When Calls for Jewish Genocide Can Cost a University Its Government Funding

Over the last month, the campus antisemitism wars have entered a new phase, shifting from university quadrangles and libraries to congressional hearings and federal courthouses. In recent weeks, scores of antisemitism complaints and lawsuits have been filed against prominent universities leading the Department of Education's Office of Civil Rights to announce that it is opening up a wave of investigations into numerous prominent universities, such as Harvard University, Cornell University, Columbia University, University of Pennsylvania, Cooper Union, and Wellesley College. Indeed, these investigations–and the Department of Education's capacity to adequately address all of them—were one of the recurring themes at yesterday's congressional hearings addressing antisemitism on campus, which included testimony from university presidents from Harvard, Penn, and MIT.

At their core, these antisemitism complaints all level similar allegations: These universities, as institutions receiving federal funding, are obligated under federal law to protect Jewish students from severe and pervasive antisemitism—an obligation the complaints allege the universities have

failed to satisfy. If successful, such complaints and investigations could significantly impact how universities address questions of campus antisemitism, forcing university administrators to develop more significant protections against antisemitic hostility as a condition of receiving government funding.

The primary legal obligation at play in campus antisemitism debates is Title VI of the 1964 Civil Rights Act. Title VI prohibits institutions receiving federal funding—including indirect funding—from discriminating on the basis of "race, color or national origin." Universities are subject to these requirements because they typically receive various forms of federal funding, including benefiting indirectly from federally subsidized student loans. Complaints for Title VI violations can either be filed with the Department of Education's Office of Civil Rights (as they have been, for example, against University of Pennsylvania and Wellesley College) or in federal court (as they have been, for example, against Berkeley and New York University).

Importantly, the antidiscrimination rules of Title VI prohibit more than just direct discrimination. They also prohibit schools from acting with "deliberate indifference" to "severe, pervasive and objective offensive" harassment, including peer-to-peer harassment. So, a university would be in violation of Title VI if it is aware of—and fails to adequately address—harassment on the basis of race, color, or national origins that is so severe that it prevents the victim from accessing the range of educational opportunities available to all other students.

How Antisemitism Fits Into Title VI

Applying these rules to antisemitic harassment, however, presents a bit of a puzzle; Jew hatred does not, at first glance, fall under the three categories of discrimination prohibited by Title VI: race, color or national origin. It would, more naturally, fall under religious discrimination, which Congress expressly omitted from the kinds of discrimination prohibited under Title VI.

However, since at least 2004, the Department of Education has interpreted Title VI to cover certain forms of religious discrimination—including antisemitism—when students are "targeted for harassment based on their membership in groups that exhibit both ethnic and religious characteristics, such as Arab Muslims, Jewish Americans and Sikhs." In such circumstances, Title VI—even though it does not, by its terms, address religious discrimination—still applies because the underlying harassment can also qualify as race, color or national origin discrimination.

Over the years, the Department of Education has further elaborated that Title VI prohibits pervasive antisemitic hostility where religious discrimination is also based on "actual or perceived shared ancestry or ethnic characteristics" As a result, where students face "ethnic or ancestral slurs," harassment "for how they look, dress, or speak in ways linked to ethnicity or ancestry," or endure stereotypes "based on perceived shared ancestral or ethnic characteristics," the protections of Title VI will kick in. Under those circumstances, antisemitism is not only a form of religious discrimination, but it also can qualify as discrimination based on race, color or national origin. President of the Brandeis Center, Alyza Lewin, has explained this application of Title VI to antisemitism by noting how Judaism isn't simply a religion, but is "an ethno-religion, a belief system inextricably connected to cultural heritage, traditions, history — and land."

By way of example, the Department of Education has explained, "[a]nti-Semitic graffiti, including swastikas," along with bullying accompanied with statements such as "You Jews have all of the money, give us some" could trigger the protections of Title VI. Sure, such statements are antisemitic—and therefore a form of religious discrimination—but such harassment also could qualify as race, color, or national origin discrimination because it "is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices."

In 2019, President Trump further applied this Title VI methodology by linking antisemitism to conduct "targeting of the state of Israel." Thus, his Executive Order 13899—titled "Combating Anti-Semitism"—instructed all government agencies to consider, when enforcing Title VI, the International Holocaust Remembrance Alliance (IHRA) working definition of antisemitism, which states, "Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews." In explaining the significance of the IHRA definition of antisemitism, the Department of Education provided a number of examples of antisemitic conduct that could trigger Title VI. Those included justifying the killing or harming of Jews, expressing "mendacious, dehumanizing, demonizing or stereotypical allegations" about Jewish power, accusing Jews of being disloyal citizens, claiming that "the state of Israel is a racist endeavor," and "[h]olding Jews collectively responsible for actions of the state of Israel."

The Executive Order generated controversy because it moved closer towards using antidiscrimination law to suppress free speech rights; some of the examples, if construed too broadly, could potentially be deployed to prohibit criticism of Israel that ought to be protected by the First Amendment's free speech guarantees. Notwithstanding these concerns of overbroad application, the Biden administration has, by all appearances, reaffirmed the executive order, continuing to reference the executive order as part of the guidance it provides school administrators; moreover, the Biden administration, on multiple occasions, has embraced the overall methodology, clearly stating the Title VI prohibits antisemitism when it is based upon perceived or actual shared ancestry or ethnicity and opening this most recent round of Title VI investigations for campus antisemitism.

How Universities Violate Title VI

Of course, while Title VI requires universities, as federally-funded institutions, to address antisemitic hostility, the standard for a university violating Title VI remains high. Universities only violate Title VI if they fail to immediately and effectively address antisemitism that is not only objectively offensive, but also so severe and pervasive that it prevents a student from participating in, or benefiting from, the school's educational program.

Where a university is found to have violated Title VI, student victims can receive monetary damages to compensate for being unable to participate in the educational program on account of pervasive discrimination. In addition, if the Department of Education finds a school to have violated Title VI, the university must "take immediate and appropriate action" to remedy those violations. Those steps are generally negotiated between the Department of Education and the university in the form of a resolution agreement. These agreements typically require universities to take a variety of steps to address campus antisemitism, including updating discrimination policies to emphasize and educate

the campus about the legal prohibitions against antisemitism; encouraging, and sometimes requiring, members of the campus community to report violations; establishing a system for addressing and reporting antisemitism complaints on campus; implementing surveys of campus antisemitism climate; and training students, employees, and senior leadership about antisemitism and its various manifestations. Indeed, a number of recent Title VI antisemitism complaints against Duke, North Carolina, New York University and, most recently, Vermont, were resolved via resolution agreements.

The Road Ahead for Jewish Students

All told, given the broad interpretation of Title VI across multiple administrations, we are likely to see a wave of complaints filed against universities for failing to address severe and pervasive antisemitism on campuses. Students and organizations filing such suits will need to document a range of antisemitic incidents to satisfy the relatively high standard for violating Title VI. However, because antisemitism can qualify as actionable under Title VI, such complaints provide an important incentive for university administrators to adequately address systemic antisemitism on campuses. Universities certainly cannot do without federal funding. Title VI complaints thereby remind universities that the benefits of federal funding also come with responsibilities. Administrators must ensure that their universities are governed by policies that protect their Jewish students and allow them to be full participants in campus life.

Michael A. Helfand is the Brenden Mann Foundation Chair in Law and Religion at Pepperdine Caruso School of Law; Florence Rogatz Visiting Professor at Yale Law School; Senior Legal Advisor to the Teach Coalition; and Senior Fellow at the Shalom Hartman Institute.