The Anti-Semitism Awareness Act Doesn’t Restrict Free Speech—it Helps Prevent Bullying

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Data released in February by the Anti-Defamation League (ADL) showed an astounding 57% increase in [anti-Semitic incidents across the United States in 2017](https://www.adl.org/news/press-releases/anti-semitic-incidents-surged-nearly-60-in-2017-according-to-new-adl-report), including physical assaults, vandalism, and attacks on Jewish institutions.

Every part of the country was affected, with an incident reported in each of the 50 states for the first time in at least a decade. This sharp rise, the ADL observed, was due in part to a significant increase in incidents in schools and on college campuses, which nearly doubled for the second year in a row. The trend persists in 2018.

The Anti-Semitism Awareness Act, or AAA, was drafted to help the U.S. Department of Education’s Office for Civil Rights (OCR) recognize anti-Semitic incidents on campus by using the U.S. State Department’s definition of anti-Semitism to evaluate complaints under Title VI of the Civil Rights Act.

Title VI obligates universities that receive federal funds to prevent peer-to-peer harassment based on race, color, or national origin when the harassment “is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” The OCR evaluates reported incidents in part by considering the speech that accompanies them.

Does that mean Title VI limits speech? No. Speech – including hate speech – is protected under the First Amendment. But speech can be used as evidence in investigating Title VI harassment claims  of misconduct, such as assaults, battery and vandalism.

In 2004, the OCR expanded Title VI protection to cover harassment based on membership in religious groups perceived to share ethnic characteristics. Such groups include Jewish, Muslim, and Sikh students, among others.

Since 2004, there have been many well-documented incidents of anti-Semitism, yet the OCR has failed to find a single violation of Title VI. Why is that?

The AAA was drafted to address the problem by providing the OCR with a definition of anti-Semitism—one that has been used by the U.S. State Department for many years and has been endorsed by more than 50 countries as the global gold standard for defining and recognizing anti-Semitism.

The definition reads: “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.”

The State Department’s definition goes on to list examples of anti-Semitism, including “Anti-Semitism Relative to Israel.”

While the definition makes clear that “criticism of Israel similar to that leveled against any other country cannot be regarded as anti-Semitic,” it recognizes that anti-Semitism may be found in efforts to demonize Israel (e.g., by “[u]sing the symbols and images associated with classic anti-Semitism to characterize Israel or Israelis”); to apply a double standard to Israel, or to delegitimize Israel (e.g., by “denying the Jewish people their right to self-determination, and denying Israel the right to exist.”)

The AAA directs the OCR to consider the State Department’s definition of anti-Semitism in evaluating claims of harassment that are “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” That is all.

The AAA was passed by unanimous consent of the Senate on Dec. 1, 2016. Unfortunately, the AAA was immediately attacked by opponents, who argued that it would interfere with free speech by making anti-Israel rhetoric illegal or otherwise punishable on college campuses.

This claim is simply false. The AAA does not regulate campus speech against Israel or any other type of campus speech. Nor could it: Congress cannot pass a law preventing individuals from speaking out against Israel any more than Congress can prohibit criticism of the United States (or any other country).

The AAA underscores this principle by affirmatively stating that the AAA can and must be implemented consistent with the First Amendment.

It is critical, now more than ever, that college and university campuses remain spaces where Jewish students can learn without fear of anti-Semitic assault or harassment. That is their right. The AAA seeks to protect that right consistent with the right of free speech.

In examining whether anti-Semitic activity is “severe, persistent, or pervasive” enough to constitute an actionable hostile environment under Title VI, it is crucial that the OCR be able to recognize anti-Semitism in action. It is time for the AAA to be passed into law.