Sandra D. Bruce
Deputy Inspector General Delegated the Duties of the Inspector General
U.S. Department of Education
550 12th Street, S.W.
Washington, D.C. 20202

Via email to Sandra.Bruce@ed.gov

Dear Acting Inspector General Bruce:

Palestine Legal and the undersigned organizations request an investigation of Assistant Secretary for Civil Rights Kenneth L. Marcus. We understand that this is a trying time for the nation and the world as a whole, as well as for the department, particularly with the new duties you have undertaken as part of the pandemic response. We are nonetheless hopeful that this critical issue can be addressed, as it threatens to undermine the department's mission to foster educational excellence and ensure equal access.

There is substantial evidence that Mr. Marcus has engaged in violations of his obligation of impartiality as required by the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. pt. 2635. Specifically, Mr. Marcus deviated from established procedures to respond to a pending appeal brought by the Zionist Organization of America (ZOA) about whether Rutgers University engaged in a violation of Title VI of the Civil Rights Act of 1964.

Mr. Marcus decided the appeal ahead of hundreds of appeals that had been awaiting review prior to the ZOA appeal.[1] In resolving the ZOA's appeal, Mr. Marcus adopted a highly contested definition of antisemitism, previously used only by the federal government in the foreign arena, which poses significant risks to First Amendment freedoms on colleges campuses. Though Mr. Marcus's decision to adopt the definition has now been overshadowed by Executive Order 13899, which directed all executive agencies to consider the definition, Mr. Marcus's partiality and deviations from OCR procedures have a continuing impact, including the still-pending investigation at Rutgers and a growing influx of complaints and OCR investigations targeting advocacy and scholarship on Palestinian rights.

As the attached memorandum explains, there is substantial objective evidence that Mr. Marcus acted partially and gave preferential treatment to the ZOA, a group with which he had worked closely on matters at the heart of the Rutgers appeal prior to his OCR appointment, in violation of 5 C.F.R. § 2635.101(b)(8). At the very least, Mr. Marcus's actions to personally resolve the ZOA's appeal in the manner he did created an appearance of partiality from the perspective of a reasonable person with knowledge of the relevant facts, in violation of 5 C.F.R. § 2635.101(b)(14) and § 2635.502(a).

We urge you to fully investigate this matter and to take appropriate steps to ensure that Mr. Marcus and OCR comply with procedural safeguards that have been established to ensure evenhanded application and interpretation of the laws and regulations OCR enforces. We await

[1] Letter from Kenneth L. Marcus, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Susan B. Tuchman, Zionist Org. of America (Aug. 27, 2018), available at https://www.insidehighered.com/sites/default/server_files/media/Rutgers%20Appeal.pdf.

your decision to open an investigation and offer our full cooperation. It is our hope that an investigation into internal departmental matters can be accomplished through remote interviews and document reviews that would not pose a risk to investigators, or if this is not feasible, the investigation can move forward as soon as circumstances allow.

Sincerely,

Zoha Khalili
Staff Attorney
Palestine Legal

On behalf of:

American-Arab Anti-Discrimination Committee
Asian Americans Advancing Justice – Asian Law Caucus
Center for Constitutional Rights
Civil Liberties Defense Center
Council on American-Islamic Relations (CAIR)
Defending Rights & Dissent
Palestine Legal
Partnership for Civil Justice Fund
Project South

Table of Contents

An investigation of Assistant Secretary for Civil Rights Kenneth L. Marcus—for engaging in violations of his obligation of impartiality as required by the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. pt. 2635—is necessary to preserve the department's ethical standards. It is a basic obligation of public service that employees "shall act impartially and not give preferential treatment to any private organization or individual."[1] There is substantial objective evidence that Mr. Marcus acted partially and gave preferential treatment in violation of 5 C.F.R. § 2635.101(b)(8), or, at the least, created an appearance of partiality from the perspective of a reasonable person with knowledge of the relevant facts, in violation of 5 C.F.R. § 2635.101(b)(14) ("Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part.") and § 2635.502(a) ("…where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless…"), when he personally resolved the appeal of the Zionist Organization of America (ZOA) in August 2018.

I. Background of the ZOA's 2011 complaint, the 2014 decision of the OCR New York regional office, and Mr. Marcus's 2018 decision on ZOA's appeal.

On July 20, 2011, the Zionist Organization of America, a right-wing Israel proxy group, filed a complaint with OCR arguing that Rutgers University had violated Title VI by refusing to take steps to eliminate an alleged hostile environment for Jewish students.[2] In addition to a generalized complaint about criticism of Israel in Middle East studies courses, the complaint cited three incidents as the basis for its hostile environment claim: a November 2009 argument and December 2009 Facebook comment regarding a student who had complained in the school paper about student support for a charity for Palestinian children; a January 2011 Facebook post regarding an opinion piece in the school paper that criticized a group that hosted an event on campus featuring two Holocaust survivors and a Palestinian survivor of the founding of Israel; and the admissions fee charged at this campus event.

Several of the allegations in the complaint were dismissed prior to investigation because OCR could not determine that it had jurisdiction over these claims.[3] The ZOA filed an appeal of this dismissal with OCR's Deputy Assistant Secretary for Enforcement, who referred it to the director of the regional enforcement office, who denied the reconsideration request on May 21, 2012.[4] OCR investigated the remaining allegations in the complaint.

---

[1] 5 C.F.R. § 2635.101(b)(8).

