ACLU of New York

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March 20, 2025

Mr. Josh Gruenbaum
Commissioner of the Federal Acquisition Service
General Services Administration
1800 F St., NW
Washington DC 20270

Mr. Sean R. Keveney
Acting General Counsel
U.S. Dept. of Health & Human Services
200 Independence Ave., SW
Washington DC 20201

Mr. Thomas E. Wheeler
Acting General Counsel
U.S. Department of Education
400 Maryland Ave., SW
Washington DC 20202

Dear Commissioner Gruenbaum and Acting General Counsel Keveney & Wheeler:

We are writing regarding your letter of March 13, 2025 to Dr. Katrina Armstrong, the Interim President of Columbia University. Your letter follows upon the reported cancellation of $400 million dollars in federal funds, most of which had apparently been intended to support principally scientific and medical research. Your March 13 letter now seeks to impose obligations upon Columbia that grossly exceed your authority under the 1964 Civil Rights Act and violate fundamental principles of academic freedom secured by the First Amendment to the Federal Constitution.

We do not here purport to speak for Columbia University. The Administration of Columbia is fully capable of representing itself and advancing what it regards as the best interests of the University. But a flourishing Columbia University is vital to the intellectual lifeblood of New York City. Its faculty and students – and, indeed, the entire New York community – deserve to have the University protected from the partisan pandering exemplified by the hearings, conducted during the previous academic year by the Congressional Committee on Education and Workforce.

Those hearings were little more than a "show trial" designed to promote the political fortunes of some members of Congress and to provide opportunities to embarrass academic officials who, in good faith, tried to present nuanced answers to complex questions. The hearings offered little or no serious inquiry into the complexities of the campus controversies. As we read your March 13 letter, we are concerned that it reflects yet another episode of political opportunism. In the interest of avoiding a similar abuse of federal authority, we convey the following observations to you.

I.

If you possess any legal authority to dictate terms of the sort set out in your March 13 letter, such authority presumably rests upon Title VI of the 1964 Civil Rights Act. Title VI prohibits recipients of federal funds from engaging in racial and ethnic discrimination. Its anti-discrimination provisions have been interpreted to proscribe, *inter alia,* antisemitism as well as other forms of religious discrimination, such as Anti-Muslim and Anti-Catholic bigotry. A failure to comply with the anti-discrimination provisions of the statute can result in a loss of federal funding.

On March 7, you apparently sent a letter to Columbia with respect to its Title VI obligations. We have not seen that letter. But we have read your press release of that date. It announced that the funding "cancellation" had already been undertaken under Title VI and it asserted that such a drastic measure was necessary because Columbia had been unresponsive "in the face of persistent harassment of Jewish students." The press release further ascribed to Secretary of Education Linda McMahon the statement that "Jewish students have faced relentless violence, intimidation, and Anti-Semitic harassment . . . ." It did not, however, identify any specific incidents or examples of deliberate indifference on the part of Columbia.

Antisemitism is, of course, invidious, and deeply offensive. It assumes different forms and arises in a variety of circumstances. Accordingly, the responses to antisemitism must vary with the manner that such bigotry presents itself. Antisemitic violence can make no claim of legitimacy. It is utterly unacceptable and appropriately punished as criminal conduct. Such violence crosses the classic line dividing "speech" from "conduct" and can be regulated for the non-speech conduct that it is. There are, however, other forms of antisemitism that may be purely verbal but can, nonetheless, be punished even if conveyed only with words. "True Threats" describe a category of speech that is unprotected by the First Amendment and can be proscribed in circumstances where a reasonable person would be intimidated by the threat. *Virginia v. Black*, 538 U.S. 347 (2003). "Incitement" involving the advocacy of violence that is likely to result imminently in violence is also a category of speech unprotected by the First Amendment. *Brandenburg v. Ohio*, 395 U.S. 569 (1969). Similarly, "Fighting Words," usually in the circumstances of face-to-confrontations, are also regarded as an unprotected category of speech regardless of the content of the provocative words. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

But verbal forms of harassment present more complicated questions when dealing with speech that does not fall into one of the categories of unprotected speech described above. In its prohibition of racial and religious discrimination, Title VI might proscribe some harassing statements but not all versions of verbal bigotry regardless of how offensive.

Here is why. As a legislative enactment, Title VI must be interpreted and applied in a manner that comports with constitutional standards. Under those standards, efforts to punish or even regulate verbal or symbolic expression on the basis of its content or viewpoint can only be sustained if such efforts advance "compelling" state interests and do so in a manner that is "narrowly tailored" to the pursuit of those interests. Prohibiting racial and religious bigotry clearly serves "compelling" state interests.

But, to satisfy the First Amendment's "narrow tailoring" requirement and to limit Title VI to its basic interest in securing equal educational opportunity, a claim that verbal or symbolic harassment constitutes a violation of Title VI can be sustained only if the expression is "sufficiently severe or pervasive so as to alter the conditions of [ ]education and create an abusive educational environment." *Folkes v. New York College of Osteopathic Medicine,* 214 F.Supp.273,292 (E.D.N.Y. 2002). Indeed, the harassment must be "serious enough to have the systemic effect of denying the victim equal access to an educational program or activity." *Sauerhaft v. Bd. of Education,* 2009 WL 156467, *aff'd,* 371 F. Appx. 231 (2nd Cir. 2010).

