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September 23, 2024

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Dear Governor Hochul:

I respectfully present the attached report detailing my review and recommendations related to antisemitism and discrimination policies and procedures at the City University of New York (“CUNY”). This report is the culmination of a more than ten-month process my team and I undertook, that involved hundreds of interviews of members of the CUNY community, in depth visits to numerous CUNY campuses, and extensive reviews of relevant law and existing CUNY policies and procedures. I am honored to have been chosen for this important project.

As set forth in my report, I believe that CUNY’s current policies and procedures for preventing and addressing antisemitism and discrimination need to be significantly overhauled and updated in order to handle the levels of antisemitism and discrimination that exist on CUNY’s campuses today. In that regard, while my mandate was not to opine on whether specific past conduct at CUNY constituted antisemitism, I feel compelled to note that recently there has been an alarming number of unacceptable antisemitic incidents targeting members of the CUNY community. As an example, earlier this month, a disturbing video surfaced of protesters harassing Jewish Baruch College freshmen that were attending a welcome event sponsored by the Hillel organization at a local kosher restaurant. Reports are that the protest was organized, at least in part, by the Baruch College chapter of Students for Justice in Palestine. Not only did the protestors cruelly taunt the students about the murder of six hostages by Hamas terrorists in Gaza, but the protestors also appear to have threatened the students with violence, and used antisemitic tropes in the process. Of particular note, the protestors appear to have couched some of their deplorable attacks in antizionist rhetoric, which only confirms a point I make in my report—that antizionism can constitute antisemitism. As Chancellor Matos Rodríguez correctly noted, behavior along the lines of the Baruch College incident has no place in this great City, and it is truly saddening that students just beginning their college education were subject to such blatant hate.

Incidents like those involving the Baruch College students highlight the critical need to keep all members of the CUNY community safe, and as I detail in my report, CUNY has been properly focused on that issue. Nonetheless, as I state in my conclusion to the report, antisemitism and hate in all its forms cannot be ignored or minimized and incidents such as this

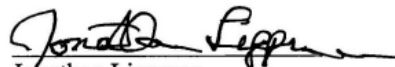
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must never be tolerated at CUNY as part of the campus climate. When faced with such situations, CUNY must gravitate to creating the conditions for students to gather safely.

Recent events only highlight the myriad of complex problems that CUNY faces in dealing with antisemitism and discrimination. While I recognize that this report will not solve all those issues, it is my sincere hope that this report and the recommendations contained therein will assist CUNY's leadership in fostering a safe and inclusive environment, free from hate of any kind.

Respectfully Submitted,

LATHAM & WATKINS LLP


Jonathan Lippman

September 23, 2024

Antisemitism and Discrimination at the City University of New York

Report of the Honorable Jonathan
Lippman, former Chief Judge of New York
and Chief Judge of the New York Court of
Appeals, to the Honorable Kathy Hochul,
Governor of New York

TABLE OF CONTENTS

	Page
I. EXECUTIVE SUMMARY	1
A. Introduction.....	1
B. Key Observations.....	6
C. Recommendations.....	10
II. THE MANDATE.....	22
III. THE REVIEW PROCESS.....	25
A. Overview.....	25
B. Confidentiality of the Interview Process.....	30
C. Formulation of this Report.....	32
IV. THE HISTORY OF CUNY	33
A. Overview.....	33
B. CUNY’s Historical Ties to the Jewish Community and History Related to Complaints About Antisemitism.....	38
V. THE RELEVANT LAW.....	45
A. The First Amendment	45
1. The First Amendment Protects the Rights of Public University Employees and Students To Speak, Associate, and Assemble.....	47
2. The First Amendment Does Not Prevent CUNY From Regulating <i>Conduct</i> or Imposing Certain Reasonable Viewpoint- and Content- Neutral Regulations That Impact the Exercise of First Amendment Rights	51
a. Conduct.....	52
b. Time, Place, And Manner Restrictions	53
c. Unprotected Categories Of Speech.....	55
d. Other Content-Neutral and Viewpoint-Neutral Regulations	58
3. The First Amendment Also Protects <i>CUNY’s</i> Right To Speech and Association.....	59
B. Title VI of the Civil Rights Act of 1964.....	61
C. Executive Order 13889 on Combatting Antisemitism.....	69
VI. THE DEFINITION OF ANTISEMITISM	72
A. IHRA Working Definition of Antisemitism	72
B. The Jerusalem Declaration.....	75
C. The Nexus Document	77
D. What Role Should Definitions of Antisemitism Play at CUNY?.....	79

E.	Should CUNY Adopt a Definition of Antisemitism?	80
F.	What Steps Should CUNY Take in the Absence of Choosing to Adopt a Formal Definition of Antisemitism?	82
VII.	CUNY’S POLICIES AND PROCEDURES	84
A.	The City University of New York Policy on Equal Opportunity and Non- Discrimination.....	85
1.	Background.....	85
2.	Concerns Regarding the EOND Policy and How To Improve It.....	87
B.	The CUNY Policy on Acceptable Use of Digital Assets and Resources	91
1.	Background.....	91
2.	Concerns Regarding the Digital Assets Policy and How To Improve It.....	92
C.	Guidance Memorandum Regarding Protocol for Responding to Hate Crime Incidents.....	94
1.	Background.....	94
2.	Concerns Regarding the Guidance Memorandum and How to Improve It.....	96
D.	CUNY Procedures for Implementing Reasonable Accommodations and Academic Adjustments	97
E.	Henderson Rules	98
1.	Background.....	98
2.	How To Improve CUNY’s Use Of The Henderson Rules	99
F.	Targeted Communications and Outreach.....	101
VIII.	KEY OBSERVATIONS.....	103
A.	CUNY’s Structure Contributes to Difficulties In Handling Issues Concerning Antisemitism and Discrimination.....	103
B.	Differences Among Schools Partially Explain Relative Rates of Antisemitism	108
1.	Critical Differences Between Schools	108
a.	Location	108
b.	Campus Layout	109
c.	Demographics	109
d.	Type of School.....	110
2.	Even in Schools More Likely to Have Incidents of Antisemitism and Discrimination, Strong Leadership Can Still Help Prevent Hate From Flourishing on Campus	111
C.	The Discrimination and Retaliation Reporting Portal Has Failed	112
1.	The Creation of the Portal.....	112
2.	How the Portal Works.....	113
3.	Problems with the Portal.....	116
D.	A Number of CUNY’s Policies and Procedures Are Outdated	118
E.	CUNY Is Properly Concerned With Student, Faculty and Staff Safety	119
F.	Not All CUNY Students Feel Safe	121

G.	CUNY Must Better Address the Use of Social Media	123
H.	Antisemitism at CUNY is Carried Out By a Vocal Minority	123
I.	Members of the CUNY Faculty Often Need to Do More.....	124
J.	Even Those Who Disagree About the Topics of the Day, Do Agree on Many Important Issues.....	125
IX.	RECOMMENDATIONS	127
1.	Increase Centralization of Resources for Dealing With Antisemitism and Discrimination by Establishing a University Wide Center, Including an Internal Monitor.....	127
2.	Overhaul CUNY’s Current System for Lodging Complaints Regarding Discrimination and Harassment	129
3.	Provide Additional Resources to Victims of Antisemitism and Discrimination Through Establishment of a Victims Advocate Program.....	129
4.	Coordinate at All Times with Law Enforcement to Protect Everyone at CUNY	130
5.	Provide More Guidance to Those Conducting Investigations Into Antisemitism and Discrimination	131
6.	Increase Consideration of the Relationship Between Israel and the Jewish People When Adjudicating Whether Conduct Constitutes Antisemitism	132
7.	Ensure That All Those at CUNY, Including Chief Diversity Officers, Follow The Law With Reference to How Antisemitism is Legally Defined	133
8.	Update CUNY’s Existing Policies and Procedures and Remove Ambiguities.....	134
9.	Hold Faculty and Others Accountable for Violative Conduct.....	135
10.	Draft and Adopt a Comprehensive Policy on Freedom of Speech and Expressive Conduct.....	136
11.	Encourage Leadership to Speak Out Forcefully Against Hate	136
12.	Recruit and Hire to Foster Inclusiveness	137
13.	Encourage More Dialogue Aimed at Bringing People Together.....	137
X.	CONCLUSION.....	139

I. EXECUTIVE SUMMARY

A. Introduction

On October 31, 2023, the Honorable Governor Kathy Hochul announced that she would appoint me to conduct “an independent third-party review of the City University of New York’s policies and procedures related to antisemitism and discrimination.”¹ My review was one of several steps the Governor announced that day aimed at keeping New Yorkers safe following a surge in hate and bias incidents in the weeks following the October 7 Hamas terror attacks.² As I said at the time of my appointment, “[a]ntisemitism and discrimination in all its forms are unacceptable, and I am honored that the Governor has asked me to carry out this important task.”³ To conduct this work, I was supported by a team from my law firm, Latham & Watkins LLP, led by my colleague Lawrence Buterman, whom I would especially like to recognize and thank for his exceptional leadership and contributions to the drafting of this report.

Following the announcement of my review, my team and I engaged in an extensive process that involved conducting more than 200 interviews and meeting with more than 300 people over almost 10 months. All totaled, dozens of attorneys and staff devoted thousands of hours to this project.

We began by speaking with members of the City University of New York (“CUNY”) Board of Trustees, as well as presidents, deans, senior administrators, faculty, chief diversity officers, staff, and students at several CUNY schools. At the outset of my review, we also

¹ <https://www.governor.ny.gov/news/following-surge-hate-and-bias-crimes-governor-hochul-deploys-all-available-state-resources>

² *Id.*

³ *Id.*

established an email address, cuny.review@lw.com, where individuals could provide us with information directly and request to be interviewed. We requested that CUNY announce the review on its main website with links to the cuny.review@lw.com address.⁴ Only certain members of my team had access to emails sent to the cuny.review@lw.com address. My team and I also directly received many unsolicited emails, letters, and calls from individuals eager to participate in my review and share their experiences related to antisemitism and discrimination. In addition to members of the CUNY community, we also spoke with various political and religious leaders, First Amendment experts, non-profit organizations, and other interested parties.

After we conducted a number of initial interviews, members of my team traveled to 13 CUNY schools to conduct in-depth examinations of the climates on each of those campuses.⁵ The Governor's mandate clearly included understanding the different campus environments and perspectives on antisemitism and discrimination.⁶ We selected campuses that represent a cross-section of the 25 different schools that make up CUNY. They included graduate and professional schools, senior colleges, and community colleges throughout the City. Some of the schools within the scope of the review had a significant number of reported incidents of antisemitism, while others did not. By choosing both schools that did and did not appear to have pervasive problems with

⁴ See <https://www.cuny.edu>.

⁵ In-depth reviews were conducted at Baruch College, Brooklyn College, Borough of Manhattan Community College, City College of New York, Craig Newmark Graduate School of Journalism, CUNY Graduate School of Public Health and Health Policy, CUNY School of Law, Hunter College, John Jay College of Criminal Justice, Kingsborough Community College, LaGuardia Community College, Queens College, and Queensborough Community College.

