

**UPDATE: ICCPR Shadow Report:  
The Misuse of United States Law to Silence Pro-Palestinian Students' Speech and  
Expression  
September 6, 2013**

**I. Overview**

This Update relates to the Shadow Report submitted on August 23, 2013, on behalf of a coalition of five organizations: Asian Americans Advancing Justice-Asian Law Caucus, American Muslims for Palestine, Council on American Islamic Relations-San Francisco Bay Area, Center for Constitutional Rights, and National Lawyers Guild International Committee. That Shadow Report is attached to this update. This Update was authored by Advancing Justice-ALC.

**II. Update**

The Shadow Report submitted on August 23, 2013 concerned the ongoing pendency and the harmful effects on freedom of expression by virtue of three U.S. Department of Education (DOE) investigations. The investigations were pursuant to Title VI of the Civil Rights Act of 1964, and were being misused to suppress pro-Palestinian viewpoints on college and university campuses by making the unsupported argument that speech critical of Israeli state policies is anti-Semitic.

All three investigations were dismissed and the dismissals became public in late August 2013. All were accompanied by findings holding that most of the allegations in the underlying complaints were protected expression, and that the remaining components were unsubstantiated. The dismissal letter for University of California Berkeley investigation can be found here, <https://docs.google.com/a/asianlawcaucus.org/file/d/0BzLzVUyvGNIIIdVhBYWJ2Nkdta0E/edit?usp=sharing>, for the UC Santa Cruz investigation can be found here, <https://docs.google.com/a/asianlawcaucus.org/file/d/0BzLzVUyvGNIIbllqTGltRmI3TVk/edit?usp=sharing>, and for the UC Irvine investigation can be found here, <https://docs.google.com/a/asianlawcaucus.org/file/d/0BzLzVUyvGNIIYU02UzVSZEIzLUE/edit?usp=sharing>.

While advocates commend the dismissal of these frivolous investigations, a number of issues remain. First, the same groups that used this civil rights law to harass and intimidate students are threatening to appeal the dismissals, which could potentially result in additional chilling on speech depending on how long the appeals are permitted to linger. Second, these same groups are also threatening to lodge similar complaints asking for investigations at other college campuses. Third, the dismissals do not address the damage that has already occurred on campuses by virtue of these investigations having been ongoing for several years.

We ask that the DOE be questioned about these ongoing concerns, and be encouraged to (1) adopt a policy that will ensure that these civil rights laws are not used to suppress expression, (2) address the damage that has occurred by virtue of the years-long pendency of these investigations, and (3) resolve any appeals of these dismissed complaints quickly to limit any additional chilling of student expression.

**ICCPR Shadow Report:  
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Expression  
August 23, 2013**

**I. Reporting Organizations**

This Shadow Report is being submitted by a coalition of five organizations: Asian Americans Advancing Justice-Asian Law Caucus, American Muslims for Palestine, Council on American Islamic Relations-San Francisco Bay Area, Center for Constitutional Rights, and National Lawyers Guild International Committee.

This same coalition of organizations submitted an Issue Statement regarding the same issue to the Human Rights Committee on December 17, 2012.<sup>1</sup> Our organizational descriptions are contained in that document and in the interest of brevity are not repeated here.

**II. Introduction and Issue Summary**

This Shadow Report provides an update to the Issue Statement submitted by our organizations on December 17, 2012, and concerns the use of Title VI of the Civil Rights Act of 1964 to suppress pro-Palestinian viewpoints on college and university campuses by making the unsupported argument that speech critical of Israeli state policies is anti-Semitic.

Since the submission of our Issue Statement the four federal investigations by the U.S. Department of Education ("DOE") continue. Despite attempts by advocates to convey to the DOE the harm done by these on-going investigations, the DOE has responded only that it will deal with the investigations "with dispatch." Even if these particular cases are indeed concluded "with dispatch," there is a significant threat that additional complaints on similar grounds will be filed, and that the same problems with DOE policies will be present in future investigations. Because these investigations continue and because of a possibility of other similar investigations in the future, the speech and expression of impacted student organizations, including Muslim Student Associations ("MSA") and Students for Justice in Palestine ("SJP") organizations, is being severely and increasingly chilled.

