

**Written Answers to Questions for The Record**  
**From Hon. Kenneth L. Marcus**  
**Founder and Chairman of The Louis D. Brandeis Center for Human Rights Under Law**  
**"Confronting The Scourge of Antisemitism on Campus" Testimony**  
**Before The United States House Committee on Education and The Workforce**  
**Subcommittee on Higher Education and Workforce Development**  
**Hearing Date: November 14, 2023**

**Questions from Rep. Llyod Smucker (R-PA):**

**1. Mr. Marcus, in your testimony you mentioned the importance of the Executive Branch adopting the International Holocaust Remembrance Alliance's working definition of antisemitism, under which denying the Jewish people their right to self-determination and to the state of Israel is considered antisemitism. This was a process started under the Trump Administration but has been needlessly delayed and postponed. How would adopting this definition help the Office for Civil Rights pursue investigations of antisemitic incidents on campuses, and what is the impact on Jewish students and faculty in its absence?**

Unfortunately, the Biden administration has once again delayed its promised rule-making on combating anti-Semitism by another full year.<sup>1</sup> The regulation, implementing President Trump's Executive Order 13899 on Combating Anti-Semitism, would apply the International Holocaust Remembrance Alliance (IHRA) Working Definition of Antisemitism to Office for Civil Rights (OCR) investigations involving anti-Semitic discrimination and harassment on campuses. At a time when universities must rethink their failed approaches to anti-Semitism, this is an extremely disappointing move. Jewish students and those investigating violations of Title VI of the Civil Rights Act cannot wait until December 2024. The Department of Education is well aware that we are in unprecedented times and that universities need clarity on their obligations to Jewish students.

A recent study has shown that 73% of Jewish college students have experienced or witnessed anti-Semitic incidents on their campuses since the start of the 2023-24 school year.<sup>2</sup> The number of Jewish students who say they physically or emotionally feel safe on campus has dropped dramatically in the wake of Oct. 7.<sup>3</sup> We know anti-Semitism is underreported on campuses, as 55% of Jewish students say they fear repercussions for reporting.<sup>4</sup> We at the Louis D. Brandeis Center for Human Rights Under Law, in conjunction with Hillel International, Anti-Defamation League, and Gibson Dunn, have received over 260 requests for Title VI legal

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<sup>1</sup> Pierre, Dion J. "Biden Administration Again Delays Civil Rights Protections against Antisemitism." *Algemeiner*, December 14, 2023. <https://www.algemeiner.com/2023/12/14/biden-administration-again-delays-civil-rights-protections-against-antisemitism/>.

<sup>2</sup> "Campus Antisemitism: A Study of Campus Climate Before and After the Hamas Terrorist Attacks." *Anti-Defamation League*, November 29, 2023. <https://www.adl.org/resources/report/campus-antisemitism-study-campus-climate-and-after-hamas-terrorist-attacks>.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

assistance across 152 campuses since establishing a Campus Antisemitism Legal Line (CALL).<sup>5</sup> Students, university administrators, and even the Department of Education Office for Civil Rights (OCR) need assistance navigating the increasingly hostile and anti-Semitic climate on campus. Fortunately, a tool for evaluating anti-Semitic discrimination already exists. It just needs to be properly implemented.

In light of the Department's repeated failure to honor its commitment, Congress may need to act legislatively to provide the clarity that the IHRA Working Definition contains. Whether through statute or regulation, implementation of the Executive Order on Combating Anti-Semitism, including its carefully constrained use of the IHRA Working Definition, would provide a standard, consistent, and transparent definition and examples that would guide the work of federal officials and give clarity to university and school officials. It would make clear when conduct is motivated by anti-Semitic animus and when it is not.

**2. Mr. Marcus, we obviously want to uphold all students' free speech while we protect students from threats, harassment, and intimidation. What is the legal distinction between free speech and unlawful discrimination, and how should colleges and universities be approaching this issue to ensure that Jewish students and faculty are protected?**

The legal obligation for university administrators at public universities to uphold free speech on campus is rooted in the First Amendment. Just as the government cannot shut down free speech, a public university must ensure speech is not suppressed on campus. In *Tinker v. Des Moines*, the Supreme Court declared that students do not “shed their constitutional rights of freedom of speech or expression at the schoolhouse gate.”<sup>6</sup> While only public universities are legally bound by the First Amendment, many private institutions are bound to protect free speech by state law or by their own contractual commitments.

Freedom of speech is what makes American college campuses so vibrant – the free exchange of ideas, encouragement of open debate, and the ability to use one’s own voice to protest speech one finds objectionable. When done properly, students, faculty, staff, and even outside guests benefit from a tolerant, open campus. Yet while Jewish students are entitled to the same rights and protections as their non-Jewish peers, their voices are routinely silenced. Jewish students are forced to shed or hide their Jewish identity, including their religious, historical, and cultural connection to Israel. As stated in my testimony, surveys have shown that a majority of pro-Israel Jewish students avoid expressing their views on Israel.<sup>7</sup> They are concerned about being verbally or physically attacked, being socially excluded or harassed online, and being marginalized or penalized by a professor.<sup>8</sup> Jewish students should feel free to express themselves, engaging in their classes and with their fellow students without fear of repercussion.

The First Amendment should not be abused as a shield for unlawful conduct, such as the violence and intimidation that many Jewish students are facing. We are seeing many

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<sup>5</sup> “Leading Jewish Organizations and Law Firms Launch Legal Protection Helpline for Campus Antisemitism.” Brandeis Center, November 15, 2023. <https://brandeiscenter.com/leading-jewish-organizations-and-law-firms-launch-legal-protection-helpline-for-campus-antisemitism-press-release/>.

<sup>6</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

<sup>7</sup> “ANTI-SEMITISM @ College Survey (Spring 2021).” The Louis D. Brandeis Center for Human Rights Under Law. Accessed November 5, 2023. <https://brandeiscenter.com/wp-content/uploads/2021/09/Brandeis-Survey-Findings.pdf>

<sup>8</sup> *Ibid.*

administrators sit on their hands or selectively apply school policies, while ignoring unlawful behavior. Administrators must enforce policies even-handedly, consistently, and fairly, ensuring that all students, regardless of their identity, enjoy their rights to free expression without fear of discrimination or harm.