⁶ See <https://www.governor.ny.gov/news/following-surge-hate-and-bias-crimes-governor-hochul-deploys-all-available-state-resources> ("The review is expected to include interviews, research, and other consultations and to cover the following topics: Campus environment, including an assessment of attitudes and perspectives of antisemitism on various CUNY campuses.").

antisemitism, we were able to glean insights into some of the complex factors that determine whether a particular campus is likely to be at greater risk for incidents of hate. At each school, my team met not only with leadership but also faculty, staff, and students, including student organization leaders.

Consistent with my mandate, I did not undertake an “investigation” aimed at assigning blame or holding specific individuals responsible for past conduct. Although in the interest of transparency, my team and I did find enough blame to go around in the way that some at CUNY handled prior documented instances of antisemitism. We also did not set out to determine whether specific past incidents constituted antisemitism, though we note that the U.S. Department of Education, Office of Civil Rights (“OCR”), and CUNY recently entered into a settlement agreement to resolve nine discrimination complaints alleging antisemitism and other harassment—many occurring well before the October 7 Hamas terrorist attack on Israel.⁷ Rather, we sought to understand how CUNY currently deals with issues of antisemitism and discrimination and to identify areas where CUNY should institute changes to improve its processes and make sure complaints are handled in a more uniform fashion. My ultimate conclusion is that CUNY’s current policies and procedures for preventing and addressing antisemitism and discrimination need to be significantly overhauled and updated in order to handle the levels of antisemitism and discrimination that exist on CUNY’s campuses today.

⁷ <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-nine-complaints-against-city-university-new-york-alleging-discrimination-based-national-origin-including-antisemitic-anti-palestinian-anti-muslim-and-anti-arab-harass>

Throughout the review, we sought to hear from individuals reflecting as many viewpoints as possible and made clear that participation in the process was entirely voluntary.⁸ We endeavored to speak with everyone who requested to do so and did not declare any topics as outside the scope of the review. And we encouraged interviewees to provide us with any documentation they had or written advocacy they were interested in providing. That said, we understood that confidentiality was an important consideration for many in deciding whether to speak with us. Accordingly, we aimed to honor all such requests and in interviews made it our general practice not to share specifics about who else we interviewed and what any other interviewees may have told the team.

Though the issue of what constitutes antisemitism and discrimination is, of course, critical, my team and I approached our interviews without any preconceived notions on those topics. By doing so, we were able to keep our interviews open-ended and gather information that members of the CUNY community viewed as relevant.⁹ Most interviews included at least two members of my team and lasted between one and two hours. We met with some interviewees on multiple occasions.

⁸ In addition to seeking to interview those who had claimed to have experienced antisemitism or discrimination at CUNY, my team and I also sought to speak with those who may have felt that their protected speech was improperly deemed as antisemitic. Regrettably, some of those individuals refused to speak with my team and claimed that our efforts to interview them amounted to an attempt to chill their First Amendment rights. That is the opposite of why my team sought these interviews. While we respect anyone's decision to decline an interview, we categorically reject any notion that our requests for interviews constituted or were motivated in any way by a desire to target political or academic speakers expressing any particular viewpoint.

⁹ I am aware that certain individuals and groups raised concerns with the fact that we would not share with interviewees the definition of antisemitism we were using. With respect, this criticism reflects a fundamental misunderstanding of the nature of my mandate.

In addition to our interviews and campus visits, my team undertook a thorough review of CUNY's relevant existing policies and procedures and a comprehensive analysis of legal issues related to free speech in a public university. As a public university subject to the First Amendment, it is critical for CUNY's decision makers to understand what constitutes protected free speech and what constitutes discriminatory conduct that violates federal and New York state law. In my years as a judge, I have seen that freedom of expression and freedom from discrimination are compatible under the law. I also know from the long and dynamic history of CUNY that one of the organization's great values is its ability to foster robust discourse on difficult topics.

While the Governor's announcement of my appointment centered on issues of antisemitism and discrimination, I understood this mandate to be part of the Governor's efforts to combat "antisemitism, Islamophobia, or hate of any kind."¹⁰ Thus, in conducting interviews, my team and I did not limit discussions to issues of antisemitism but also sought information as to whether CUNY's policies and procedures adequately address other forms of discrimination and bias. In approaching my recommendations, my team and I propose changes to combat all forms of hate. Though my review was triggered by and focused in significant measure on issues of antisemitism, I recognize that CUNY may also need to grapple with other forms of discrimination and hate. Accordingly, my recommendations are broad and sufficiently content neutral to meet those challenges.

I also want to note that my recommendations are specific to CUNY. As my work made clear, CUNY is a unique institution that faces unique challenges. While we are, of course, aware

¹⁰ <https://www.governor.ny.gov/news/following-surge-hate-and-bias-crimes-governor-hochul-deploys-all-available-state-resources>

of numerous incidents and investigations on other campuses throughout the United States related to antisemitism and discrimination, our work focused solely on CUNY.

I am pleased to note that throughout the process we received steadfast cooperation from Chairperson William Thompson, the CUNY Board of Trustees, and Chancellor Félix Matos Rodríguez. Those individuals, along with CUNY's General Counsel, Derek Davis, helped facilitate numerous interviews and provided us with historical information that assisted in the process. We also received cooperation from the presidents and deans at the various CUNY schools as well as senior leadership at those institutions. Along the way, we encountered certain faculty and student organization leaders that declined to speak with us or that demanded that we agree to unreasonable pre-conditions before meeting with us. Although we regret we were not able to hear their views and experiences, and in many instances disagree with their stated reasons for not speaking with us, we respect their decision not to participate in the review. Ultimately, I do not believe that the reluctance of any individual to participate in this process has compromised the comprehensive nature of this report or the value of the recommendations.

B. Key Observations

My team and I have learned a great deal through the hundreds of interviews, numerous on-campus visits, and thorough review of CUNY's existing policies and procedures that comprised the bulk of our work. In the following summary, I highlight key observations that inform my recommendations.

CUNY is a unique institution, with a structure that creates complex challenges regarding issues related to antisemitism and discrimination. Specifically, CUNY operates 25 distinct institutions: 11 senior colleges, seven community colleges, six graduate and professional schools, and an honors college. Each school has its own leadership structure with significant

autonomy over day-to-day operations. CUNY historically has vacillated between periods when it prioritized centralization and periods when it prioritized the autonomy of individual campuses. From my review, it appears CUNY currently has veered too far away from centralization. This decentralization has contributed to a problematic lack of uniformity in addressing antisemitism and discrimination. In particular, because complaints of antisemitism and discrimination are typically investigated by chief diversity officers at the specific school where the alleged incident occurred, and any resolution or discipline is similarly promulgated at the school level, the same conduct may be adjudged differently on different campuses. This inconsistency is not fair to many members of the CUNY community.

The location and demographics of schools impact the extent to which a school encounters issues of antisemitism and discrimination. CUNY schools are located throughout New York City and, in many instances, draw students and faculty from the surrounding community. As a result, different schools have vastly different demographics and experiences with respect to antisemitism. For example, schools located in Manhattan are typically located in multi-story buildings with a limited number of entrances. These schools are more easily targeted as locations to interfere with students' ability to attend class and are, therefore, more vulnerable to disruption by people who are not affiliated with CUNY participating in protests in close proximity to academic life. In contrast, other schools are located on sprawling campuses that are largely inaccessible except by car—making protests involving individuals that are not part of the CUNY community less likely and less disruptive when they do occur.

CUNY's current system of handling complaints regarding antisemitism, discrimination, and retaliation is ineffective and needs to be completely overhauled. The

most common complaint we heard during our interviews relates to CUNY’s complaint portal, which though perhaps well-intentioned, in some instances may cause more harm than good.

CUNY’s current policies and procedures are in many respects outdated and potential sources of confusion. Some of CUNY’s bylaws and policies that inform how issues surrounding antisemitism and discrimination should be handled have not been updated in almost a decade. While there may be legitimate reasons why this is so, the result is that some of the policies do not explicitly track current applicable law on issues like discrimination and harassment. Additionally, some of CUNY’s policies do not reflect more recent guidance CUNY has promulgated with respect to how complaints should be made and resolved—creating a risk of confusion.

CUNY leadership, both at the central University level and at the individual school level, are properly concerned with student, faculty, and staff safety. Despite the inconsistency we witnessed in how complaints of antisemitism and discrimination are addressed at individual schools, all leaders in the CUNY system uniformly take safety on their campuses very seriously. Across the board, there is coordination between campus security and local law enforcement, where necessary, and as a result we heard of few incidents of physical violence on CUNY campuses against members of the CUNY community. Of course, even one such incident is too many. During our review, we learned about some limited incidents adjacent to campuses involving people who are not members of the CUNY community as well as acts of violence during the encampments in April and May 2024.

CUNY students do not all feel safe. Despite CUNY’s emphasis on physical safety (and relative success in ensuring physical safety), we heard from many in the CUNY community that they do not feel safe on campus due to antisemitism and other forms of hate. Some students raised concerns about protests they had to walk through to attend classes or enter campus buildings.

Others noted that they fear that they have been targeted and may be subject to doxxing, academic discipline, or repercussions from law enforcement for exercising their First Amendment rights to protest peacefully.

Social media can exacerbate issues of antisemitism and discrimination. During our interviews, we heard many instances in which organizations and individuals utilized social media to advance hate speech. This includes content sent from personal social media accounts and accounts associated with CUNY, or falsely identified as associated with CUNY, which violated school policies and perpetuated antisemitism and discrimination.

CUNY students, by and large, are focused primarily on their education. Antisemitism and discrimination that exist on CUNY campuses are carried out by a small, vocal minority of individuals. The vast majority of students and members of the CUNY community do not engage in antisemitism or discrimination of any kind and instead want only to access the quality education CUNY affords.

Members of the CUNY faculty need to take more decisive action to stop antisemitism and discrimination. Faculty at CUNY, like faculty throughout the country, hold the most critical place in the educational system. They are often revered by students who turn to them not only for the information in course syllabi but also for guidance on how to engage productively with the world around them as an essential part of learning. Faculty, of course, must be permitted to exercise their First Amendments rights and must be free to challenge students—even if that means exposing students to uncomfortable concepts. However, some faculty can and should do more to promote dialogue between those with differing viewpoints on critical issues and to encourage peaceful solutions to disagreements rather than inflame conflict, which we often found to be the

case. Free speech rights are rendered no less sacrosanct by asking faculty to help fulfill the mission of a great university like CUNY to educate and promote critical thinking by its students.

There is more agreement throughout CUNY regarding hate speech than many would think. The final observation I share is a positive one. One of the most interesting things my team and I observed during our work was that, despite the heightened and heated discourse that CUNY operates under today, we found more agreement than we anticipated with respect to issues related to hate on CUNY campuses, such as whether CUNY needs to adopt a formal definition in order to deal with antisemitism on campuses. This supports my recommendation to promote dialogue between those with seemingly differing views.

C. Recommendations

Based on the review, I have developed a 13-point action plan that CUNY should begin implementing immediately. The recommendations are summarized below and described in more detail in Section IX of the report.

Create a center at CUNY that, first and foremost, addresses antisemitism, discrimination, and other forms of hate, promotes civil discourse and inclusion, and monitors compliance with these recommendations. I found that CUNY's composition of 25 unique institutions has resulted in significant unevenness in how issues of antisemitism and discrimination are analyzed, prevented, and addressed in the various schools. This unevenness exists at multiple levels of the University. Dealing with these disparities is one of the most significant challenges facing CUNY as it attempts to tackle the antisemitism and discrimination that we found.