**III. Discussion of Issue**

**A. Description of Issue**

As explained in our Issue Statement submission we are concerned with the use of Title VI of the Civil Rights Act to open investigations on college campuses in response to allegations of anti-Semitism for activity that, on its face, only concerns pure political criticism of Israeli state policy by student groups that advocate for Palestinian human rights. These federal investigations continue to be conducted in secret, and without the input of the student groups whose speech is being misrepresented.

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<sup>1</sup> ICCPR Issue Statement Submission (Dec. 17, 2012), *available at* [http://www2.ohchr.org/English/bodies/hrc/docs/NGOs/26-USHRNetwork\\_AsianLawCaucusCoalition.pdf](http://www2.ohchr.org/English/bodies/hrc/docs/NGOs/26-USHRNetwork_AsianLawCaucusCoalition.pdf).

## **B. Status of Investigations**

Our Issue Statement submission discussed the pendency of four separate Title VI complaints being investigated by the DOE that allege that speech critical of the state of Israel is anti-Semitic and creates a hostile environment for Jewish students. As of the writing of this Shadow Report, all four investigations continue. These complaints are levied against the University of California (“UC”) at Berkeley, UC Irvine, UC Santa Cruz, and Rutgers University.

Despite the fact that internal guidelines of the Office of Civil Rights, the body charged with investigation, suggest that investigations should not exceed 180 days, all of the investigations have long exceeded that timeframe.<sup>2</sup> The UC Berkeley investigation has been open since September 2012, the UC Santa Cruz investigation has been open since March 2011, the UC Irvine investigation has (to our knowledge) been open since April 2008, and the Rutgers University investigation has been open since October 2011.

The on-going pendency of these investigations, coupled with their marked lack of transparency, has prolonged and intensified the chilling of speech and expression by students whose political viewpoints are targeted by these investigations. This chilling effect will not be cured by the conclusion of these investigations, given that students have already self-censored, significantly curtailed or entirely avoided activities because of these investigations. Similar complaints have been threatened against other universities, and in the event that new investigations are opened based on similar false allegations of discrimination, the chilling effect on speech and expression will continue.

## **B. Negative Effects of Investigations: Chilling of Student Speech**

Since the submission of our Issue Statement many students continue to report that they deliberately stay silent on this issue for fear of reprisals, harassment, immigration consequences, criminal investigations into their activities, being labelled anti-Semitic or other stigmatization, and ensuing damage to their academic and career prospects. For example, we have heard a multitude of reports from Arab and Muslim students who are reluctant to join pro-Palestinian student groups such as SJP, for fear of retaliation and reputational and academic harm. A student of Arab descent reported that she was fearful of signing her true name to opinion pieces she wrote for her school newspaper, which ironically levied a critique of these efforts to chill student speech and expression; she eventually decided to intentionally misspell her name in order to protect herself from backlash.<sup>3</sup> Earlier this year, during UC Berkeley student senate debates discussing a proposal to divest university funds from corporations that profit from the occupation of Palestine, not a single Palestinian student was willing to speak publicly, although many worked tirelessly behind the scenes on this issue.

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<sup>2</sup> Office of Civil Rights Case Processing Manual section 202, *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.html> (indicating 180-day benchmark for resolution of complaints); *see also* Office of Civil Rights Graph, *available at* <http://www2.ed.gov/about/offices/list/ocr/gpra.html> (showing that over 80 percent of investigations between 1997 and 2001 were resolved within 180 days).

<sup>3</sup> Letter from Civil Rights Groups to Office for Civil Rights-San Francisco Div., Dep’t of Educ. (May 14, 2013) at 26-29 [hereinafter Letter to OCR-SF], *available at* [http://library.constantcontact.com/download/get/file/1101295800375-1006/2013+05+14\\_LTR+to+SF+OCR+w+ATTACHMENTS.pdf](http://library.constantcontact.com/download/get/file/1101295800375-1006/2013+05+14_LTR+to+SF+OCR+w+ATTACHMENTS.pdf).

The chilling effect of these investigations is pervasive, but difficult to quantify, given that the result is the absence of speech that would have occurred in other circumstances. The chilling of speech and expression will continue so long as the DOE continues to seriously consider baseless complaints that on their face concern students' pure political speech directed at the actions of a foreign government.