[2] Letter from Morton A. Klein, Nat'l President, Zionist Org. of America, et al., to Timothy Blanchard, Reg'l Dir., Office for Civil Rights, N.Y. Office, U.S. Dep't of Educ. (July 20, 2011), available at https://www.amchainitiative.org/wp-content/uploads/2012/10/ZOAs-Title-VI-complaint-agst-Rutgers-7-20-11.pdf.

[3] See Letter from Timothy Blanchard, Reg'l Dir., Office for Civil Rights, N.Y. Office, U.S. Dep't of Educ., to Susan B. Tuchman, Dir., Ctr. for Law and Justice, Zionist Org. of America (May 21, 2012), available at https://www amchainitiative org/wp-content/uploads/2012/10/OCR-denial-of-ZOA-req -for-recons -of-dismissed-allegations-5-21-12.pdf.

[4] *Id.*

On July 31, 2014, OCR issued a determination letter dismissing the complaint.[5] The letter described the university's investigation and response to the three incidents and OCR's findings. OCR found that the first and second incidents constituted protected speech, not actionable harassment. OCR also found that the university promptly investigated claims that the admissions policy at the January 2011 event was applied unevenly to Jewish students. Neither the university nor OCR found sufficient evidence to support this claim. The ZOA appealed this determination on September 29, 2014.[6]

On August 27, 2018, within weeks of taking office in late June, Mr. Marcus sent a letter to the ZOA vacating the July 2014 findings with regard to the third allegation and reopening the investigation.[7] The decision was predicated on a single footnote in the OCR determination letter, which stated that OCR was unable to verify the credibility of a redacted email that ZOA claimed was from a student volunteer at the event. According to Mr. Marcus, the email allegedly stated that the admissions fee was necessary because "150 Zionists just showed up" but that "if someone looks like a supporter, they can get in for free." Mr. Marcus found that OCR erred in disregarding the email based on its credibility determination and argued that despite that credibility determination, the email could potentially support the allegations in the complaint.

In the letter, Mr. Marcus also quoted in full the International Holocaust Remembrance Alliance (IHRA) definition of antisemitism, stating that it "is used by OCR." The letter did not describe the relevance of the definition to the reopening of the investigation or explain how the definition aids OCR in enforcing Title VI and identifying discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics. Though the circumstances underlying the complaint took place seven years prior, the letter also broadened the scope of the investigation to encompass whether a hostile environment currently exists at Rutgers under the new definition.

In a subsequent statement to media outlets, the Department of Education reportedly clarified Mr. Marcus's statement, stating that the department had not adopted any formal definition of antisemitism.[8]

II. Mr. Marcus expressed an opinion about the merits of this very ZOA complaint against Rutgers before joining the department.

Prior to taking his government post, Mr. Marcus expressed his views on the ZOA complaint against Rutgers University.

Mr. Marcus, as president and general counsel for the Louis D. Brandeis Center for Human Rights Under Law and in his prior role as staff director at the U.S. Civil Rights Commission, worked

---

[5] Letter from Emily Frangos, Compliance Team Leader, U.S. Dep't of Educ., to Morton A. Klein, President, Zionist Org. of America (July 31, 2014), available at https://www documentcloud org/documents/1300803-ocr-decision-on-title-vi-complaint-7-31-14 html.

[6] Letter from Kenneth L. Marcus, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Susan B. Tuchman, Zionist Org. of America (Aug. 27, 2018), available at https://www insidehighered com/sites/default/server_files/media/Rutgers%20Appeal pdf.

[7] *Id.*

[8] See Zach Greenberg, OCR's use of overly broad anti-Semitism definition threatens student and faculty speech, FIRE (Sept. 14, 2018), https://www.thefire.org/ocrs-use-of-overly-broad-anti-semitism-definition-threatens-student-and-faculty-speech/ (quoting statement from the department).

closely with the ZOA.[9] For example, in 2013, Mr. Marcus and the ZOA jointly filed complaints with Brooklyn College against an event on activism for Palestinian rights.[10] In 2013 and 2016, Mr. Marcus and the ZOA co-authored letters to OCR demanding that OCR adopt the IHRA definition of antisemitism.[11]

In April 2012, several months after the Rutgers complaint had been filed with OCR, Mr. Marcus's Brandeis Center issued a press release stating that "Rutgers is the subject of a campus anti-Semitism complaint brought by the Zionist Organization of America under Title VI of the Civil Rights Act of 1964." Even while acknowledging that OCR "is currently investigating that complaint," Mr. Marcus "questioned the adequacy of Rutgers' response to a series of pending allegations." Writing as president and general counsel of the Brandeis Center, but identifying himself as "a former head of OCR" who "authored the OCR policy under which government campus anti-Semitism investigations are conducted," Mr. Marcus explained in his open letter to the Rutgers University president:

> Based on our preliminary evaluation of information provided by Rutgers community members, as well as by other civil rights organizations, we are seriously concerned that serious material issues exist your campus. In particular, we are concerned about matters alleged by the Zionist Organization of America … . In addition, we are concerned that your administration's public responses to these incidents have not met the standards set by your prior best practices, nor have they achieved a level of firmness which we would expect to see at a university of Rutgers' caliber.
>
> As we continue our process of evaluation, we are available to meet with you or your designees, or to discuss these matters by telephone. We are also available to discuss with you how the pending matters can be resolved in a manner which best represents Rutgers' institutional values, fully conforms to applicable law, completely respects freedom of expression, and strongly demonstrates your commitment to equal opportunity, non-