The answer to this challenge is, in my view, an increased centralized presence within CUNY to deal with these issues. I believe that the creation of a center is an essential tool for

CUNY in focusing on antisemitism and discrimination in all its forms and in promoting civil discourse and fostering inclusion and understanding. Such a center would, among other things, focus CUNY on combatting antisemitism, deploy resources to individual CUNY schools on an as-needed basis, ensure that CUNY schools promulgate applicable policies and procedures in a consistent manner, be a source of guidance to chief diversity officers and investigators to ensure uniformity in the investigative process, facilitate interfaith programming throughout CUNY, and provide training and forums to promote civil engagement.

Additionally, given how critical it is that CUNY properly address and curb incidents of antisemitism, discrimination and hate, and given how ever evolving these issues tend to be, I believe that active compliance monitoring is needed. Accordingly, I recommend that within the center, CUNY appoint an internal antisemitism and hate monitor, publicly identified as such, whose responsibility it is to ensure that these recommendations are being implemented, and that CUNY's policies and procedures continue to best address and remedy issues of antisemitism, discrimination and hate of all kinds.

I discussed the formation of a center with Chairperson Thompson and others throughout my review. Recently, CUNY's Board of Trustees adopted a resolution calling for the creation of a Center for Inclusive Excellence and Belonging ("CIEB"), which is to be committed to promoting dialogue and fostering understanding, intellectual curiosity, and scholarly pursuit of cultural and religious diversity.¹¹ While I am not averse to CUNY forming a center that deals with issues beyond antisemitism and discrimination, it is important for the major focus of the CIEB to be, at

¹¹ <https://www1.cuny.edu/mu/forum/2024/06/27/cuny-board-of-trustees-and-chancellor-announce-creation-of-center-for-inclusive-excellence-and-belonging-in-ongoing-effort-to-combat-discrimination/>

least in the near term, dealing with issues of antisemitism and hate, before potentially broadening its mission.

Revamp CUNY’s Portal for lodging complaints regarding antisemitism and discrimination. CUNY’s University-Wide Discrimination and Retaliation Reporting Portal (the “Portal”), where anyone can lodge complaints regarding incidents of antisemitism, discrimination, and retaliation, is ineffective. While the Portal appears to have been created with the best of intentions,¹² it was apparently rapidly designed and suffers as a result. One primary problem with the Portal is that it operates as a black box: an individual who submits a complaint does not receive any acknowledgment that the complaint has been received, nor is the system designed to provide status updates regarding progress of an investigation. That is unacceptable, as it creates uncertainty and anxiety as to whether an individual’s complaint is being thoroughly addressed or even considered. Additionally, I have found that the Portal competes with certain individual schools’ reporting procedures, creating confusion and unnecessary duplication, and draining resources from investigating and addressing underlying complaints. I have also learned that the Portal is not capable of running queries that would allow for identification of trends across campuses—making it an ineffective tool for analytic purposes.

I recommend that CUNY at once begin to remedy this failure of the investigative process. At a minimum, the Portal should provide acknowledgment of receipt of a complaint and, thereafter, updates as to the status of the investigation as it proceeds, subject to relevant privacy considerations. I recommend that CUNY engage an outside consultant to assist in implementing

¹² <https://www1.cuny.edu/mu/forum/2023/01/30/cuny-launches-online-portal-for-students-and-staff-to-report-community-acts-of-discrimination-and-retaliation/>

this recommendation and overhauling the Portal with the goal of establishing a best-in-class system at CUNY.¹³

Establish a centralized victim’s advocate position. During my review, I repeatedly heard that those dealing with antisemitism and discrimination of all kinds at CUNY do not feel heard. To combat this issue, CUNY should establish a victim’s advocate program. Victim advocates can, on a completely confidential basis, assist individuals in the CUNY community to navigate the investigative process and identify for them available resources. As a former judge, I have seen the value of such victim advocates. CUNY should take the opportunity to set itself apart by implementing a robust victim’s advocate position within the institution.

Coordinate with law enforcement and security experts to establish standard safety protocols, including time, place, and manner restrictions. While there have been few incidents of violence related to antisemitism and discrimination on CUNY campuses, many students do not feel safe. To help remedy this, CUNY should continue to establish best practices related to safety on campus. Issues like encampments or concealing one’s identity during protests can have significant safety implications and should be dealt with expeditiously and with clarity before they disrupt other students’ education and campus life. Presidents and deans of colleges should not be left without central guidance on how best to deal with these types of issues, including the appropriate scope of content-neutral time, place, and manner restrictions on expressive conduct. In addition, there must be clear guidance related to issues of vandalism and destruction of property on CUNY campuses.

¹³ I note that as part of CUNY’s recent settlement with OCR, CUNY has committed to numerous reforms related to reporting. Nonetheless, I believe CUNY must fully revamp its Portal in the manners I lay out in this report.

Provide oversight, guidance, and related training for chief diversity officers and others who are responsible for investigating allegations of antisemitism and discrimination.

Today, investigations into allegations of antisemitism and discrimination are typically conducted by the chief diversity officer or Title IX coordinator on the campus where the alleged incident took place. As a result, determinations of whether alleged conduct violates CUNY's policies and procedures depend on the judgment of the individual undertaking the investigation—with, in most cases, no oversight. This is problematic because, as I note above, there is significant unevenness concerning how issues of antisemitism and discrimination are analyzed, prevented, and addressed in the various schools, as well as significant differences in the backgrounds and experience among the chief diversity officers. CUNY's approach must be consistent to ensure that all complaints, regardless of the school at which they occur, are investigated properly and that wrongdoing is addressed consistently.

To remedy the problem and ensure a consistent approach in addressing complaints across CUNY campuses, I recommend that CUNY implement a system of mandatory training for chief diversity officers and others who may investigate allegations of antisemitism and discrimination. That baseline training should involve not only training on investigative techniques and dealing with victims, but also on issues of implicit bias, relevant legal requirements, relevant CUNY policies and procedures, and related best practices concerning investigations of this nature. No matter their school, background, or personal views, chief diversity officers and other investigators should follow consistent guidelines to determine whether to substantiate a complaint. In addition, CUNY, either through the aforementioned center or through another vehicle, should implement a system of oversight of the investigative process and individual investigative findings. CUNY should do away with a system that puts the outcome of investigations within the hands of a single

individual without guidance or oversight. Indeed, CUNY would be well-advised to consider whether future investigations of hate in any form should continue to reside within individual school diversity offices.

Consistent with the Governor’s 2022 Proclamation, CUNY should recognize that the International Holocaust Remembrance Alliance (“IHRA”) definition of antisemitism is a valuable tool used to determine contemporary manifestations of antisemitism. What constitutes antisemitism is one of the most controversial and complex issues that all examining these issues face. For many Jewish people, Zionism is part of their Jewish identity and shared ancestry. For that reason, when dealing with speech related to the State of Israel, understanding what is protected free speech and what constitutes antisemitism is critical. In 2022, the Governor issued a proclamation identifying the IHRA definition of antisemitism as a valuable tool in determining contemporary manifestations of antisemitism.¹⁴ Consistent with the Governor’s proclamation, I recommend that CUNY put significant focus on IHRA when it comes to understanding what constitutes antisemitism.¹⁵ The IHRA definition, in particular, provides important insight into the relationship between Jews and the State of Israel, and in doing so makes clear why antizionism may constitute antisemitism. CUNY should also consider whether other definitions of antisemitism may assist faculty and administrators in grappling with these complex issues.

¹⁴ https://www.governor.ny.gov/sites/default/files/2022-06/IHRA_Antisemitism_Definition_Proclamation-2022.pdf

¹⁵ I recognize that CUNY’s Chancellor has already taken a positive step in this direction by reaffirming Governor Hochul’s proclamation and identifying the IHRA definition of antisemitism as a vital resource.
<https://www.cuny.edu/about/administration/offices/transformation/diversity-equity-and-inclusion-hub/combating-antisemitism/>

CUNY must at all times operate and be guided by how antisemitism is defined under the law. Notwithstanding the above, I want to be very clear: CUNY does not need to formally adopt a definition of antisemitism in order to handle properly antisemitic incidents on its campuses. Indeed, the debate over definitions of antisemitism and other forms of hate risks diverting attention from addressing conduct occurring on CUNY campuses that satisfy any definition of hateful conduct. These include reported instances of hateful slogans or graffiti, such as swastikas, as well as incidents of physical intimidation, including intentionally knocking yarmulkas and hijabs off of the students who are wearing them.

What is critical is that CUNY follow the law.¹⁶ Senior leadership at CUNY, including presidents, deans, and chief diversity officers, must be trained on the requirements of the law and cannot gauge the propriety of conduct based on their personal views of what constitutes antisemitism. They must be guided by what the law applicable to CUNY dictates—even if that involves applications or interpretations of a definition of antisemitism with which they disagree.

Revamp CUNY’s policies and procedures to bring them in line with applicable law, ensure they provide uniform and clear guidance, and better define appropriate behavior with respect to modern topics such as social media. CUNY’s policies and procedures that address issues related to antisemitism and discrimination are, in many instances, unclear, outdated, and not in accord with current law. Regardless of the reasons why that is so, CUNY should undertake an extensive effort to modernize its policies and procedures to ensure they reflect the current legal frameworks and provide the CUNY community with clear guidance. In addition, because some of CUNY’s policies have not been revised in almost a decade, even where they do

¹⁶ In Section V below, I lay out the relevant law with respect to the First Amendment, Title VI of the Civil Rights Act of 1964, and Executive Order 13889.

not diverge from existing law, they are not as effective as possible for dealing with today's problems. For instance, during my review I heard of instances where personal social media accounts and accounts associated with CUNY, or falsely identified as being associated with CUNY, were used as vehicles to promote violence or hate. The use of social media to promote hate, and engage in improper actions like doxxing, is a more recent phenomenon. CUNY must make clear in its policies and procedures what conduct with respect to social media, for example, will and will not be permitted and the consequences for violating those rules. And CUNY should establish a process for reviewing its policies and procedures on a regular basis to ensure they do not become stale.

Consistently hold faculty and others accountable for violative conduct. If CUNY wants to combat discrimination on its campuses, there must be accountability for those who violate CUNY's policies and procedures, including students and individuals who should be role models for students.

As I note above, students and faculty must be permitted to exercise their First Amendment rights fully and without restriction, and faculty must be free to challenge students—even if that means exposing them to uncomfortable concepts. However, when students or faculty, including tenured faculty, violate CUNY's policies and procedures, or otherwise engage in antisemitic conduct or conduct that creates an unsafe environment at CUNY, they must be held accountable.

Accordingly, I recommend that CUNY institute protocols to address, discipline, and remediate conduct and speech that violates CUNY's policies and procedures. As part of those efforts, the entire CUNY community, and especially students and faculty, should be trained on CUNY's policies and procedures and relevant law with respect to antisemitism, discrimination, and the First Amendment. Additionally, given that CUNY faculty necessarily interact with and

supervise students with diverse viewpoints, CUNY would be well-served to train its faculty on implicit bias. To be clear, the overwhelming majority of students, faculty and staff are behaving appropriately at CUNY and are a credit to the institution. But even those who do not run afoul of CUNY's policies and procedures and/or applicable law benefit from training and clear guidance on expectations.

