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Legal Sidebar

Religious Discrimination at School: Application of Title VI of the Civil Rights Act of 1964

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Since the beginning of armed hostilities between Israel and Hamas on October 7, 2023, Congress has focused significant attention on the reaction of students and schools, colleges, and universities to events unfolding in the region. Congressional hearings have been held and legislative proposals have been introduced addressing religion-based animus, and in particular antisemitism, at institutions of higher education. A number of media reports, complaints filed with the Department of Education (ED), and lawsuits allege that Jewish or Muslim students have faced harassment or other discrimination on campus because of their religious beliefs or identities.

These events have prompted questions about whether and how federal antidiscrimination statutes protect students from discrimination on the basis of religion. A trio of statutes enacted pursuant to Congress's authority under the Spending Clause serve as the primary (though not exclusive) vehicles for students seeking redress for certain kinds of discrimination by their schools: Title VI of the Civil Rights Act of 1964 (Title VI), Title IX of the Education Amendments of 1972 (Title IX), and Section 504 of the Rehabilitation Act of 1973 (Section 504). These laws prohibit discrimination on the basis of race, color, and national origin (Title VI); sex (Title IX); and disability (Section 504) by all or certain recipients of federal financial assistance. None of these laws directly prohibit religious discrimination.

Students facing religious discrimination at public schools may be able to bring claims under the First or Fourteenth Amendments, but the Constitution does not provide for the same enforcement mechanisms that Title VI, Title IX, and Section 504 do. The Constitution does not offer any direct recourse to students at private institutions. In addition, federal agencies lack the authority they possess under these other antidiscrimination laws to enforce any prohibition on religious discrimination, including, for example, the authority to issue regulations, undertake compliance reviews, and investigate and resolve complaints.

For several decades, however, ED has interpreted Title VI to reach religious discrimination when it overlaps with race or national origin discrimination. As ED, Congress, and the courts respond to allegations of religious discrimination at schools, they are considering whether and how Title VI applies to such claims. This Sidebar reviews the state of the law on that question.

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Background on Title VI

Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in federally funded programs. All public schools, colleges, and universities in the country and many private ones accept federal funding and are therefore subject to Title VI. Each federal agency enforces Title VI with respect to its own funding recipients. ED, through its Office for Civil Rights (OCR), is the primary federal agency that enforces Title VI against schools, colleges, and universities.

OCR has broad authority to prevent racial and national origin discrimination by its funding recipients. It issues formal regulations and sub-regulatory guidance interpreting and implementing Title VI. OCR regulations impose obligations beyond the basic nondiscrimination mandate, including, for example, recordkeeping and reporting requirements. OCR may secure Title VI compliance via "any . . . means authorized by law." It can conduct compliance reviews and investigate complaints. If it finds a violation, it determines the remedy to seek, although it must first attempt a cooperative resolution. Remedies can include agreements or orders to an institution to, for example, change its policies, compensate injured students, and cooperate with OCR monitoring going forward. As a last resort, ED may seek to terminate federal funding, which it can do only after making a finding of noncompliance on the record of a formal administrative hearing and giving Congress a chance to weigh in. OCR can also refer cases to the Civil Rights Division at the Department of Justice for enforcement in court.

Educational institutions may be liable under Title VI when they treat students differently because of their race or national origin (known as a disparate treatment claim) and when they fail to respond appropriately to racial or national origin harassment that is so severe, pervasive, and objectively offensive that it deprives students of access to educational benefits or opportunities (known as a hostile educational environment claim). Not all racially or ethnically offensive conduct rises to the level of actionable harassment. Furthermore, to be liable for harassment, a school must have exhibited deliberate indifference—that is, its response must be clearly unreasonable in light of the known circumstances. (For more information on Title VI harassment claims, see CRS Legal Sidebar LSB11087, *Title VI and Peer-to-Peer Racial Harassment at School: Federal Appellate Decisions*, by Jared P. Cole (2023)). Additionally, ED's Title VI regulations prohibit disparate impact discrimination, that is, neutral policies that adversely affect a particular racial or national origin group. The Supreme Court has held that the disparate impact regulation is not enforceable by private litigants, but it has never directly ruled on the validity of the regulation and whether ED can enforce it.

Students who believe their schools have violated Title VI can file complaints with OCR. They may also bring suit directly in federal court. Victorious plaintiffs can receive injunctive relief, that is, a court order directing the institution to change its policies or practices; certain compensatory damages (although likely not damages for emotional distress); and attorneys' fees.

An original draft of Title VI included a prohibition on religious discrimination. Congress omitted that language in the final version. One commentator reads the legislative history to suggest that Congress was concerned that including religion would cut off sectarian colleges and universities from federal funding. Members also expressed the view that religious discrimination in education was not widespread.

For more information about Title VI in general, see CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back.