### **C. Legal Framework**

Article 19 of the ICCPR relates directly to this issue. It states in relevant part:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

General Comment No. 34<sup>4</sup> discusses the importance of Article 19, and points to the broad scope of the rights ensured by it, in the interest of preserving free and democratic societies.<sup>5</sup> It also specifically states that Article 19's freedom of expression provision includes political discourse discussions of human rights, which undeniably encompasses the speech at issue.

As pointed out in General Comment No. 34, actions by any branch of the State, including all public or governmental authorities of all levels, can implicate the responsibility of the State party with respect to the ICCPR. Thus, the U.S. is responsible for the actions of the DOE, and is required to provide adequate remedies to prevent violations of Article 19.

### **V. Inadequate U.S. Government Response**

Our groups have repeatedly attempted to engage with both our local and national DOE offices, to no avail. We have sent letters<sup>6</sup> to the DOE discussing this issue at length, provided ample evidence of the on-going chilling of student speech as a result of the overlong pendency of its investigations, and consistently requested to meet with department officials.

After months of such efforts, in July 2013, we received a reply from the DOE's national office. The reply ignored our request for a meeting; merely mentioned, but did not address, the areas of concern that we detailed at length; and provided a vague statement that the department would endeavour to resolve the cases "with dispatch," without addressing the overlong duration of the complaints thus far or the continued delay.<sup>7</sup>

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<sup>4</sup> HRC Gen'l Comments, 102<sup>nd</sup> Sess., U.N. Doc. CCPR/C/GC/34 (July 11-29, 2011) at 2 [hereinafter GC/34], available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

<sup>5</sup> GC/34, *supra* note 4.

<sup>6</sup> See Letter to OCR-SF, *supra* note 3; Letter from Civil Rights Groups to Dep't of Educ. Headquarters (May 14, 2013), available at [http://library.constantcontact.com/download/get/file/1101295800375-1005/2013+05+14\\_LTR+to+DOE+HQ+w+ATTACHMENTS.pdf](http://library.constantcontact.com/download/get/file/1101295800375-1005/2013+05+14_LTR+to+DOE+HQ+w+ATTACHMENTS.pdf); Letter from Civil Rights Groups to Office for Civil Rights-San Francisco Div., Dep't of Educ. (May 06, 2013), available at [http://www.scribd.com/doc/162025550/2013-05-06-LTR-to-SF-OCR-Re-SJP-and-MSA-Waiting-to-Aid-Investigation?secret\\_password=1a7nmzavxkthqpwlgn1j](http://www.scribd.com/doc/162025550/2013-05-06-LTR-to-SF-OCR-Re-SJP-and-MSA-Waiting-to-Aid-Investigation?secret_password=1a7nmzavxkthqpwlgn1j).

<sup>7</sup> Letter from Seth Galanter, Acting Assistant Sec'y, Office for Civil Rights, Dep't of Educ., to Christina Sinha, Staff Attorney, Asian Americans Advancing Justice-Asian Law Caucus (July 17, 2013), available at

In addition, on May 30, 2013, several of our organizations took part in a U.S. State Department consultation concerning the ICCPR and at that time provided updated information regarding the status of this issue after the consultation via email. We received a response email that the information we had shared had been shared with the DOE.

## **VI. Recommended Questions**

We recommend that the Committee pose the following questions to the U.S.:

1. How will you ensure that federal agencies, such as the DOE, do not use Title VI to conduct investigations that are based on the false premise that political speech critical of Israeli policies is anti-Semitic and harmful to Jewish students, or prolong investigations unnecessarily?
2. What steps will you take to ensure that the pending DOE complaints that threaten student speech rights are expeditiously resolved?
3. How will you mitigate the harm already done, and the harm currently being done, to students across the country, whose speech rights have been and continue to be chilled or otherwise adversely impacted by the DOE's investigations?
4. More broadly, how will you ensure that Title VI and other federal laws are not misused in a manner that runs afoul of Article 19's freedom of opinion and freedom of expression provisions?

## **VI. Suggested Recommendations**

We propose that the Committee recommend the following to the U.S.:

1. The DOE should resolve the pending cases discussed herein without delay.
2. The DOE should delineate clear restrictions on the investigation of complaints that implicate speech and other expressive activity protected by Article 19.
3. The DOE should institute a procedural mechanism whereby groups whose activities are directly implicated by a complaint may provide evidence and other input to the department.