Draft and adopt a Comprehensive Policy on Freedom of Speech and Expressive Conduct. Today, CUNY's primary guidance with respect to antisemitism and discrimination is its Equal Opportunity and Non-Discrimination Policy. While CUNY schools are subject to other rules that provide guidance on permissible activities on campus, such as the Henderson Rules,¹⁷ CUNY would be well-served to develop a comprehensive policy reaffirming its commitment to free speech while also setting forth appropriate direction on activities that are and are not permissible, as well as the time, place, and manner restrictions for expressive conduct on campus. I note that CUNY attempted to pass such a policy in 2016. While that policy was flawed in certain respects, I recommend CUNY put together a diverse working group that can create a similar policy that is fair to all members of the community.

Encourage leadership to speak out forcefully against hate, even when it does not necessarily violate the law or CUNY's policies. The protections of the First Amendment do not require CUNY leadership to stay silent in the face of speech that, while not violative of applicable law, is inconsistent with CUNY's values or obligations. To the contrary, the First Amendment affords leadership the latitude to denounce hate speech or conduct that threatens CUNY's value system, contributes to an atmosphere of intolerance, or impinges on the ability of CUNY to deliver

¹⁷ In Section VII below, I discuss CUNY's policies and procedures applicable to antisemitism and discrimination, including the Henderson Rules.

on its educational commitments to its students. CUNY has to date been vocal in denouncing actions that run afoul of CUNY's values, and I believe CUNY leadership has an obligation to continue to use its voice to reject antisemitism, discrimination and hate of all kinds, and foster an inclusive community. Standing on the sidelines is not an option when the very value system and future of a great public university are at stake.

Increase efforts to recruit and hire those who foster inclusive dialogue. CUNY is by most measures an extremely diverse institution. Just by way of example, many consider the CUNY School of Law to be the most ethnically and racially diverse law school in the United States. While I applaud this diversity, CUNY must recognize that at some schools, this diversity has not translated into an environment of tolerance and respect. I recommend that CUNY examine its faculty recruitment and hiring processes and determine whether there are ways that it can ensure that its efforts produce a culture that encourages and respects inclusive dialogue and tolerance.

Increase dialogue among people holding different viewpoints and create additional joint programming. There is a familiar refrain that the remedy for bad speech is more speech. Unfortunately at CUNY, it appears that on the complex issues of antisemitism and discrimination, individuals are speaking but not listening to one another. While lectures and debates among faculty and campus leaders with divergent backgrounds and viewpoints on today's issues have not always proven successful, we heard enough examples of positive results from such efforts that I believe CUNY should look for more opportunities to advance such programs. Certainly, the aforementioned center can review what has worked best on individual campuses and facilitate such programming throughout CUNY.

Moreover, CUNY is intertwined with the fabric of New York City. A CUNY education has helped millions of New Yorkers of all races, ethnicities, and religious backgrounds better

themselves and improve their lots in life. Students across all demographics share the aspirations of growth and success that a CUNY education can help deliver. Infusing in CUNY students and faculty an understanding of the rich history of CUNY can only help in fostering an environment where peaceful and civil debates replace dangerous and violent protests and where everyone is treated with respect regardless of their viewpoints on the issues of the day.

* * *

I close by noting that we must acknowledge the ever-changing reality and larger landscape in which this report is being submitted. My initial conversations with the Governor's office about undertaking this review predated the October 7 Hamas terror attacks. While issues of antisemitism and discrimination were certainly part of life at CUNY at that time, the world has drastically changed since then. During the course of this review, we have seen thousands of lives lost in Israel and Gaza and countless individuals and families throughout the world who have been permanently affected by those events—including many members of the CUNY community. Public sentiment and reactions evolve almost on a weekly basis. CUNY has had to deal not only with protests and counter-protests but also with issues such as attacks on free speech, doxxing, hate attacks on social media, encampments, and attempted take-overs of school buildings. Leadership has been challenged in unprecedented ways. During interviews, I have seen the emotions and felt the pain that many currently experience. These realities have led to a level of mistrust with respect to any efforts that touch upon these complex issues—including the work my team and I undertook. In this tense environment, even the most innocent or innocuous statements or conduct are scrutinized, which only leads to further suspicion, disagreements, and conflicts. Nonetheless, as a judge and lawyer, my focus has always been first and foremost on fairness and equal justice. This report is premised on those principles, with the sincere hope that it will assist CUNY in better handling

complaints of antisemitism and discrimination of any kind in the future and will ultimately lead to far fewer incidents of hate on CUNY campuses.

As a native and resident of New York City, and son of a CUNY graduate, I know how important CUNY is to the fabric of this great City and the incredible opportunities it affords to tens of thousands of students each year.¹⁸ My recommendations are intended only to ensure that those students and future generations can attend and learn in CUNY schools safely and free of antisemitism and other forms of discrimination and hate and that CUNY will operate as a sanctuary of academic freedom and center of informed discussion.

¹⁸ My colleague, Lawrence Buterman's late father, Dr. Irving Buterman, was a renowned physician in New York and a proud graduate of City College. Many other members of my team either attended CUNY schools or have close relatives who are alumni of CUNY schools.

II. THE MANDATE

On October 31, 2023, the Honorable Governor Kathy Hochul announced a series of actions to deploy all available resources to keep New Yorkers safe following a surge in hate and bias incidents in the weeks following the October 7 Hamas terror attacks.¹⁹ As part of those efforts, the Governor appointed me to conduct “an independent third-party review of the City University of New York’s policies and procedures related to antisemitism and discrimination.”²⁰

In specific terms, the Governor announced that my review, which would be supported by a team from my law firm Latham & Watkins LLP, would include “recommended actions for the CUNY Board of Trustees to bolster its antidiscrimination polices and help protect Jewish students and faculty.”²¹ The Governor further stated her expectation that the review would include interviews, research, and other consultations and cover the following topics:

- Campus environment, including an assessment of attitudes and perspectives of antisemitism on various CUNY campuses.
- Current University policies, procedures, and systems of investigating antisemitism complaints.
- Consistency of treatment by the University in handling of antisemitism complaints and all other types of discrimination.
- Appropriate balance of free speech rights with protection of students’ right to receive education free of antisemitic threats, intimidation, or discrimination.

¹⁹ <https://www.governor.ny.gov/news/following-surge-hate-and-bias-crimes-governor-hochul-deploys-all-available-state-resources>

²⁰ *Id.*

²¹ *Id.*

I understood that my mandate was to conduct a *review* of CUNY’s existing policies and procedures related to antisemitism and discrimination and their implementation on campuses and to provide recommendations that CUNY’s Board of Trustees could adopt to better handle future complaints of antisemitism and discrimination and make sure they were dealt with in a uniform fashion. The mandate was not to conduct an *investigation* into whether specific incidents at CUNY constituted antisemitism, nor was the mandate to assign blame to specific individuals for past conduct.²² Additionally, my mandate was limited to reviewing relevant policies and procedures just at CUNY (as opposed to any other institutions) and to making recommendations based on that review as to how CUNY could improve its processes.

An immediate issue I faced as I began the review was whether my work would be limited to antisemitism or whether it would be broader and encompass issues related to other forms of hate, including Islamophobia. While the Governor’s October 31, 2023 announcement of this review focused on “antisemitism and discrimination,” the Governor made clear in her release that day and in subsequent statements that her “top priority is to protect the safety and well-being of all New Yorkers” and that “there is zero tolerance in New York for antisemitism, Islamophobia, or hate of any kind, and it’s critical we deploy every possible state resource to keep New Yorkers safe.”²³ Thus, my team did not limit our inquiries to antisemitism alone. During our interviews,

²² I note that earlier this year, OCR and CUNY entered into a settlement agreement to resolve nine complaints against CUNY alleging discrimination based on national origin, including antisemitic, anti-Palestinian, anti-Muslim, and anti-Arab harassment.

<https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-nine-complaints-against-city-university-new-york-alleging-discrimination-based-national-origin-including-antisemitic-anti-palestinian-anti-muslim-and-anti-arab-harass>

²³ <https://www.governor.ny.gov/news/following-surge-hate-and-bias-crimes-governor-hochul-deploys-all-available-state-resources>. Just weeks after announcing my review, the Governor, on November 21, 2023, announced that following a significant uptick in anti-Muslim and antisemitic

we specifically inquired about forms of discrimination beyond antisemitism and also sought to understand how CUNY dealt with issues related to all forms of hate. Additionally, we sought to speak with individuals who believed that their free speech was improperly labeled as antisemitic and restricted and/or believed they were punished for their speech.²⁴ That said, as my review was announced by the Governor in response to acts of antisemitism, it is not surprising that the majority of complaints my team received related to issues of antisemitism at CUNY.

While today the prevalent issue of hate on CUNY campuses centers on antisemitism, the hate of today is not necessarily the hate of tomorrow. Thus, I have tailored my recommendations to be beneficial to CUNY in tackling incidents of hate in any form and against any group of people.

rhetoric on social media, she was deploying additional resources to combat all forms of online hate. <https://www.governor.ny.gov/news/following-significant-uptick-anti-muslim-and-antisemitic-rhetoric-social-media-governor-hochul>

²⁴ Unfortunately, I am aware that some individuals and organizations instructed members of the CUNY community not to speak with me or my team. As a result, I am not in a position to comment on how prevalent it is for members of the CUNY community to believe they have had their speech improperly labelled as antisemitic or improperly restricted.

III. THE REVIEW PROCESS

A. Overview

After being tasked with this project, my team and I began by conducting various meetings with the Chairperson of CUNY's Board of Trustees, William Thompson, other members of CUNY's Board of Trustees, CUNY's General Counsel Derek Davis, CUNY's Chancellor Félix Matos Rodríguez, and other members of CUNY's senior leadership. The purpose of the initial meetings was to explain our review process, establish basic review protocols, understand the structure of CUNY, identify an initial list of individuals we should interview, and obtain relevant materials from CUNY, including current policies and procedures. In addition to the aforementioned interviews, I attended a meeting of CUNY's Board of Trustees, which allowed me to speak directly to the entire CUNY Board and describe my anticipated review process.

Once I completed those initial interviews and meetings, I sought to speak with as many of the presidents and deans of the CUNY schools as possible. With the Chancellor's permission, I addressed a monthly meeting of CUNY's Council of Presidents, which was attended by senior administrators of the various schools, including presidents, counsels, and chief diversity officers. The purpose of that meeting was to explain to those administrators the review process and also to inform those administrators that, as part of the review, my team would be visiting a number of campuses. In addition, from the time my review was announced publicly, I began receiving requests to speak from various entities, including community leaders, CUNY personnel, interested politicians, and advocacy groups. My team and I sought to engage with all those who reached out to us to share their viewpoints on issues related to antisemitism, discrimination, the First Amendment, and life at CUNY.