---

[9] Mr. Marcus's relationship with the ZOA dates back to at least 2006. See Morton A. Klein, ZOA Complaint Triggered Federal Anti-Semitism Investigation At UC Irvine, Says U.S. Civil Rights Commission, ZOA (May 18, 2006), https://zoa.org/2006/05/101592-zoa-complaint-triggered-federal-anti-semitism-investigation-at-uc-irvine-says-u-s-civil-rights-commission/ ("We at the ZOA are so grateful to Ken Marcus …"); Morton A. Klein, After Six-Year ZOA Campaign, The U.S. Department Of Education Announces It Will Protect Jewish Students From Anti-Semitic Harassment Under Title VI, ZOA (Oct. 26, 2010), https://zoa org/2010/10/102797-after-six-year-zoa-campaign-the-u-s-department-of-education-announces-it-will-protect-jewish-students-from-anti-semitic-harassment-under-title-vi/ ("The ZOA also thanks Kenneth L. Marcus …").

[10] See Louis D. Brandeis Ctr., Brandeis Center Welcomes Brooklyn College Administration's Apology for Its Handling of 2013 Anti-Israel Event: Jewish Pro-Israel Students Vindicated By Apology, Further Action To Protect Civil Rights Will Be Pursued, https://brandeiscenter.com/brandeis-center-welcomes-brooklyn-college-administrations-apology-for-its-handling-of-2013-anti-israel-event-jewish-pro-israel-students-vindicated-by-apology-further-action-to-protect-civil/.

[11] See, e.g., Letter from Kenneth L. Marcus, President and Gen. Counsel, Louis D. Brandeis Ctr., et al., to Seth Galanter, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (May 2, 2013) (on file with Palestine Legal) [hereinafter Marcus-ZOA Letter 2013]; Letter from Kenneth L. Marcus, President and Gen. Counsel, Louis D. Brandeis Ctr., et al., to James Ferg-Cadima, Deputy Assistant Sec'y for Policy, U.S. Dep't of Educ. Office for Civil Rights (June 2, 2016) (on file with Palestine Legal) [hereinafter Marcus-ZOA Letter 2016].

discrimination, and civil discourse. We will follow-up with your office shortly. In the meantime, you may contact me at this email address.

While we have no further knowledge of Mr. Marcus's follow-up communications with Rutgers University, even this public statement, and its reference to Mr. Marcus's affiliation with OCR, would lead a reasonable observer to question Mr. Marcus's ability to be impartial in adjudicating the ZOA appeal. As explained below, Mr. Marcus's extraordinary role in the ZOA appeal, after he had previously intervened in support of the ZOA's complaint to question Rutgers' response to the ZOA's allegations, was a violation of 5 C.F.R. § 2635.101(b)(14).

III. Mr. Marcus engaged in extreme deviations from normal OCR procedures to resolve the ZOA's appeal himself ahead of other pending appeals.

A. Mr. Marcus decided and signed the appeal letter even though authority over appeals had been assigned to another official.

Mr. Marcus personally reopened the Rutgers case even though OCR's Case Processing Manual (CPM) did not authorize any role for the Assistant Secretary in the appeal process.

OCR's CPM authorizes and governs appeals from regional office decisions. While the CPM has been revised several times, no version of the CPM in effect from the time the complaint was filed until the time the appeal was resolved allowed for any role for the Assistant Secretary. Section 306 of the January 2010 CPM, in effect when the complaint was filed, provided that the Deputy Assistant Secretary for Enforcement would decide any appeals challenging a regional finding of insufficient evidence.[12] As of December 12, 2012, OCR had modified the appeal process, placing those appeals solely within the purview of the director of the regional enforcement office that handled the complaint.[13] The next CPM change regarding appeals occurred in March 2018, when OCR eliminated the appeal process entirely.[14] That CPM was in effect at the time Mr. Marcus issued his letter to the ZOA, granting the four-year-old appeal.

None of the procedural manuals that potentially governed the Rutgers case contained any role for the Assistant Secretary in the appeal process. To our knowledge, no other appeals resolved under this administration had been signed by the Assistant Secretary or Acting Assistant Secretary

---

[12] See Office for Civil Rights, U.S. Dep't of Educ., OCR Case Processing Manual (CPM) (Jan. 2010), available at https://web.archive.org/web/20100615134056/http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html#III_6

[13] See Office for Civil Rights, U.S. Dep't of Educ., OCR Case Processing Manual (CPM) (Jan. 2010), https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm-2010.html#III_6 (last modified Dec. 11, 2012).

[14] See Office for Civil Rights, U.S. Dep't of Educ., Case Processing Manual (CPM) (March 5, 2018), https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm-201803.pdf. The current CPM, which was adopted in November 2018, months after the Mr. Marcus intervened in the appeal, reinstates appeals, directing complainants to file them with OCR headquarters. See Office for Civil Rights, U.S. Dep't of Educ., Case Processing Manual (CPM) (Nov. 19, 2018), https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf.

prior to the Rutgers decision.[15] But in this case, Mr. Marcus personally signed the letter reopening the investigation.[16]

Mr. Marcus's highly unusual decision to disregard written OCR procedures and personally intervene in the Rutgers appeal could lead a reasonable person to believe that he was abusing his position to advance a personal agenda, in violation of 5 C.F.R. § 2635.101(b)(14).

