general counsel and personnel who supervise student activities.

Should you have any questions or concerns, please feel free to contact us. Thank you for your time and consideration.

Sincerely,

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²⁴ American Association of University Professors, Statement on Case of Steven Salaita, Aug. 7, 2014, <http://www.aaup.org/media-release/statement-case-steven-salaita>.

²⁵ *Open letter by dozens of OU faculty supports Megan Marzec*, THE ATHENS NEWS, Sep. 10, 2014, <http://www.athensnews.com/ohio/article-43169-open-letter-by-dozens-of-ou-faculty-supports-megan-marzec.html>.

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Encl.

In August 2013, the United States Department of Education’s (DOE) Office of Civil Rights (OCR) closed three investigations into the University of California Berkeley, Irvine, and Santa Cruz opened under Title VI of the Civil Rights Act of 1964.² The investigations were prompted by complaints that Jewish students were deprived of an equal educational opportunity because campus events created a “hostile environment” by featuring criticism of United States foreign policy towards Israel/Palestine and criticism of Israel’s policies towards the Palestinians.

DOE *rejected* these complaints, finding that such events “constitute[] 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.”³

Examples of Protected Speech

The Supreme Court has repeatedly recognized that speech on matters of public concern is entitled to the highest protection under the First Amendment.⁴ Public universities may violate the Constitution if they interfere with students and faculty engaging in such activities.⁵ In closing these three investigations, DOE determined that the following activities are examples of speech on matters of public concern that *do not* constitute actionable harassment under Title VI:

- Mock military checkpoints, whereby students don military costume to enact scenes from the Occupied Palestinian Territories, sometimes during a week of events called “Israeli Apartheid Week.”⁶
- A professor in a World History course makes comments critical of Israeli military activities without discussing other political issues.⁷
- Debates concerning university divestment from companies that support Israel’s military in the Palestinian territories.⁸

¹ This advisory is intended for informational purposes only as a public service, and is not legal advice or a substitute for legal advice.

² DOE’s determination letters in these three cases, explaining its legal findings, can be downloaded at the following URLs: UC Berkeley (<http://bit.ly/doeucb>); UC Santa Cruz (<http://bit.ly/doeucsc>); UC Irvine (<http://bit.ly/doeucirvine>).

³ See UC Santa Cruz and UC Berkeley determination letters. (Emphasis added.)

⁴ “[S]peech on matters of public concern...is at the heart of the First Amendment’s protection.” *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011) (quotations and citations omitted). “[I]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Id.* at 1219 (quotations and citations omitted).

⁵ For additional legal background, please see an October 2011 letter from the National Lawyers Guild concerning universities’ obligations to protect students’ free speech rights at <http://bit.ly/nlgspeech>.

⁶ See UC Berkeley letter at 1, 3.

⁷ *Id.*

⁸ *Id.*

- A film screening and panel discussion about Palestine featuring guest speakers and moderated by a University professor, with a University department's sponsorship.⁹
- A student-organized and University-sponsored "teach-in" called "Understanding Gaza" which featured only speakers perceived to be sympathetic to the Palestinian cause.¹⁰
- A University-sponsored program entitled "Costs of War on Israeli Society: Two Unheard Perspectives" and another one entitled "Truth and Consequences of Israel's Gaza Invasion."¹¹

Distinguishing Between Political Disputes and Racial/Ethnic Disputes

DOE determined that in many instances, student-on-student conduct in this context (like "unwelcoming looks," the use of curse words in heated arguments, the use of cameras at protests to record adversaries, and calling someone a "neo-con" or "Zionist") "was based on the student's political views," not "national origin,"¹² and thus, did not implicate Title VI.

DOE also considered a small number of allegations pertaining to specific acts of vandalism by unknown perpetrators expressing hatred of an identifiable group, like racially-charged graffiti in bathroom stalls and a swastika on a student's dorm room door. Although DOE did not find Title VI violations in the particular circumstances of these cases, its treatment of the allegations suggests that, if a University is notified of such incidents, it should take prompt action to remedy it, including removing the graffiti and offering support services to affected students.

Important Takeaway Points

1. Criticism of a government's policies is not the same as harassment of students who identify with that government. It is not anti-Semitic or anti-Jewish to criticize Israel.
2. University departments have the right to sponsor panels, discussions, and other events featuring viewpoints critical of a government, including the Israeli government.
3. Universities must honor students' right to engage in expressive conduct on a subject of public concern, including theatrical events and demonstrations concerning the Israeli-Palestinian conflict.

⁹ See UC Santa Cruz letter at 1, 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² See UC Irvine letter at 3-6.