As noted previously, part of the Governor's mandate was for my team to ascertain the climate on CUNY campuses with respect to antisemitism. In order to do that, my team identified a cross-section of schools to visit and analyze in greater depth. We chose a mix of community colleges, senior colleges, and graduate and professional schools throughout New York City. We also chose both schools that had reported incidents of antisemitism and those that did not. By doing so, we hoped to identify the factors that allowed antisemitism and discrimination to occur in certain environments, if any. The schools we chose were:

- Baruch College,
- Brooklyn College,
- Borough of Manhattan Community College,
- City College of New York,
- Craig Newmark Graduate School of Journalism,
- CUNY Graduate School of Public Health and Health Policy,
- CUNY School of Law,
- Hunter College,
- John Jay College of Criminal Justice,
- Kingsborough Community College,
- LaGuardia Community College,
- Queens College, and
- Queensborough Community College.

For each school, a dedicated team of lawyers was assigned to conduct the on-campus review. Each team was led by at least one partner at my firm and supported by at least four associates. Prior to

going on campus, my team and I met individually with each president or dean for each school we intended to visit. The presidents were encouraged to bring with them any administrators they wanted, and a number of them brought their chief diversity officers or other senior members of their staff. During those interviews, we asked the presidents and deans to give us their assessments of the climate on their campuses with respect to antisemitism and to discuss any incidents of antisemitism or hate that may have occurred at their schools. We solicited their candid assessments of whether their schools had problems with antisemitism and discrimination and what they believed contributed to their schools either having or not having, in their opinion, a problem. We also sought to understand from the presidents their levels of interaction with, and autonomy from, CUNY's central leadership and. During those meetings and afterwards, some presidents and deans presented us with relevant background information regarding their schools and policies and procedures related to antisemitism and discrimination. At the end of each meeting, members of the team assigned to visit that school set up a process to coordinate with the president or dean on the campus visit.

On-campus visits occurred over the course of several months. During those visits, our teams met with senior administrators, faculty, students, religious leaders and student organization leaders. We chose individuals to interview through a combination of recommendations and independent research. We also interviewed all members of the CUNY community who indicated an interest in speaking with us. At some campuses, we interviewed dozens of individuals. We also toured campuses to understand where rallies, protests, and any notable incidents of antisemitic or discriminatory behavior transpired. While we endeavored to speak with as many individuals as possible, during the course of setting up some meetings, potential interviewees attempted to place conditions on speaking with us. Some required lists of questions in advance, while others

demanded that we identify for them information regarding the review, including with whom we had spoken and what definition of antisemitism we were applying to the review. In most instances, we were able to address interviewees' concerns and have our meetings, but in some instances we could not satisfy interviewees' preconditions and they chose not to speak with us.

For those who were hesitant to meet with us on-campus, we offered to meet in our offices or via videoconference. However, we also made clear to all potential interviewees that participation in the review was completely voluntary. During the course of the review, we became aware that certain students, faculty, and organizations were advising people not to speak with us. I understand that some of those individuals were concerned that my team was trying to "target" individuals who may have engaged in antisemitism or spoken out against Israel. While I recognize the atmosphere of distrust that surrounds these issues, any such charges of targeting are flatly wrong and wholly misguided. My team and I sought to interview people with divergent viewpoints on issues related to antisemitism and discrimination. We wanted to hear from not only those who believed they were victims of antisemitism but also from those who believed they were victims of false claims of antisemitism as well as other forms of discrimination. And, as noted above, we also sought to speak with members of the CUNY community who may have been victims of other forms of hate or had their First Amendment rights impinged. My review was in no way aimed at uncovering perpetrators of improper behavior at CUNY or assigning blame for past incidents of antisemitism or discrimination, which my team and I routinely explained.

With the exception of issues that touched upon the confidentiality of the interview process (which I discuss below), no topics were off limits. Because of that, some interviewees shared concerns with us about CUNY that went well beyond my mandate. However, we thought that was a better way to proceed to ensure we obtained the most complete view of life at CUNY.

On occasion, we received questions about whether interviewees could bring with them legal representation. We informed them that they were free to bring with them whomever they chose. However, we also made clear that the review was not a criminal investigation and that we were not looking into whether any individual had engaged in wrongdoing. We also received requests from some potential interviewees to record our interviews. We informed those individuals that while it was our preference to not have our interviews recorded, ultimately it was their decision. We made clear, however, we would not be recording the interviews.

While the on-campus interviews were ongoing, we also continued to interview those who requested to speak with us. All totaled, we conducted approximately 200 interviews and spoke with approximately 300 people during the course of my review. Most of the 300 people with whom we spoke were affiliated with CUNY in some way, either as a current or former student, faculty or staff, parent, or administrator. But we also heard from various interested community leaders, advocacy groups, religious leaders, and public officials. We encouraged all those with whom we spoke to provide us with any materials they wanted, including advocacy papers, research, and other documents. Though most everyone had something unique to share with us, through the hundreds of interviews, a consistent narrative of the issues at CUNY developed.

In addition to our interviews, we maintained regular communication with CUNY's leadership. Chairperson Thompson repeatedly told me from the outset that if we uncovered problems, he wanted to know about them immediately, so he did not have to wait until this report came out to address them. Consistent with that request, during our meetings with Chairperson Thompson and his team, I provided real-time feedback into areas where I believed CUNY could improve its policies and procedures related to antisemitism and discrimination. I note that, consistent with his expressed position, Chairperson Thompson has already begun instituting

certain reforms we discussed during my review that I believe will help CUNY better deal with antisemitism and discrimination in the future.

Beyond the interviews, members of my team undertook extensive reviews of relevant First Amendment law and caselaw concerning appropriate campus policies and procedures—including those related to time, place, and manner restrictions for expressive conduct. In addition, we conducted a thorough review of CUNY’s history with respect to issues of antisemitism and discrimination and its existing policies and procedures related to those topics. Finally, my team extensively researched various issues related to this inquiry, including the debate surrounding the definition of antisemitism.

B. Confidentiality of the Interview Process

One of my goals in this process was to hear from as many members of the CUNY community as possible regarding their experiences with antisemitism and discrimination of any kind at CUNY. I recognized, however, that some individuals might be unwilling to speak with me and my team for fear that they could be subject to punishment or retaliation by those with respect to whom they were being critical, although, to be clear, I have not seen any evidence of such behavior to date. To help alleviate that concern, I instructed my team to create an email address where anyone could directly email the review team, cuny.review@lw.com. Only certain members of my team (including me) had access to the cuny.review@lw.com inbox, and at no time were any communications we received shared with CUNY or anyone outside of my team. I also instructed CUNY to put on its main webpage a notification that informed individuals that they could contact me directly. The text of that notification on the CUNY.edu landing page reads as follows:

Email Judge Jonathan Lippman, former Chief Judge of the State of New York

At the request of Governor Hochul, Judge Lippman is conducting an independent review of CUNY policies and procedures related to antisemitism and discrimination. In connection with that review, Judge Lippman and his team have established an email address, cuny.review@lw.com, so that CUNY students, faculty, employees, and other members of the CUNY system and the public, can directly communicate with Judge Lippman's review team. Anyone can use the cuny.review@lw.com address to directly provide comments, suggestions, materials, or other information that will assist, or otherwise be relevant to, the review. The email address also can be utilized by anyone seeking to speak directly with the team conducting the review. If such a request is made, the review team will make best efforts to arrange an interview, subject to availability. Emails sent to cuny.review@lw.com will go directly to the outside review team and no one at CUNY will have access to the mailbox. Please note that while the review team cannot guarantee that it will be able to keep all messages and or materials received through cuny.review@lw.com confidential, the team will do its best to honor any requests for confidentiality.²⁵

During the course of the review, we received numerous substantive communications and requests for interviews through the cuny.review@lw.com email address. In addition, various individuals inside and outside of the CUNY community contacted me directly via email or phone to request to speak or share information regarding antisemitism and discrimination at CUNY.

In order to maximize the likelihood that individuals would be willing to speak, and do so freely, we decided to do our best to honor any requests for confidentiality. But, in our interviews and in the notice on the CUNY website, we made clear that though our general practice was to keep all interviews and information confidential, we could not guarantee absolute confidentiality. We believed it important to provide that caveat to potential interviewees because we recognized that there could be instances in which we had legal obligations to share certain information. Consistent with this decision regarding confidentiality, and recognizing the prevalence of doxxing incidents on campuses, we made it a practice not to share with interviewees the names of others

²⁵ <https://www.cuny.edu/>

who had spoken with us or specifics of what we learned during interviews. In this report, we continue to honor that decision by summarizing the information we received and not attributing specific statements to individuals with whom we spoke.

C. Formulation of this Report

This report is the culmination of the review process that my team and I have conducted over the past ten-plus months. During that time, dozens of attorneys and staff worked on this project, devoting thousands of hours. My team and I met regularly throughout that time to discuss what we were learning and what we believed were the ways that CUNY could improve its processes. Members of my team, as well as various interviewees, provided suggestions to me as to ways CUNY should reform its policies and procedures to better address antisemitism, discrimination, Islamophobia, and other forms of hate. Though I am greatly indebted to the entire review team for the thousands of hours they devoted to this important project, and to all the interested parties that shared their ideas, at the end of the day, the recommendations contained herein are my own.

IV. THE HISTORY OF CUNY

A. Overview

In order to appreciate how critical it is to address and remedy the problems that CUNY faces with respect to antisemitism and discrimination, it is important to understand CUNY's rich history. CUNY is in many respects an educational crown jewel with origins dating back more than 170 years. Especially compared to other institutions of higher learning in this country that, at times, imposed quotas or otherwise restricted applications from underrepresented persons, CUNY institutions were trailblazers for ensuring quality education to all people regardless of their financial means or their racial, ethnic, or religious backgrounds. This commitment has resulted in one of the most diverse institutions of higher education in the world—and with that achievement a rich educational environment in which different viewpoints are central to its fabric. Student activism has likewise played an important part of CUNY's commitment to providing affordable education; student activists have helped expand access to CUNY's offerings and promoted CUNY's principles beyond the geographical limits of CUNY's campuses. Like many educational institutions across our nation, CUNY confronts issues of antisemitism and other forms of discrimination, yet CUNY remains a pivotal gateway for socioeconomically, ethnically, racially, and religiously diverse people to participate ever more robustly—economically, socially, and politically—in our society. I am honored to have spoken at various CUNY institutions over the course of my career and indeed am constantly inspired by CUNY as an institution. For those reasons, I believe it necessary that my work be guided by the principle that CUNY must continue to meet its commitment to New York City's diverse students, providing them with a rich education and exposure to different viewpoints, and does not dampen the spirit of activism that is core to CUNY's history and identity.