B. Mr. Marcus decided the ZOA appeal before 435 older appeals and, of the 743 appeals resolved in the previous six years, it was one of only three appeals that resulted in a change.

According to data in a spreadsheet released by OCR in response to FOIA request #18-02861-F, when the ZOA filed its appeal on September 29, 2014, there were 619 appeals pending with OCR's Deputy Assistant Secretary for Enforcement.[17] At the time of Mr. Marcus's appeal letter in Rutgers, 435 of those appeals were still pending. Each of these appeals had been pending longer than the Rutgers appeal, including 78 appeals that had been pending for more than 10 years. This includes an appeal of an earlier case at Rutgers University, which had been pending since May 2006.[18] Yet Mr. Marcus elected to disregard hundreds of older appeals and resolved the ZOA appeal.

The irregularity of Mr. Marcus personally handling the ZOA appeal is also evident when looking at the other appeals that OCR resolved during the same period. Of the 183 appeals that were resolved between September 29, 2014, and August 27, 2018, the ZOA appeal was the youngest appeal resolved, save perhaps one.[19] All the other resolved appeals were filed no later than January 2013, 17 months before the ZOA appeal was filed. There is no obvious neutral explanation why the ZOA appeal jumped ahead of all the other appeals that had been pending significantly longer.

The unique handling of the ZOA appeal decision is also reflected in its outcome. Of those 183 appeals resolved between September 29, 2014, and August 27, 2018, by OCR's Deputy Assistant Secretary for Enforcement, only two were reopened (on April 12, 2013, and April 18, 2013).[20] Indeed, if one considers an even broader time period of almost six years (from December 11, 2012, to November 5, 2018) in which 743 appeals were resolved by OCR's Deputy Assistant

---

[15] A request for these documents, filed on November 6, 2018, has yielded only a partial disclosure. See Department of Education FOIA Request 19-00314-F (Interim 1) (on file with Palestine Legal). It is possible that some of the appeal response letters that have not been disclosed were signed by the Acting Assistant Secretary.

[16] Letter from Kenneth L. Marcus, supra note 6.

[17] The numbers in this section are based on our calculations from data provided by the Department of Education FOIA office. There may be slight inaccuracies in the data released and our calculations based on that data.

[18] OCR Docket Number 02052075.

[19] The spreadsheet indicates that with regard to a complaint against Seminole County, Georgia, an adverse decision was issued on November 17, 2016, an appeal was filed on November 21, 2016, and the appeal was resolved on December 19, 2016. Given the comparative speed, we suspect that this appeal was resolved on purely procedural grounds.

[20] The spreadsheet indicates that another appeal was granted on February 17, 2009 in a complaint involving Loyola University New Orleans. But the spreadsheet indicates the appeal was submitted on January 18, 2013, which suggests this entry may contain a coding error.

Secretary for Enforcement, there are no additional examples of the Deputy Assistant Secretary reopening a complaint.

Even assuming that the data released by OCR under FOIA contain some errors, these stark numbers certainly warrant further investigation. A reasonable person knowing that Mr. Marcus had elected to resolve an appeal when there were hundreds of older appeals pending, and reached an outcome that occurred in less than one-half of one percent of resolved appeals (three out of 743) in the prior six years would be hard pressed not to reach the conclusion that Mr. Marcus acted with partiality. This preferential treatment of the ZOA is a violation of 5 C.F.R. § 2635.101(b)(8).

C. Mr. Marcus deviated from prior agency views, in this administration and the prior administration, without explanation.

In his appeal decision, Mr. Marcus stated that the IHRA definition of antisemitism, was "used by OCR" and that it was "widely used by governmental agencies, including the U.S. Department of State."[21] Mr. Marcus's statement in the appeal decision that the IHRA definition is used by OCR, and the implication that it has been used in the past, are unsupported and concealed a dramatic shift in policy.

The department, in this administration and the last, had previously rejected requests that it adopt the IHRA definition of antisemitism to inform its Title VI investigations. In response to a request from a member of Congress, Secretary of Education Betsy DeVos stated in a September 2017 letter that "OCR does not adopt definitions of particular forms of racism or national origin discrimination."[22] As Secretary DeVos explained, such definitions would not aid OCR's highly fact-specific investigations and would quickly become outdated given the myriad and changing ways in which racism and discrimination are expressed. Secretary of Education Arne Duncan sent members of Congress a similar letter during the last administration in December 2015.[23]

Mr. Marcus's implication that the IHRA definition has been used by OCR is also contradicted by prior statements from Mr. Marcus himself. Prior to becoming Assistant Secretary, Mr. Marcus co-authored multiple letters with the ZOA demanding that OCR adopt the IHRA definition.[24]

---

[21] Letter from Kenneth L. Marcus, supra note 6.

[22] Letter from Sec'y of Educ. Betsy DeVos to Rep. Brad Sherman (Sept. 8, 2017), available at https://reason.com/assets/db/15369499618934.pdf.

[23] Letter from Sec'y of Educ. Arne Duncan to Rep. Brad Sherman, et al., (Dec. 18, 2015) (on file with Palestine Legal).