This "narrowly tailored" and restrictive reading of Title VI will undoubtedly leave some offensive speech unpunished by governmental entities. This is not to say that such offensive speech must remain unaddressed. Our First Amendment tradition offers an approach to problematic speech that can and should be pursued where speakers cannot be punished by the State.

The Supreme Court has observed that the answer to offensive speech in many, if not most, circumstances lies not in imposing punishment but in generating "more speech" to correct the errors of the inaccurate statements and to explain why the offensive speech is truly offensive. Justice Brandeis eloquently conveyed this point, observing that "[i]f there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence . . . . Such must be the rule if authority is to be reconciled with freedom. Such . . . is the command of the Constitution." *Whitney v. California,* 274 U.S. 274, 377 (1927) (Brandeis, J., concurring). This "more speech" approach is one that universities are particularly well-positioned to pursue, as discussed in more detail below.

II.

The limited reach of Title VI requires that you specifically explain the nature of the conduct that you regard as antisemitic and that you further explain how Columbia was unresponsive. Such transparency is, indeed, mandated by Title VI regulations which impose procedural requirements which must be satisfied before funds can be withdrawn from a university for a failure to comply with the statute. 34 C.F.R. §100.8. The termination of federal funds can only occur (1) after the U.S. Department of Education has advised the recipient of

funding that the Department has concluded that "compliance cannot be secured by voluntary means"; and (2) there must be an "express finding" on the record, after an opportunity for a hearing on the issue of the recipient's failure to comply with Title VI; and (3) the requirements of a hearing and an "express finding" of non-compliance must be followed by a Report issued by the Secretary of Education which must be filed with the appropriate House and Senate committees and this Report must set forth the "circumstances and grounds" for the termination of funding; and (4) the Department of Education must wait 30 days after the filing of the Secretary's Report with Congress before it can terminate any funding. Finally, any termination of funding must be limited to the specific program that has been found to have failed to comply with the statute. We question whether this limitation has been respected. Compliance with all of these requirements will further transparency which can and must be accomplished in ways that continue to protect the privacy of students' educational records. *See* Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g.

It does not appear from the public record that you complied fully with these requirements prior to the termination of Columbia's funding. But if you have complied, please let us know which provisions you claim to have followed.

III.

We take no position on the Israeli-Hamas conflict. But we must acknowledge that the verbal exchanges on college campuses in this country have, at times, been emotionally-charged, angry and hurtful. Student protests have invoked terms and phrases such as "settler colonialism," "genocide" and "apartheid" in their condemnation of policies pursued by the Israeli government. This condemnation was often met with claims that these terms were being distorted or unfairly applied.

The application of these terms rests upon complex and deeply contested historical concepts. Given the nature of mass protest demonstrations, there was no real capacity to examine these complex concepts at the rallies themselves. Mass demonstrations broadly convey the grievances maintained by those engaged in the protest activity. They provide a rough sense of the numbers of people who share those grievances. In these respects, mass rallies offer an important form of political messaging and serve as an instrument for measuring the size of public opposition and attitudes but, often, only convey the general contours of the message. These rallies do not typically provide opportunities for refined ideological discussions. Consequently, during the campus demonstrations over the past year, these controversial terms were generally reduced to political slogans. There were few opportunities to engage in serious consideration of these difficult and emotionally charged concepts.

These lost opportunities were all the more regrettable because colleges and universities are uniquely positioned to conduct serious inquiries into these matters. Academic scholarship provides opportunities for reasoned discourse and for the nuanced evaluation of these concepts. Competing claims regarding these issues can be debated in academic journals and in classrooms. Conversations can be structured so that disputants listen to one another even if, in the end, they might only agree to disagree. At the very least, such discourse can provide all the participants with a broader perspective and understanding.

Your engagement with Columbia could have constructively offered to assist Columbia in moving the bitter and difficult controversy over Palestine and Israel from the streets into the classroom where these complex issues could have been explored more seriously through a process of reasoned discourse. Sadly, your heavy-handed intrusion is squandering that opportunity.

IV.

This failure is even more troubling because the demands that you have imposed upon Columbia in your March 13 letter violate basic principles respecting academic freedom. In *Sweezy v. State of New Hampshire,* 354 U.S. 234 (1957), Justice Frankfurter offered a concurring opinion in which he identified "the four essential freedoms of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id* at 263. And to secure these freedoms, Frankfurter insisted on the "exclusion of governmental intervention [from] the intellectual life of a university."

Your March 13 letter repeatedly violates Frankfurter's admonition. Your instruction that Columbia place the Middle East, South Asian and African Studies Department in receivership for a minimum of five years intrudes fundamentally upon the University's right to determine for itself "who may teach, what may be taught, and how it shall be taught." Your demands regarding student expulsion, holding student groups accountable, and admissions reform intrude upon the authority of the University to determine for itself who may be admitted to study. The implicit threat to withhold funding unless there is compliance with these demands demonstrates the coercive nature of your March 13 letter.

In your zeal to enforce Title VI of the Civil Rights Act, you have a responsibility to do so in conformance with the First Amendment and with federal regulations. We strongly urge that you do so.

Sincerely,

Donna Lieberman
Executive Director

Arthur Eisenberg
Executive Counsel

c: Dr. Katrina Armstrong
David Greenwald
Claire Shipman