CUNY's history dates to 1847 with the founding of the Free Academy. The mission of the Free Academy was to "offer a free, quality education based on academic worth, and to serve all social classes of the city."²⁶ The Free Academy, originally located on 23rd Street and Lexington Avenue in Manhattan, ultimately became City College.²⁷ The Free Academy was followed in 1869 by the Female Normal and High School, which was created to train young women to become teachers.²⁸ The Female Normal and High School (now Hunter College) was the first institution of public higher education for women in New York City and was open to women of all races, religions, and ethnic backgrounds. In 1884, William Hallett Greene became the first Black graduate of City College. Greene subsequently became the first Black member of the U.S. Army Signal Corps and the first Black meteorologist in the United States.²⁹

In 1926, the New York state legislature established the Board of Higher Education with the mission to integrate the college system and expand public access in the city's outer boroughs.³⁰ Eventually, the Board of Higher Education became known as CUNY's Board of Trustees. Over the next century, additional colleges, such as Brooklyn College and Queens College, were founded but operated independently. In 1946, with the end of World War II and passage of the G.I. Bill, there was an enrollment boom in the schools that would eventually become part of CUNY, as institutions like the New York State Institute of Applied Arts and Sciences in downtown Brooklyn were created to train technicians and other specialists for the postwar economy.³¹ That same year,

²⁶ <https://www.cuny.edu/about/history/origins-and-formative-years/>

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ <https://www.cuny.edu/about/history/the-move-uptown-and-new-colleges-in-the-boroughs/>

³¹ <https://www.cuny.edu/about/history/the-postwar-expansion/>

the Security Council of the United Nations held its first formal meetings on American soil in the Gym Building of Hunter-in-the-Bronx, which would later become the campus of Lehman College.³² Shortly thereafter in 1951, City College began admitting women to its School of Liberal Arts, and the then all-female Hunter-in-the-Bronx school opened to men.³³

In 1961, under an Amendment to the New York State Education Law, seven New York City colleges (the City College of New York, Hunter College, Brooklyn College, Queens College, Staten Island Community College, Bronx Community College, and Queensborough Community College) were integrated into a coordinated system of higher education, forming CUNY.³⁴ By forming CUNY, school and City leadership could better coordinate to meet the fast-growing demand for an affordable college education in New York City. At the same time, the CUNY Faculty Senate was established to facilitate CUNY-wide shared governance.

Throughout the 1960s, CUNY campuses were hotbeds of activism, aiming to enact change within the CUNY community and the world writ large. In particular, students targeted racial and economic inequities in the admissions process and mobilized in favor of “open admissions” policies that guaranteed admission to a CUNY school for all New York City high school graduates and the expansion of the Search for Education, Elevation, and Knowledge (SEEK) Program, which provides disadvantaged youth with resources to attend college.³⁵ CUNY implemented its open admissions policy in 1970. Under that policy, all high school graduates were guaranteed entrance to CUNY without having to fulfill traditional requirements. The policy had the effect of nearly

³² *Id.*

³³ *Id.*

³⁴ <https://www.cuny.edu/about/history/creation-of-the-modern-university/>

³⁵ *Id.*

doubling the number of students enrolled in the CUNY system, with Black and Hispanic student enrollment increasing threefold.³⁶ Due to the 1976 fiscal crisis, CUNY ended its free tuition policy, leading to the introduction of tuition fees for all CUNY colleges. In 1983, the CUNY School of Law opened. The school would eventually be ranked as the most diverse and top public interest law school in the country.³⁷

Over time, CUNY suffered certain setbacks. According to a task force appointed by Mayor Rudolph Giuliani, by 1999, CUNY's senior college enrollment rates and graduation rates declined, and students were taking a long time to earn degrees.³⁸ The task force also criticized CUNY for "loose and confused" academic standards, an aging and shrinking faculty, and a governing process dominated by "[m]istrust and confusion."³⁹ The task force's report described CUNY as "an institution adrift" and called for an improved, more cohesive university structure and management, as well as more consistent academic standards.⁴⁰ Following the report, Matthew Goldstein, a mathematician and City College graduate who had led CUNY's Baruch College and briefly, Adelphi University, was appointed chancellor. During Goldstein's tenure, CUNY ended its policy of open admissions to its four-year colleges and raised the admissions standards at Baruch, Brooklyn, City, Hunter, and Queens Colleges. Goldstein also took measures to significantly

³⁶ Fullinwider, Robert K., "Open Admissions and Remedial Education at CUNY." *Philosophy & Public Policy Quarterly* (1999).

³⁷ <https://www.cuny.edu/about/history/creation-of-the-modern-university/>

³⁸ <https://cdha.cuny.edu/files/original/fc81c19bcac557fb041e3afa4ea08920.pdf>

³⁹ *Id.*

⁴⁰ *Id.*

increase centralization at CUNY—which was met with criticism and resistance from faculty and administrators at individual schools.⁴¹

In 2016, former Governor Andrew Cuomo appointed former New York City Comptroller William C. Thompson Jr. as Chairperson of CUNY’s Board of Trustees.⁴² On February 13, 2019, CUNY’s Board of Trustees unanimously voted to appoint Félix V. Matos Rodríguez, the former president of Queens College, as the eighth Chancellor of CUNY. Chancellor Matos Rodríguez became the first Latino and minority educator to head CUNY.⁴³ Chairperson Thompson and Chancellor Matos Rodríguez still occupy these positions today. CUNY’s Board of Trustees is comprised of 17 members, ten of whom are appointed by the Governor and five of whom are appointed by the Mayor. The final two trustees are *ex officio* members. One is the chair of CUNY’s student senate, and the other is the chair of CUNY’s faculty senate.

Today, the CUNY system comprises 25 institutions, including 11 senior colleges, seven community colleges, an honors college, and graduate schools located in each of the five boroughs.⁴⁴ Having largely succeeded in its mission to democratize education in New York City,

⁴¹ Kaminer, Ariel, “Longtime CUNY Chancellor to Step Down After Pushing Higher Standards.” *The New York Times*, April 13, 2013.

⁴² <https://www1.cuny.edu/mu/forum/2016/05/09/governor-nominates-thompson-to-chair-trustees-ferrer-to-seat-on-the-board/>

⁴³ <https://www1.cuny.edu/mu/forum/2019/02/13/queens-college-president-felix-v-matos-rodriguez-to-be-named-chancellor-of-city-university-of-new-york/>

⁴⁴ Those institutions are: Baruch College, Borough of Manhattan Community College, Bronx Community College, Brooklyn College, College of Staten Island, Craig Newmark Graduate School of Journalism, CUNY Graduate Center, CUNY Graduate School of Public Health and Health Policy, CUNY School of Labor and Urban Studies, CUNY School of Law, CUNY School of Professional Studies, Guttman Community College, Hostos Community College, Hunter College, John Jay College of Criminal Justice, Kingsborough Community College, LaGuardia Community College, Lehman College, Macaulay Honors College, Medgar Evers College, New York City College of Technology (City Tech), Queens College, Queensborough

many of these institutions are among the most diverse in the country. CUNY has left an indelible mark on New York City and has become a foundation of the City's educational, economical, and cultural landscape. Each year over 225,000 students attend CUNY schools, many of whom would not otherwise be able to receive a college or graduate degree in New York City. For these students, CUNY provides key educational and economic opportunities. Because many CUNY students opt to remain in New York City and contribute to their local communities throughout their careers and lives, the benefits of the CUNY education provide ongoing benefits both to those students and the communities that they serve.

Over the years, some of the greatest minds in our country have taught at CUNY, including Hannah Arendt, Edwin Burrows, Allen Ginsberg, Michio Kaku, Mark Rothko and Elie Wiesel. CUNY's list of notable alumni is no less impressive, and includes such luminaries as Justice Felix Frankfurter, Secretary Colin Powell, Secretary Henry Kissinger, New York Attorney General Letitia James, Alan Dershowitz, Mel Brooks, Jerry Seinfeld and Queen Latifah. All totaled, CUNY's graduates and faculty have received many prestigious honors, including 13 Nobel Prizes and 26 MacArthur "Genius" Grants.

B. CUNY's Historical Ties to the Jewish Community and History Related to Complaints About Antisemitism

The CUNY system has played an invaluable role in the Jewish community. CUNY provided a free or near-free quality education to countless Jewish immigrants after World War II when they could not afford (or were excluded from) other institutions of higher learning. Because

Community College, The City College of New York, and York College. Background information on each school and links to individual school websites can be found at <https://www.cuny.edu/about/colleges/>.

CUNY did not implement quotas regarding the admission of Jewish students, many enrolled at CUNY institutions located in neighborhoods with large Jewish populations, such as Brooklyn College and City College. Indeed, during the 1950s and 1960s, City College was sometimes referred to as the “Jewish Harvard.” While Jewish enrollment in CUNY schools has fluctuated over time, certain colleges remain centers for Jewish life in New York City.

Nonetheless, in recent years there have been many complaints of antisemitism levied against CUNY and its schools. Those complaints have, in numerous instances, led to investigations and campus climate reviews at CUNY. For example:

- In 2012, following state legislator letters and press reports alleging a pattern of employment discrimination at Brooklyn College against Orthodox Jews, then-Chancellor Goldstein asked then-General Counsel Frederick Schaffer and Bettina Plevan of the law firm of Proskauer Rose LLP to conduct an investigation. That investigation ultimately concluded that “the evidence does not support the allegations of a pattern of discrimination against Orthodox Jews at Brooklyn College.”⁴⁵
- In 2013, a forum was organized by the Brooklyn College Students for Justice in Palestine (“SJP”) at Brooklyn College on the subject of the Boycott, Divestment, and Sanctions (“BDS”) movement against the State of Israel. After questions arose about whether Brooklyn College should have permitted the forum to take place, whether it was appropriate for the Political Science Department at Brooklyn to co-sponsor the event, and whether Jewish students had been given equal access to

⁴⁵ <https://nypost.com/2012/05/16/bklyn-college-cleared-of-bias/>

participate in the event, then-Chancellor Goldstein asked then-General Counsel Schaffer to conduct an investigation. That investigation was assisted by James Gill and Austin Campriello of then-Bryan Cave LLP, who also submitted a report to Mr. Schaffer.⁴⁶ That report ultimately concluded that while certain Jewish students had not been able to register for the event, that was the result of confusion and disorganization and not the product of religious or political discrimination.⁴⁷ The report also concluded that while four Jewish students had been improperly removed from the event, the evidence did not necessarily support an inference that their removal was for discriminatory purposes.⁴⁸

- In 2016, then-Chancellor James Milliken engaged Judge Barbara Jones and Paul Shechtman of Bracewell LLP to conduct an independent review of alleged incidents of antisemitism on the campuses at CUNY and to review CUNY's responses to those incidents. The investigation focused on four campuses where allegations of antisemitism had been raised: Hunter College, the College of Staten Island, Brooklyn College, and John Jay College. The Bracewell report ultimately concluded that while there had been a number of antisemitic incidents on CUNY campuses, much of the offending conduct was protected under the Constitution.⁴⁹ The report stated that “[a]s a public university, CUNY is limited in the ways that it can respond to hate speech, whether the words are anti-Semitic, racist, anti-Muslim,

⁴⁶ <https://www.scribd.com/document/135651806/REPORT-ON-BDS-FORUM-HELD-AT-BROOKLYN-COLLEGE-ON-FEBRUARY-7-2013>

⁴⁷ *Id.* at 16.

⁴⁸ *Id.* at 36.

⁴⁹ <https://www.cuny.edu/wp-content/uploads/sites/4/page-assets/news/newswire/assets/CUNYReport.pdf>

or anti-LGBT” and that “CUNY cannot punish such speech unless it is part of a course of conduct so pervasive or severe that it denies a person’s ability to pursue an education or participate in University life. It cannot mandate civility or sanction isolated derogatory comments.”⁵⁰ The report went on to state that “what CUNY cannot punish, it can still condemn,” and that “[w]hat CUNY can sanction is threatening conduct that puts a community member in fear for his safety.”⁵¹ The report noted that actions that go beyond offensive speech—like threatening violence or forcibly pulling signs from the hands of a demonstrator—should be punished if the persons responsible are identified.⁵² The report also pointed out that there had been incidents of Islamophobia at CUNY.⁵³

- OCR recently resolved nine complaints against CUNY alleging discrimination based on national origin, including antisemitic, anti-Palestinian, anti-Muslim, and Anti-Arab harassment.⁵⁴ In particular, OCR investigated whether CUNY and/or Hunter College, Brooklyn College, the School of Law, Baruch College, or Queens College failed to address alleged antisemitic and anti-Palestinian discrimination and harassment, creating a hostile environment for students. As part of the investigation, OCR identified compliance concerns that specific CUNY schools did not conduct adequate investigations into these matters, one of which involved

⁵⁰ *Id.* at 20.