[24] E.g., Marcus-ZOA Letter 2013, supra note 11 (expressing concern that OCR's definition of antisemitism does not include criticism of Israel and complaining about unresolved cases alleging that criticism of Israel created an antisemitic environment); Marcus-ZOA Letter 2016, supra note 11 (urging OCR to use the U.S. State Department definition of antisemitism, which is substantially similar to the IHRA definition). For more information about the . State Department definition and the IHRA definition, see Backgrounder on Efforts to Redefine Antisemitism as a Means of Censoring Criticism of Israel, Palestine Legal, https://palestinelegal.org/redefinition-efforts (updated January 2020) [hereinafter Backgrounder].

Similarly, before joining the department, Mr. Marcus communicated by email and in person with various OCR officials and staff to try and persuade them to make this change.[25]

Mr. Marcus's lack of candor regarding this change of policy gives the appearance of some type of malfeasance. It also resulted in Mr. Marcus failing to provide any explanation or reasoned justification for changing the department's long-standing policy against adopting definitions of particular forms of discrimination. These failings all point towards malfeasance and partiality, or at least an appearance of partiality in violation of 5 C.F.R. § 2635.101(b)(14).

IV. Mr. Marcus clearly exceeded his authority both in adopting the IHRA definition and in the manner in which he adopted it.

A. Congress was debating whether to empower OCR to issue this definition.

This administration has consistently espoused the view that Congress sets policy and the department merely implements it. Yet Mr. Marcus's decision to adopt the IHRA definition was taken while Congress had been considering for the past two years whether to require OCR to use this definition.[26] The legislation has faced significant opposition from civil liberties groups because of the threat it poses to free speech rights.[27] In both the 114th and 115th Congress, Congress declined to enact this legislation, and the current bills have stalled.

Mr. Marcus, before he was nominated and confirmed, unsuccessfully lobbied for these bills, explaining that it was important for Congress to act "immediately" to give the department "the tools necessary to stamp out this ugly blight of campus anti-Semitism."[28] Yet, at the end of the day, Mr. Marcus decided that he could give himself the "tools" that Congress had elected not to give him. That would also lead a reasonable observer to question Mr. Marcus's impartiality in adjudicating the ZOA appeal.

After years of lobbying by Mr. Marcus and the ZOA, in December 2019, President Trump signed Executive Order 13899, directing executive departments and agencies to consider the IHRA

---

[25] See, e.g., Email from Kenneth L. Marcus, President and Gen. Counsel of the Louis D. Brandeis Ctr., to James Ferg-Cadima, Deputy Assistant Sec'y for Policy, Office for Civil Rights, U.S. Dep't of Educ. (May 21, 2015 2:37 PM) (on file with Palestine Legal) (regarding a meeting in April 2015); Email from James Ferg-Cadima to Kenneth Marcus, Susan Tuchman, et al., "Re Letter from AJC, B'nai Brith, LDB and ZOA," (June 10, 2016 3:00 PM) (on file with Palestine Legal) (discussing potential future meeting).

[26] Anti-Semitism Awareness Act of 2019, S.852, 116th Cong. (introduced March 14, 2019) & H.R.4009, 116th Cong. (introduced July 25, 2019); Anti-Semitism Awareness Act of 2018, S.2940, 115th Cong. (introduced May 23, 2018) & H.R.5294, 115th Cong. (introduced May 23, 2018); Anti-Semitism Awareness Act of 2016, S.10, 114th Cong. (introduced December 1, 2016) & H.R.6421, 114th Cong. (introduced December 1, 2016).

[27] See, e.g., ACLU Statement On Senate Introduction Of 'Anti-Semitism Awareness Act,' ACLU (May 23, 2018), https://www.aclu.org/press-releases/aclu-statement-senate-introduction-anti-semitism-awareness-act; Oppose H.R. 6421/S. 10, The Anti-Semitism Awareness Act Of 2016, ACLU, Dec. 5, 2016, https://www aclu org/letter/oppose-hr-6421s-10-anti-semitism-awareness-act-2016.

[28] Kenneth Marcus, How the government can crack down on anti-Semitism on college campuses," Politico (Jan. 11, 2017), https://www.politico.com/agenda/story/2017/01/government-crack-down-anti-semitism-college-campuses-000272; see also Press Release, Louis D. Brandeis Center, LBD Commends Scott and Casey's "Game-Changing" Bipartisan Anti-Semitism Awareness Act (Dec. 1, 2016), https://brandeiscenter.com/ldb-commends-scott-and-caseys-game-changing-bipartisan-anti-semitism-awareness-act/

definition in enforcing Title VI of the Civil Rights Act.[29] As explained below, the use of the IHRA definition, whether pursuant to Mr. Marcus's letter or under the executive order, unconstitutionally infringes on freedom of speech. The executive order makes no reference to Mr. Marcus's prior statement regarding the definition. Given that the executive order was issued over a year after Mr. Marcus's letter, the similarity of President Trump's unilateral adoption of the definition to Mr. Marcus's unilateral adoption of the definition does not absolve Mr. Marcus of the procedural irregularities of his actions and the apparent impartiality they evidence. Nor does it retroactively justify these actions. In fact, Mr. Marcus's statement that the definition is "used by" OCR indicates it may have a potentially much broader application than the order's directive that agencies "consider" the definition.

B. Mr. Marcus's adoption of the IHRA definition violates the First Amendment and does not provide Jewish students additional protections from discrimination.

