



# CAMPUS COUNSEL

A legal blog written for administrators, HR professionals, in-house counsel, and deans at colleges and universities

## OCR Provides Examples of Discrimination Based on Shared Ancestry – Colleges Take Note!

BY BOWDITCH & DEWEY • MAY 9, 2024

On May 7, 2024, the U.S. Department of Education’s Office for Civil Rights (OCR) *again* issued guidance in the form of a Dear Colleague Letter (DCL) to educational institutions discussing how Title VI of the Civil Rights Act of 1964 applies to discrimination based on shared ancestry or ethnic characteristics. Tuesday’s DCL followed weeks of campus-based “encampments” and student protests that have rocked college campuses, and on the same day that President Biden forcefully condemned antisemitism in higher education in a speech during the Holocaust Museum’s Days of Remembrance.

In the DCL, OCR clarified – as it did in two prior DCLs each issued within the past six months – that prohibited discrimination under Title VI includes discrimination against Jewish, Israeli, Muslim, Arab, Sikh, South Asian, Hindu, or Palestinian students and school community members. The DCL makes clear that Title VI’s protection against discrimination encompasses antisemitism, while also clearly stating that Title VI does not protect individuals from discrimination based solely on religion.

The key points of the DCL are nothing new. However, the May 7 DCL is considered “significant guidance,” meaning that OCR will take public comments on it and consider such comments in developing new guidance or modifying existing guidance. Perhaps most helpfully, this DCL provides examples of how OCR intends to enforce Title VI and how it expects schools to respond to allegations of discrimination based on shared ancestry or ethnic characteristics. Colleges would be well-served to read these examples closely, as they may inform their responses to student and community concerns.

### HOSTILE ENVIRONMENT

The DCL explains that OCR analyzes whether alleged harassment based on shared ancestry or ethnic characteristics creates a **hostile environment** by determining whether unwelcome conduct is based on race, color, or national origin; is objectively offensive; and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit

from a school's education program or activity. This is similar to the hostile environment standard for sex-based harassment under the final 2024 Title IX regulations and the standard used in the Title VII employment context.

The DCL goes on to provide hypothetical examples of conduct that could create a hostile environment. Examples 4 and 8 may bear resemblance to some of the student protests on campuses since October 7. It is clear based on these examples that OCR is very willing to open Title VI shared ancestry complaints and find violations if schools fail to act in a manner reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

We recommend that schools who have experienced protests and student encampments closely review Examples 4 and 8 and determine what steps, if any, the school has taken or needs to take to fulfil its obligations under Title VI. Please reach out to your Bowditch attorney for assistance in this process.

## DIFFERENT TREATMENT

The DCL also explains that OCR will analyze whether a student was **treated differently** based their shared ancestry or ethnic characteristics by determining whether the school treated a student or group of students differently, whether the school can provide a legitimate, nondiscriminatory basis for the different treatment, and whether the school's explanation for the different treatment is a pretext for discrimination. This is the commonly applied *McDonnell Douglas* framework that OCR has traditionally applied to different treatment claims under Title VI.

The DCL goes on to provide hypothetical examples of conduct that could amount to different treatment. In particular, OCR provides one example related to the Israel-Hamas conflict – see Example 9 – as well as other examples drawn from prior OCR cases. It is clear based on these examples that OCR is sensitive to and willing to open cases where it is abundantly clear that students are being singled out based on their shared ancestry or ethnic characteristics.

We recommend that schools remember to consistently enforce their disciplinary policies and policies around equal treatment. Please reach out to your Bowditch attorney if you have questions.

## EXPRESSION OF VIEWS ABOUT A PARTICULAR COUNTRY

In its final pages, the DCL turns to the big question of when does expression of one's views about a particular country (for example, Israel) cross the line to prohibited discrimination under Title VI. The DCL explains that "if harassing conduct that otherwise appears to be based on views about a country's policies or practices is targeted at or infused with discriminatory comments about persons from or associated with a particular country, then it may implicate Title VI and should be analyzed on a fact-dependent analysis." OCR acknowledges that such analysis can be difficult, as the expression of views about a particular country or its policies does not implicate Title VI, whereas conduct based on students' actual or perceived shared ancestry or ethnic characteristics or citizenship or residency in such country could implicate Title VI.

The DCL provides examples comparing classroom discussions of geopolitical issues with classroom discussions that use offensive stereotypes. In these examples – specifically in footnote 35 – OCR is clarifying that the nondiscrimination requirements of Title VI may override curricular choices made by schools and faculty.

This blog post is just a summary of this important DCL. We highly recommend that all college and university clients read the DCL. Notably, the DCL recognizes that these are nuanced, fact-based inquiries that schools and regulators may have difficulty analyzing. We encourage schools to talk to their Bowditch attorney about Title VI shared ancestry concerns on their campuses.