⁵¹ *Id.* at 21.

⁵² *Id.*

⁵³ *Id.* at 24.

⁵⁴ <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-nine-complaints-against-city-university-new-york-alleging-discrimination-based-national-origin-including-antisemitic-anti-palestinian-anti-muslim-and-anti-arab-harass>

students and faculty disrupting two Zoom sessions of a required Hunter College course in 2021 by commandeering the scheduled course discussion to use the class time to call for the decolonization of Palestine. In June 2024, CUNY entered into a CUNY-wide agreement to ensure that all campuses fulfill their Title VI responsibilities when responding to complaints of discrimination. The agreement included a commitment to reopen or initiate investigations into complaints of discrimination and share the results with OCR and provide training to employees who undertake these investigations.⁵⁵ Specifically, as part of the resolution CUNY committed to:

- o “Reopen or initiate investigations of complaints and reports alleging discrimination, including harassment, on the basis of national origin, including shared Jewish, Palestinian, Muslim, Arab, and/or South Asian ancestry, or association with these national origins/shared ancestries.
- o For each investigation, provide OCR with the results of the investigation, and for each finding of a hostile environment created by harassment based on national origin/shared ancestry, report to OCR any remedial action to be taken by CUNY, including actions to remedy the effects of the environment and prevent recurrence.
- o Provide training to employees responsible for investigating complaints and other reports of discrimination, including harassment, based on national origin/shared ancestry or association with the national origin/shared

⁵⁵ *Id.*

ancestry, to ensure thorough and impartial investigations, including that the investigators know how to identify relevant witnesses to interview and how to conduct interviews about such harassment and whether it created a hostile educational environment.

- o Provide training for campus peace officers on CUNY's Title VI obligations not to discriminate based on national origin, including shared ancestry, how to engage effectively with CUNY students and the campus community, and how to ensure accurate collection and reporting of complaints and other information regarding interactions between public safety officers and students, as required by Title VI.
- o Ensure that each of CUNY's 25 constituent colleges and schools administers at least one climate survey to students no later than September 30, 2024.
- o Continue the third-party reviews currently being conducted of CUNY's nondiscrimination and antisemitism policies, at the direction and request of New York State Governor Kathy Hochul, and the other by an advocacy group."⁵⁶

This review is one of the third-party reviews referenced in the agreement between CUNY and OCR.⁵⁷ Though I do not believe that the Governor's request that I conduct this review was

⁵⁶ *Id.*

⁵⁷ I understand that the other review referenced by OCR in its resolution agreement with CUNY is a review of CUNY's written policies and procedures conducted by the Brandeis Center on behalf of the Hillel organization. I have been provided a copy of the Brandeis Center's report and considered it in connection with this review.

motivated by any single incident at CUNY, I am aware that prior to my initial conversations with the Governor, CUNY had received a significant amount of publicity in May 2023 after a student-elected speaker for the CUNY School of Law graduation made a speech that was highly critical of Israel and labeled the New York Police Department as fascist.⁵⁸ While many claimed the speech was antisemitic, many others supported the student's right to make the speech. In the aftermath, the student speaker allegedly received numerous threats, and there were calls for the dean of the School of Law to be dismissed. Ultimately, the School of Law made the decision to avoid future similar controversies by not having student-elected speakers at future graduations. That decision itself has been criticized by many, highlighting just how complicated it is to navigate these issues. My hope is that this report, and the recommendations contained herein, will provide guidance to CUNY so that it can meet future challenges.

⁵⁸ <https://www.nbcnewyork.com/news/local/cuny-commencement-address-sparks-firestorm-over-comments-on-israel-fascist-nypd/4387264/>. In 2022, the student-elected speaker likewise made a speech critical of Israel, though that speech received less publicity.

V. THE RELEVANT LAW

As I note throughout this report, students, faculty, and others in the CUNY community must not have their First Amendment rights impinged by CUNY. However, the First Amendment does not provide an absolute license to those at CUNY to say and do anything they want, and/or to do so without any potential consequences. During the course of my review, it became clear that many at CUNY, including faculty, had incorrect understandings of the relevant law. That is not meant to be a criticism—the law surrounding freedom of speech issues on college campuses is complex, and even experts in the area have disagreements at the margins. Accordingly, in this Section I provide a summary of the relevant law applicable to CUNY.⁵⁹

A. The First Amendment

The First Amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁶⁰ The First Amendment protects our right to speak, associate, and assemble to discuss topics or viewpoints that may be controversial or even offensive to others. The First Amendment therefore limits the government’s ability to regulate, censor, or punish individuals for speaking, writing, meeting, and sharing opinions and ideas.

The First Amendment applies to states through the Fourteenth Amendment.⁶¹ Accordingly, the First Amendment governs the ability of public universities and schools to

⁵⁹ In so doing, I am not providing a legal opinion or legal advice to CUNY or any member of the CUNY community. Anyone interested in such an opinion or advice should consult their own attorney.

⁶⁰ U.S. Const. amend. I.

⁶¹ See generally *Gitlow v. New York*, 268 U.S. 652 (1925).

regulate speech and assembly. The Supreme Court has long made clear that members of a school community, including students and faculty, do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁶² As such, the First Amendment meaningfully protects the rights of CUNY students and employees to speak, write, associate, and assemble both on and outside of university grounds—even to advance unpopular or controversial viewpoints at odds with those of other members of the university community.

By the same token, however, courts have repeatedly recognized the right of school officials to act within constitutional limits to impose and enforce rules to ensure the safety of a school’s community members, maintain equal access to educational opportunities, and prevent certain interference with an educational institution’s overall mission and operation. In particular, CUNY retains authority to impose and enforce rules that guard against and punish non-expressive *conduct*—such as physical violence, property damage, vandalism, trespassing, and discriminatory harassment—even when done to advance an expressive goal. Similarly, consistent with settled First Amendment principles, CUNY may enforce certain rules to restrict the time, place, and manner of speech and assembly; regulate certain unprotected categories of speech; and impose and enforce certain other reasonable content- and viewpoint-neutral rules that impact the exercise of First Amendment rights.

The First Amendment also protects CUNY’s right to engage in speech itself—including by disagreeing with or criticizing the exercise of First Amendment rights by members of its community. And consistent with those principles, CUNY may take action to prevent community members and groups from speaking in a manner that inaccurately states, implies, or infers that they

⁶² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503, 506 (1969).

are speaking *on behalf of* the University. Similarly, CUNY has greater authority to regulate the speech of campus community members in settings when those individuals *are* speaking on behalf of the University.

As the foregoing principles indicate, CUNY’s students, faculty, and community members enjoy substantial constitutional rights to engage in expressive activity. But CUNY likewise retains meaningful authority under the First Amendment to regulate expressive activity in a reasonable manner and to advance the University’s overall academic mission. Finally, the First Amendment protects CUNY’s right to speak for itself. Each of these principles is discussed in more detail below.

1. The First Amendment Protects the Rights of Public University Employees and Students To Speak, Associate, and Assemble

The rights to speak and assemble are among the most important freedoms protected by the Constitution. As the Supreme Court recognized over fifty years ago, “state colleges and universities are not enclaves immune from the sweep of the First Amendment.”⁶³ And while “the Court has long recognized ‘the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools,’” the Supreme Court’s precedents “leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”⁶⁴

⁶³ *Healy v. James*, 408 U.S. 169, 180 (1972).

⁶⁴ *Id.* (quoting *Tinker*, 393 U.S. at 507).

To the contrary, the Supreme Court has observed that “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”⁶⁵ Indeed, “[t]he essentiality of freedom in the community of American universities is almost self-evident.”⁶⁶ “The classroom is peculiarly the ‘marketplace of ideas.’”⁶⁷ “Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.”⁶⁸ Both students and the nation benefit when tomorrow’s leaders are “trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”⁶⁹

Consistent with the Supreme Court’s guidance, courts have long recognized the importance of protecting the First Amendment rights of students and faculty to speak and assemble. Students thus do not lose their First Amendment rights by stepping on campus or as a condition of becoming a member of a state university community. Nor do faculty members lose all rights to engage in protected First Amendment speech, association, and assembly as a result of their employee relationship with CUNY.

The First Amendment imposes particularly strict limitations on the government’s ability to restrict or regulate First Amendment rights on the basis of its content or viewpoint. “Government regulation of speech is content based if a law applies to particular speech because of the topic

⁶⁵ *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

⁶⁶ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁶⁷ *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

⁶⁸ *Sweezy*, 354 U.S. at 250.

⁶⁹ *Id.* (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, L.)).

discussed or the idea or message expressed.”⁷⁰ Such content-based restrictions are “presumptively unconstitutional” and “may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”⁷¹ “Government discrimination among viewpoints”—or the regulation of speech based on “the specific motivating ideology or the opinion or perspective of the speaker”—is a “more blatant” and “egregious form of content discrimination.”⁷² But it is well-established that “[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”⁷³

Accordingly, when a university like CUNY opens up areas of its campus to speech—either literally or through funding student groups or papers—the First Amendment makes it presumptively unlawful for CUNY to prohibit or discriminate against speech on the basis of its viewpoint, subject-matter, or content. Thus, CUNY could not, for instance, permit student groups to invite speakers who agreed with American policy towards Israel but not those who disagreed with it. Nor could it presumptively declare that entire issue off limits to campus speech, while permitting University faculty or students to speak about other important issues of the day.

The First Amendment also prevents even content- and viewpoint-neutral regulations of speech that would inadvertently chill or suppress constitutionally protected speech. “Where a vague statute ‘abut[s] upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of [those] freedoms.’ Uncertain meanings inevitably lead citizens to “steer

⁷⁰ *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

⁷¹ *Id.* at 164.

⁷² *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995).

⁷³ *Consolidated Edison Co. v. Public Service Comm’n*, 447 U.S. 530, 537 (1980).

far wider of the unlawful zone” . . . than if the boundaries of the forbidden areas were clearly marked.”⁷⁴ Similarly, even a “clear and precise enactment” may be “‘overbroad’ if in its reach it prohibits constitutionally protected conduct.”⁷⁵ “[O]verbroad laws, like vague ones, deter privileged activity.”⁷⁶

Courts “have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.”⁷⁷ For instance, many courts have recognized that difficult First Amendment (and due process) problems may arise from the overbreadth or vagueness of well-intentioned university efforts to shape policies to deter sexual or racial harassment. In *Doe v. University of Michigan*, for instance, a court struck down a University of Michigan policy that proposed to regulate “[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed,” and so on, and that met certain other criteria.⁷⁸ The court noted that the policy was unconstitutionally vague because it was “impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct”—given the difficulty of precisely defining behavior that “stigmatizes or victimizes.”⁷⁹ And the court noted that the policy

⁷⁴ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

⁷⁵ *Id.* at 114.