OCR's use of the IHRA definition to investigate complaints against student activism violates the First Amendment. The vague and overbroad definition sends the message that that OCR considers criticism of Israel antisemitic and thereby encourages schools to abrogate their educational missions and violate campus and constitutional free speech principles.

Contrary to Mr. Marcus's characterization of the definition as "widely used," the IHRA definition of antisemitism is highly controversial.[30] While the State Department has employed a definition similar to the IHRA definition in collecting data about antisemitism in other countries,[31] there is no public evidence that it was used by any other federal agencies prior to Mr. Marcus's letter. The lead author of the definition himself has warned about the dangers of employing the definition on college campuses[32] and described the adoption of the definition in President Trump's executive order as an "attack on academic freedom and free speech."[33]

The IHRA definition of antisemitism provides no new legal protections for Jewish students who are subjected to discrimination. Instead of safeguarding against expressions of hatred towards Jewish people, this definition aims to censor First Amendment-protected speech by labeling viewpoints critical of Israel as antisemitic, thereby serving to chill one side of an important political debate.

---

[29] Exec. Order No. 13899, 84 Fed. Reg. 68779 (Dec. 16, 2019), available at https://www.whitehouse.gov/presidential-actions/executive-order-combating-anti-semitism/.

[30] For more information on the definition, see Backgrounder, supra note 24.

[31] See Kenneth S. Stern, Written Testimony Before United State House of Representatives Committee on the Judiciary, November 7, 2017, Hearing on Examining Anti-Semitism on College Campuses, available at https://docs.house.gov/meetings/JU/JU00/20171107/106610/HHRG-115-JU00-Wstate-SternK-20171107.pdf.

[32] Kenneth Stern, Should a major university system have a particular definition of anti-Semitism?, Jewish Journal (June 22, 2015), https://jewishjournal.com/commentary/opinion/175207/.

[33] Kenneth Stern, I drafted the definition of antisemitism. Rightwing Jews are weaponizing it, The Guardian (Dec. 13, 2019), https://www.theguardian.com/commentisfree/2019/dec/13/antisemitism-executive-order-trump-chilling-effect.

Much of the IHRA definition is uncontroversial and aligns with a traditional understanding of the term.[34] But the definition radically departs from that understanding with its listing of "contemporary examples of antisemitism" which include, "Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor" and "Applying double standards by requiring of [Israel] a behavior not expected or demanded of any other democratic nation." This vague and overbroad definition falsely conflates political criticism of Israel with antisemitism and puts OCR, and universities, in the position of government censor. These examples redirect the focus of civil rights investigators away from protecting students from discrimination to shielding them from hearing political opinions with which they may disagree regarding the abuses of a foreign state.

The definition has no grounding in statute, and its enforcement would in fact violate the U.S. Constitution and bedrock principles of academic freedom intended to ensure open debate on college campuses. For example, in order to apply the IHRA definition in evaluating campus complaints, OCR and university officials might ask if, in order to avoid applying the "double standard" prohibited by IHRA, students must first criticize China, Saudi Arabia, or other states before or after criticizing Israel. The must determine whether universities are required to punish students and faculty who call the Israeli state, or the U.S. or any other government, "racist." The answers must certainly be no. Application of the IHRA definition will drive OCR investigators into a morass of viewpoint-based distinctions and may compel and punish speech in violation of the First Amendment.

C. Mr. Marcus's decision is part of a pattern of promoting the use of Title VI complaints as a means of chilling or punishing First Amendment-protected conduct.

The redefinition of antisemitism is especially detrimental to universities, whose missions necessitate respect for freedom of speech, critical inquiry, and unfettered debate. Even if OCR had taken no further action to enforce the definition, Mr. Marcus's announcement that the definition "is used" has had an unconstitutional chilling effect. It is well-documented that the same organizations that promote the IHRA definition—including the ZOA and the Brandeis Center, which Mr. Marcus founded and previously led—use it as a tool to pressure campus administrators to restrict protected speech.[35] Students, professors, researchers, and university

---

[34] For example, the IHRA definition begins: "Anti-Semitism 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." Merriam-Webster defines anti-Semitism as, "Hostility toward or discrimination against Jews as a religious, ethnic or racial group." Working Definition of Antisemitism, International Holocaust Remembrance Alliance, https://www.holocaustremembrance.com/working-definition-antisemitism.

[35] Israel-aligned groups have relied on the IHRA and similar definitions of antisemitism to allege violations of Title VI at universities where students/faculty have engaged in the following speech activities: a screening of the film *Occupation 101*; an event critical of Israeli policies featuring a Holocaust survivor; using the term "apartheid" to describe Israeli government policies; equating Zionism with racism; calling for a boycott for Palestinian rights; and wearing a Palestinian keffiyeh, or scarf. Palestine Legal and the Center for Constitutional Rights documented these and other incidents in a 2015 report, *The Palestine Exception to Free Speech*, https://palestinelegal.org/the-palestineexception. Palestine Legal published updates to the report each year since then. Year-In-Review: Palestine Legal Responded to 258 Incidents in 2016, Palestine Legal, https://palestinelegal.org/2016-report; Year-In-Review: Palestine Legal Responded to 308 Suppression Incidents in 2017, Nearly 1000 in Last 4 Years, Palestine Legal,

administrators will inevitably act in ways to avoid scrutiny of their activities and the specter of a federal investigation into their political speech activities.[36]