Title VI and Religious Discrimination

Department of Education's Approach

On its face, Title VI does not prohibit discrimination on the basis of religion. However, in 2004, OCR released guidance explaining that, in OCR's opinion, religious discrimination could, in some circumstances, overlap with racial or national origin discrimination, bringing it within Title VI and ED's purview. OCR has since released additional guidance documents explaining how it interprets Title VI to apply to claims alleging religious discrimination, including claims by Jewish, Muslim, and Sikh students. As OCR interprets the law, religious discrimination is illegal under Title VI if it is based on a group's "actual or perceived: (i) shared ancestry or ethnic characteristics; or (ii) citizenship or residency in a country with a dominant religion or distinct religious identity," rather than the group's religious practices. Discrimination may include "ethnic or ancestral slurs"; harassment based on how students "look, dress, or speak in ways linked to ethnicity or ancestry (e.g., skin color, religious attire, language spoken)"; and actions grounded in "stereotype[s] based on perceived shared ancestral or ethnic characteristics." OCR's examples of religious discrimination overlapping with racial or national origin discrimination include "Muslim students targeted for wearing a hijab," "Sikh students taunted and called terrorists," and Jewish students targeted with swastikas, Nazi salutes, and Holocaust jokes.

OCR's interpretation of Title VI to prohibit some forms of religious discrimination is not new, and OCR had investigated institutions of higher education and K–12 school districts for discrimination against religious groups on the basis of "shared ancestry" before October 7, 2023. In 2021, for example, OCR investigated the University of Vermont and State Agricultural College in response to complaints of antisemitic harassment including, among other things, that a teaching assistant had published tweets threatening to retaliate academically against "zionist" students. In 2022, OCR resolved an investigation against an Arizona school district for its failure to respond to student-on-student antisemitic harassment, including pro-Nazi conduct and Holocaust jokes. OCR has opened more than 100 investigations involving national origin discrimination and religion since October 7, 2023.

Judicial Approaches

Case law is sparse on when discrimination ostensibly on the basis of religion may also constitute racial or national origin discrimination under Title VI. Courts regularly dismiss Title VI claims based on alleged antagonism toward or failure to accommodate religious beliefs. Few courts, however, have addressed the kinds of harassment highlighted by OCR's guidance, making it difficult to know whether courts would agree with OCR's interpretation of Title VI. One district court rejected a Title VI claim based on anti-Muslim discrimination that included allegations that school officials equated Muslims with terrorists. Three other district courts have allowed Jewish K–12 students to proceed under Title VI on claims that their schools failed to address antisemitic harassment by fellow students, who, among other things, allegedly displayed swastikas, performed Nazi salutes, used antisemitic epithets, and made offensive statements about the Holocaust. One court explained that such harassment, drawing on "hackneyed stereotypes, bigoted 'jokes,' and painful references to the Holocaust and Naziism," is "rooted in" antagonism to the victims' "actual or perceived national origin or race" and not only their "faith or religious practices." This analysis appears to align with OCR's view of religious harassment that may violate Title VI.

Beyond Title VI, courts recognize that other laws prohibiting racial and national origin discrimination can reach discrimination against certain groups, including religious groups, when, at the time those laws were enacted, members of those groups were considered to share a racial or ethnic background. Thus, the Supreme Court has allowed claims by Arab and Jewish plaintiffs to proceed under two 19th-century laws

prohibiting certain racial discrimination because, by 19th-century standards, "Jews and Arabs were among the peoples then considered to be distinct races and hence within the protection of the statute." Courts have not analyzed popular ideas of race and ethnicity as applied to religious groups at the time Congress enacted Title VI in the 1960s. Nor has any court weighed in on whether Title VI would protect only those religious groups considered racially distinct in the 1960s, or whether, as OCR would have it, harassment based on the modern perpetrator's apparent view of a group's shared ethnic characteristics could suffice.

Executive Order 13,899, the Antisemitism Awareness Act, and Title VI in the Midst of the Israel-Hamas Conflict

Recent congressional attention to Title VI and discrimination at schools has focused particularly on antisemitism. Beyond whether and how Title VI covers religious discrimination at all, another question concerns what kind of conduct constitutes antisemitism. Agencies, courts, and Congress have considered whether and what forms of opposition to Israel can be antisemitic and might be prohibited by Title VI. In 2019, President Trump adopted Executive Order 13,899, which remains in effect, stating the administration's policy to enforce Title VI against antisemitism. The executive order directed federal agencies to "consider" the "non-legally binding working definition of anti-Semitism adopted . . . by the International Holocaust Remembrance Alliance (IHRA)," as well as the "contemporary examples" cited therein. The IHRA defines antisemitism as "a certain perception of Jews, which may be expressed as hatred toward Jews." Examples include, among other things, "[d]enying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor"; "[a]pplying double standards by requiring of [Israel] a behavior not expected or demanded of any other democratic nation"; and "[d]rawing comparisons of contemporary Israeli policy to that of the Nazis." A bill introduced in the 118th Congress in both houses, the Antisemitism Awareness Act, would similarly instruct ED to "take into consideration" the IHRA definition of antisemitism and contemporary examples when enforcing Title VI. The Antisemitism Awareness Act passed the House on May 1, 2024.