Though the definition carried no legal weight prior to President Trump's December 2019 executive order discussed above, it has repeatedly been used by those attempting to stifle speech on campus. The threat to protected speech has already materialized, in many cases with explicit reference to Mr. Marcus's ZOA letter. For example, a November 2018 vigil organized by Palestinian and Jewish students at UC Berkeley to jointly mourn the deaths of Palestinian children killed in Gaza and Jewish worshippers killed in the Pittsburgh massacre[37] was made the subject of a Title VI complaint to OCR relying on the IHRA definition.[38] In September 2018, a professor at San José State University cited the possibility of a federal investigation under OCR's new policy in warning other professors against holding an event called *We Will Not Be Silenced*, which planned to discuss intimidation against Israel's critics.[39] In April 2019, a group of anonymous students cited Mr. Marcus's ZOA letter and the IHRA definition in a lawsuit asking a court to force the University of Massachusetts Amherst to cancel a panel discussion about the censorship of speech supporting Palestinian rights.[40] In October 2019, a Title VI complaint against UCLA, which OCR subsequently accepted for investigation, argued that federal law requires UCLA to intervene when professors fail to support Israel, stating that a professor expressing "disagreement with [a student's] position of support for the existence of the State of Israel" was "a blatantly antisemitic statement according to the IHRA Working Definition of Antisemitism."[41]

Unfortunately, there is some evidence that Mr. Marcus would approve of these attempts to chill and censor protected speech. Prior to joining the department, Mr. Marcus published an article

---

https://palestinelegal.org/2017-report; 2018 Year-In-Review: Censorship of Palestine Advocacy in the U.S. Intensifies, Palestine Legal, https://palestinelegal org/2018-report; 2019 Year-in-Review: Movement for Palestinian Rights Thrives Despite Censorship, Palestine Legal, https://palestinelegal.org/2019-report.

[36] See, e.g., *Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1029 (9th Cir. 1998) (legal complaints based on speech protected by the First Amendment have far-ranging and deleterious effects, and the mere threat of civil liability can cause schools to "buy their peace" by avoiding controversial material.); see also Eugene Volokh, Department of Education Decision May Pressure Universities to Restrict Some Anti-Israel Speech, Reason (Sept. 14, 2018), https://reason com/volokh/2018/09/14/department-of-education-decision-may-pre ("The message to universities, which understandably don't want to face OCR investigations -- and certainly don't want a finding that they are violating federal law -- is that it's dangerous to allow the criticisms of Israel identified in the letter, and that universities should try to do what they can to suppress them.").

[37] See Joint Statement on Vigil With Jewish Voice for Peace at Berkeley, Facebook (Nov. 9, 2018), https://www.facebook.com/notes/students-for-justice-in-palestine-at-uc-berkeley/joint-statement-on-vigil-with-jewish-voice-for-peace-at-berkeley/1917395535013465.

[38] See Aaron Bandler, Pro-Israel Students File Complaint to Department of Education About SJP Vigil at Berkeley, Jewish Journal (Nov. 13, 2018), http://jewishjournal com/news/nation/241882/pro-israel-students-file-complaint-department-education-sjp-vigil-berkeley/.

[39] See Palestine Legal, San José State Professor Threatens Event With Federal Investigation If No Anti-Palestinian Voices (Nov. 14, 2018), https://palestinelegal.org/news/san-jose-state-event.

[40] Verified Complaint for Declaratory and Injunctive Relief, *Doe v. Manning*, No. 2019-01308-H (Mass. Sup. Ct., Suffolk Div., April 25, 2019). For more information, see UMass Amherst: Lawsuit Attacking Free Speech Event, Palestine Legal, https://palestinelegal org/case-studies/2019/5/31/umass-amherst (last updated Dec. 13, 2019).

[41] Letter from Roz Rothstein, CEO, StandWIthUs, et al., to U.S. Dep't of Educ. Office for Civil Rights (Oct. 7, 2019), https://www standwithus com/ucla-titlevi-complaint.

encouraging the filing of Title VI complaints with OCR even if there was no chance of success.[42] He said that despite the dismissal of the complaints, he was "comforted by knowing that we are having the effect we had set out to achieve."

In explaining the intended effect of the complaints, Mr. Marcus emphasized the chilling impact the complaints had on both universities and other students, saying that the "cases – even when rejected – expose administrators to bad publicity" and that "getting caught up in a civil rights complaint is not a good way to build a resume or impress a future employer."[43] In a comment that is remarkable given Mr. Marcus's actions over the past three years, Mr. Marcus also argued that "the findings of existing authorities are important but not final."

In November 2018, we wrote to Mr. Marcus detailing the ways in which his actions have undermined the mission of his office and threatened the First Amendment rights of students.[44] In April 2019, we received a nonresponsive reply from Deputy Assistant Secretary William E. Trachman pointing to existing policies and statements that affirm the department's respect for the First Amendment and OCR's mission to ensure equal access to education.[45] These hollow affirmations of respect for the First Amendment are not sufficient.

V. The department previously found Mr. Marcus exceeded his authority on this same topic.

Finally, we note that this is not the first time Mr. Marcus has been found to exceed his authority when it comes to determining the scope of OCR's jurisdiction on this topic.

From 2003-2004, under President George W. Bush, Mr. Marcus served at the Department of Education and was delegated the authority of the Assistant Secretary for Civil Rights. In September 2004, Mr. Marcus issued guidance explaining OCR's view on the application of Title VI to discrimination against religious groups. The guidance focused on the ways in which discrimination against religious groups could implicate Title VI protected characteristics like race and national origin, explaining that "[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."[46] In October 2004, Mr. Marcus built on that guidance in a letter, posted on the OCR website, stating that "OCR recognizes that Title VI covers harassment

---

[42] Kenneth L. Marcus, Standing up for Jewish students, Jerusalem Post (Sept. 9, 2013), https://www jpost com/Opinion/Op-Ed-Contributors/Standing-up-for-Jewish-students-325648.

[43] *Id.*

[44] Letter from Arab American Anti-Discrimination Committee, et al., to Kenneth L. Marcus, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (Nov. 30, 2018), available at https://palestinelegal.org/s/Civil-Rights-Coalition-Letter-to-Marcus-11-30-18 pdf.

[45] Letter from William E. Trachman, Deputy Assistant Sec'y for Policy and Dev., U.S. Dep't of Educ. Office for Civil Rights, to Liz Jackson, Senior Staff Attorney, Palestine Legal (April 1, 2019) (on file with Palestine Legal).

[46] Kenneth L. Marcus, 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.

of students of Jewish heritage regardless of whether the students may be Caucasian and American born."[47]

In late 2004, Mr. Marcus became staff director of the U.S. Commission on Civil Rights. In that role, Mr. Marcus shared with the Department of Education a draft of web pages for a Commission campaign on "Ending Campus Anti-Semitism." In December 2006, President Bush's then-Assistant Secretary for Civil Rights Stephanie Monroe responded by criticizing the proposed pages shared by Mr. Marcus as failing to distinguish between national origin discrimination and religious discrimination.[48] "OCR has jurisdiction to investigate complaints raising allegations of religious discrimination or anti-Semitic harassment if the allegations also include discrimination over which OCR has subject matter jurisdiction, such as, race or national origin (including discrimination based on a person's ancestry or ethnic characteristics)," she explained. But the proposed web pages did "not make this distinction, and *instead* cite examples of anti-Semitic acts that do not implicate 'race, color, or national origin' yet still refer alleged victims to OCR for redress."

Specifically, Assistant Secretary Monroe disavowed Mr. Marcus's October 22, 2004 letter. She noted that the proposed web page Mr. Marcus had shared had "a link to an October 22, 2004 letter from OCR to the Institute for Jewish and Community Research." She explained that Mr. Marcus's letter was legally incorrect because "it suggests that OCR has unlimited jurisdiction, under Title VI, to investigate allegations of anti-Semitism, regardless of the race or national origin of the student-complainant." She told him that "OCR has removed this letter from its website because the letter does not constitute an official OCR policy statement."

Mr. Marcus's overstepping of his authority when previously in charge of OCR would further bolster a reasonable person's conclusion that Mr. Marcus again acted with partiality.

VI. Conclusion

Irregularities in the manner in which Mr. Marcus reopened the Rutgers investigation, in his decision to adopt the IHRA definition, and in his decision to announce this adoption through a letter to the ZOA warrant scrutiny. This is particularly true in light of Mr. Marcus's well-documented history of working with the ZOA, and his various efforts to use Title VI as a tool to target speech activities critical of Israel by employing similar definitions of antisemitism.

Mr. Marcus's August 2018 letter to the ZOA was an abrupt change in policy that reportedly took the department by surprise, suggesting that Mr. Marcus adopted the policy without consultation.[49] The apparent subversion of regular processes in reopening the Rutgers investigation, and the lack of transparency and process around Mr. Marcus's seemingly single-

---

[47] Letter from Kenneth L. Marcus, Delegated-the-Authority-of-Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Sidney Groeneman, Senior Research Associate, Institute for Jewish and Community Research (Oct. 22, 2004), available at http://www.eusccr.com/letterforcampus.pdf.

[48] Letter from Stephanie Monroe, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Kenneth L. Marcus, Staff Director, U.S. Comm'n on Civil Rights (Dec. 4, 2006), available at http://www.eusccr.com/lettermonroe.pdf.

[49] See Erica L. Green, Education Dept. Reopens Rutgers Case Charging Discrimination Against Jewish Students, N.Y. Times (Sept. 11, 2018), https://www nytimes.com/2018/09/11/us/politics/rutgers-jewish-education-civil-rights html.

handed adoption of the IHRA definition is alarming and warrants investigation, particularly in light of Mr. Marcus's personal investment in this issue.

We urge you to determine 1) whether Mr. Marcus's reopening of the Rutgers case subverted existing processes, 2) when and how OCR adopted the IHRA definition, and 3) whether Mr. Marcus's actions in the Rutgers case and subsequent investigations complied with existing laws and regulations.

We urge you to fully investigate this matter and to take appropriate steps to ensure that Mr. Marcus and OCR comply with procedural safeguards that have been established to ensure evenhanded application and interpretation of the laws and regulations OCR enforces. These procedural safeguards have been established to not only allow members of the public, including universities and their students, to understand their legal obligations but also to give them the opportunity to understand how the department functions and to play a democratic role in oversight and decision making.

Mr. Marcus's actions and their continued effects, including the still-pending Rutgers investigation, have had a chilling impact on campus speech and have undermined the integrity of the department as a whole. Thoroughly investigating this matter and making recommendations to avoid the further appearance of impartiality would help the department more effectively fulfill its mission of fostering educational excellence and ensuring equal access.