Few courts have considered whether Title VI, or other federal antidiscrimination laws, prohibit particular forms of conduct tied to sentiments about Israel or a Palestinian state. CRS has not located any judicial opinion holding that opposition to Israel, or to Jewish claims in Israel, can be antisemitic for purposes of federal antidiscrimination law. Nor has it located any case holding that pro-Israel conduct, or hostility to pro-Palestinian advocacy, constitutes discrimination on the basis of Palestinian, Arab, or Muslim identity. In the few cases that have addressed claims in the former category, courts have avoided ruling that certain anti-Israel conduct or speech is inherently antisemitic, observing that the issue is "hotly disputed" and emphasizing First Amendment protections for political speech. Courts have also held that discrimination against people for pro-Palestinian expression is not the same as discrimination on the basis of Palestinian identity. This latter category of case suggests another approach courts may take to the question of whether or when anti-Israel activity discriminates on the basis of Jewish identity.

This issue is presently before several courts. Since October 7, 2023, lawsuits have raised the question of whether opposition to Israel can violate Title VI. For example, groups representing Jewish students sued Berkeley Law School for, among other things, allowing student groups to refuse membership and speaker invitations to people who "hold views . . . in support of Zionism." The plaintiffs argue that "'Zionism' is a proxy term for Jews." Even if the term is not being used as a "proxy," the plaintiffs argue, discriminating on the basis of "Zionism" violates Title VI both because Zionism is integral to many Jews' identity and because it denies the Jewish "ancestral" and "historical" connection to Israel. In urging the court to dismiss the suit, Berkeley contends that disciplining student groups who adopt an "anti-Zionism" policy would violate students' First Amendment rights. Other lawsuits also claim Title VI violations based on campus "anti-Zionism," and other universities have raised the First Amendment in response.

Were a court to determine that certain anti-Israel activity discriminated against Jews, that would not fully resolve the question of whether Title VI prohibited such activity—because, as explained above, Title VI does not cover religious discrimination. To find that Title VI applied, a court would also have to find that such actions constituted a form of racial or national origin discrimination, rather than religious discrimination or some other form of discrimination that Title VI does not address.

In the present litigation, many of the defendant schools have not contested that Title VI prohibits antisemitism or that the conduct alleged by plaintiffs is, at least in part, antisemitic. This approach limits the likelihood that the courts in those cases will issue guidance on Title VI's application to religious discrimination. Indeed, while one court ruled that the plaintiffs in one post-October 7 case pled a Title VI claim, it did not opine on whether and when antisemitism is a form of racial or national origin discrimination.

For its part, ED differentiates between harassing speech critical of a country's policies versus that which is critical of its people. In ED's view, Title VI does not reach the expression of purely political opinions about a country. On the other hand, Title VI may be implicated, ED says, if such expression is harassing and "targeted at or infused with discriminatory comments" about a national origin group.

Considerations for Congress

As OCR and a few courts currently interpret the law, the viability of Title VI claims based on animus toward members of a religious group may turn on whether the plaintiffs can show, based on the specific nature of the harassment, that the perpetrators perceived them to share ethnic, racial, or national characteristics. Alternatively, or perhaps additionally, plaintiffs may need to show that they are members of a group considered to share a common race or ethnicity at the time Title VI was enacted.

Congress can amend Title VI to clarify if and when it prohibits religious discrimination. It could, for example, add religion as a protected category or elaborate on when religious discrimination overlaps with racial or national origin discrimination. Congress may consider how other antidiscrimination laws approach prohibitions on religious discrimination, particularly given that a large number of sectarian schools accept federal funding. Other antidiscrimination laws contain exceptions for certain conduct by at least some religious institutions, including sectarian schools. Title VI does not.

Since 2016, lawmakers have introduced a version of the Antisemitism Awareness Act at least eight times, as well as other bills that could cause schools, colleges, and universities to lose federal funding if they respond inadequately to antisemitism as defined by the IHRA. Congress may consider how these and similar bills interact with Title VI. The versions of the Antisemitism Awareness Act in the 118th Congress, for example, instruct ED to "take into consideration" the IHRA definition of antisemitism when enforcing Title VI, but they do not amend Title VI itself to explain if and when Title VI covers religious discrimination at all. The Antisemitism Awareness Act also does not specify whether the IHRA definition of antisemitism is to be considered in private lawsuits in addition to OCR enforcement actions.

Various approaches to combating religious discrimination at schools, colleges, and universities may also raise complex constitutional questions. In imposing obligations on sectarian schools, Congress may need to take into account First Amendment limits on applying antidiscrimination laws to religious institutions. Furthermore, lower courts have struck down some school policies prohibiting harassment or limiting access to certain speakers as vague, overbroad, or viewpoint discrimination in violation of the First Amendment. The IHRA defines antisemitism broadly—"a certain perception of Jews"—and includes some forms of criticism of Israel that courts and commentators, including an author of the IHRA definition, have suggested enjoy First Amendment protection. There may be other constitutional considerations as well. For example, laws that extend greater protection to people of one faith than to people of other faiths may face scrutiny under the Equal Protection or Establishment Clauses.

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