⁷⁶ *Id.*

⁷⁷ *Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

⁷⁸ 721 F. Supp. 852, 856 (E.D. Mich. 1989).

⁷⁹ *Id.* at 867.

was both facially overbroad and had been applied in an overbroad manner that swept up speech that was well within the scope of First Amendment protection.⁸⁰

At bottom, therefore, the First Amendment both limits CUNY's ability to restrict speech and assembly on the basis of the content or viewpoint underlying those First Amendment activities and also limits its ability to enact overbroad or vague policies that would proscribe or chill otherwise protected speech. The First Amendment does not require CUNY to provide a platform to any particular speaker, nor to fund student speech or assembly in the first place. But once CUNY opens its campus doors to speech, or agrees to fund student groups or publications, it generally cannot restrict or regulate those groups because they advocate for a controversial or disfavored point of view.

2. The First Amendment Does Not Prevent CUNY From Regulating Conduct or Imposing Certain Reasonable Viewpoint- and Content-Neutral Regulations That Impact the Exercise of First Amendment Rights

Although the First Amendment broadly protects the rights of CUNY students and faculty to speak, write, and assemble, the Supreme Court has also “repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”⁸¹ Consistent with that principle, universities retain substantial authority to protect their communities, limit classroom disruption, and act in furtherance of their academic missions. In particular, the First Amendment affords universities substantial authority to regulate conduct, and in particular non-expressive conduct; impose and enforce reasonable time, place, and manner restrictions on

⁸⁰ *Id.* at 864.

⁸¹ *Tinker*, 393 U.S. at 507.

when, where, and how CUNY community members can exercise their First Amendment freedoms; address unprotected categories of speech; and impose and enforce certain other content and viewpoint-neutral regulations that impact the exercise of First Amendment rights.

a. Conduct

To begin with, the First Amendment does not limit a university’s right to regulate or react to non-expressive conduct, as distinguished from speech. Courts have long distinguished between expressive conduct and non-expressive conduct. The former includes non-verbal activities that convey ideas, such as wearing an armband with a peace symbol on it⁸² or burning the American flag⁸³. “In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [courts] have asked whether ‘[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.’”⁸⁴

While “[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word,” it “may not . . . proscribe particular conduct *because* it has expressive elements.”⁸⁵ Where “the governmental interest is unrelated to the suppression of free expression,” a university must satisfy a relatively lenient standard of review, under which “a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”⁸⁶

⁸² *Tinker*, 393 U.S. 503.

⁸³ *See Texas v. Johnson*, 491 U.S. 397 (1989).

⁸⁴ *Id.* at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)).

⁸⁵ *Johnson*, 491 U.S. at 406.

⁸⁶ *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

By contrast, the First Amendment imposes no limitations on a university's right to proscribe or punish non-expressive conduct. The Supreme Court has rejected the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."⁸⁷ Thus, even if the action is purportedly justified by a desire to advance some allegedly expressive idea, the First Amendment offers no protection to CUNY students, faculty, or other employees who engage in acts of physical violence, harassment, vandalism, destruction of property, trespassing, obstructing access to university activities, or other similarly disruptive conduct.⁸⁸

b. Time, Place, And Manner Restrictions

While CUNY community members enjoy substantial rights to engage in speech and assembly, those rights are not unlimited with respect to time, place, and manner. Rather, university leaders may enact and enforce reasonable time, place, or manner restrictions on the exercise of First Amendment freedoms to enable the university to continue functioning. Time, place, and manner restrictions must be content-neutral, "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information."⁸⁹ Such laws may not "burden substantially more speech than is necessary" to further the government's interest but they also do not need to be the least restrictive means possible.⁹⁰

For instance, consistent with the standard set forth in *Ward*, universities are permitted to implement time, place, and manner restrictions that limit who may speak on campus and when.

⁸⁷ *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993).

⁸⁸ *See, e.g., Mitchell*, 508 U.S. at 484 ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.").

⁸⁹ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁹⁰ *Id.* at 798–99.

For example, in *Bowman v. White*, the Eighth Circuit upheld a public university’s restrictions on outsider speech on campus, which included requiring speakers to obtain a permit, banning speakers from being on campus during the final examination period, and requiring speakers to provide advance notice of appearance.⁹¹ In *Bowman*, the court noted that “[t]here is no evidence that the Policy is anything but content neutral” and reasoned that the university’s interests in protecting the students’ educational experience and ensuring public safety were both significant.⁹² The rules met the narrow tailoring requirement because they were designed to address those interests.⁹³ Finally, the court stated the “the University’s requirement leaves open ample alternative channels for communication.”⁹⁴

By contrast, in *Bowman*, the court struck down a rule preventing any speaker from appearing on campus for more than five days.⁹⁵ Although the university had argued that it wanted to prevent any single speaker from monopolizing campus space, the court found that explanation insufficient because it limited a speaker’s ability to appear without necessarily ensuring that the space would be used by someone else.⁹⁶ Accordingly, the restriction was not sufficiently tailored to the asserted government interest.

⁹¹ *Bowman v. White*, 444 F.3d 967, 980–83 (8th Cir. 2006); *see also Hershey v. Jasinski*, 86 F.4th 1224 (8th Cir. 2023) (determining that a policy requiring advance notice before distributing non-University publications was constitutional).

⁹² *Bowman*, 444 F.3d at 980.

⁹³ *Id.* at 980–81.

⁹⁴ *Id.* at 981.

⁹⁵ *Id.* at 981–82.

⁹⁶ *Id.* at 982.

c. Unprotected Categories Of Speech

The First Amendment does not prevent CUNY officials from regulating certain categories of speech that fall outside of the ambit of First Amendment protection altogether. The Supreme Court has long held that certain narrow categories of speech are not protected by the First Amendment, including incitement to imminent lawless action,⁹⁷ defamation,⁹⁸ obscenity and child pornography,⁹⁹ and fighting words.¹⁰⁰ Such principles have been applied by courts to school campuses.¹⁰¹

To be sure, difficult cases arise in which parties can contest whether speech falls within the scope of the unprotected categories above. But the Supreme Court and other courts have elaborated on these categories and provide meaningful guidance to determine whether speech falls within unprotected categories.

Incitement to imminent lawless action encompasses advocacy for the use of force or of a violation of law “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁰² Thus, in *Brandenburg*, the Court concluded that

⁹⁷ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see also, *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (discussing true threats).

⁹⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

⁹⁹ *Roth v. United States*, 354 U.S. 476 (1957).

¹⁰⁰ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹⁰¹ See, e.g., *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (allowing administrators to ban the use of obscene language at school-sponsored events); *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (holding that the First Amendment protection does not protect student speech when it involves advocating for illegal drug use at school-sponsored events).

¹⁰² *Brandenburg*, 395 U.S. at 447–48 (“the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961))).

the state may forbid or proscribe advocacy of the use of force or of law violation only where (1) such advocacy is directed to inciting or producing *imminent* lawless action *and* (2) is *likely* to incite or produce such action.¹⁰³

“True threats,” by contrast, “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹⁰⁴ Notably, “[t]he speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats ‘protects individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’”¹⁰⁵ Thus, the speaker’s subjective intent to actually consummate the harm is not the focus.

The Supreme Court recently clarified that true threats of violence “still require[] proof that the defendant had some subjective understanding of the threatening nature of his statements” but that “a mental state of recklessness is sufficient.”¹⁰⁶ Thus, even if a speaker intends his threat as a joke but “consciously disregarded a substantial risk that his communications would be viewed as threatening violence,” the First Amendment affords his words no protection.¹⁰⁷

Defamatory statements likewise do not receive constitutional protection.¹⁰⁸ To be sure, speech does not fall outside of the ambit of First Amendment protection merely because it is false.

¹⁰³ *Id.* at 447.

¹⁰⁴ *Black*, 538 U.S. at 359.

¹⁰⁵ *Id.* at 360.

¹⁰⁶ *Counterman v. Colorado*, 600 U.S. 66, 69 (2023).

¹⁰⁷ *Id.*

¹⁰⁸ *Gertz v. Welch*, 418 U.S. 323, 339–40 (1974).

Rather, the “[t]he statement must be a *knowing* or reckless falsehood.”¹⁰⁹ Defamatory statements—like fraudulent ones—involve speech but have long been understood to enjoy no First Amendment protection.

Obscenity is also not protected by the First Amendment. In *Miller v. California*, the Supreme Court established that material may be considered obscene and outside the scope of First Amendment protection if it satisfies three prerequisites: “(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”¹¹⁰

Fighting words are likewise not protected by the First Amendment. Fighting words are “personally abusive epithets” that are “inherently likely to provoke violent reaction.”¹¹¹ Here too, statements are unprotected whether or not the speaker actually intended violence to follow.¹¹² Rather, courts ask only whether “the ordinary citizen,” using her “common knowledge,” would reasonably understand the statement as a “direct personal insult.”¹¹³

¹⁰⁹ *United States v. Alvarez*, 567 U.S. 709, 719 (2012).

¹¹⁰ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹¹¹ *Cohen v. California*, 403 U. S. 15, 20 (1971).

¹¹² *See, e.g., Cantwell v. Connecticut*, 310 U. S. 296, 309–310 (1940) (statements unprotected when they are “likely to provoke violence and disturbance of good order, even though no such eventuality be intended”).

¹¹³ *Cohen*, 403 U. S. at 20.

The First Amendment therefore provides no barrier to CUNY officials’ enacting and enforcing rules that hold community members responsible for engaging in speech that falls within these traditionally unprotected categories.

d. Other Content-Neutral and Viewpoint-Neutral Regulations

Finally, consistent with the First Amendment, there are a number of other circumstances in which universities may enact content- and viewpoint-neutral regulations that nonetheless impact community members’ exercise of their rights to speak, associate, and assemble. Illustrative is the “all-comers” policy approved by the Supreme Court in *Christian Legal Soc’y v. Martinez*.¹¹⁴ In *Martinez*, the Court considered a policy whereby a public law school conditioned the recognition of a student group, and its attendant access to school funds and facilities, on the organization’s agreement to open eligibility for membership and leadership to all students. The Christian Legal Society argued that the school’s policy violated its right to speech, association, and free exercise. The Supreme Court disagreed.

The court found that public universities may condition access to a limited public forum—such as the recognition of student organizations or the provision of funds thereto—when the restriction is reasonable and viewpoint-neutral. The Court emphasized, moreover, that the relatively less restrictive standard applicable to limited public forums was appropriate for cases, such as this one, where a university “is dangling the carrot of subsidy, not wielding the stick of prohibition.”¹¹⁵ The Court further explained that the First Amendment question “must be analyzed in light of the special characteristics of the school environment.”¹¹⁶ And the Court agreed that a

¹¹⁴ 561 U.S. 661 (2010)

¹¹⁵ *Id.* at 683.

¹¹⁶ *Id.* at 686 (citation omitted).

public university may reasonably decide that the educational experience is best promoted when all participants in the forum must provide equal access to all students.

As *Martinez* illustrates, universities may not enact regulations controlling access to their limited public forums in a manner designed to eliminate disfavored groups or expression. But they may enact reasonable, viewpoint-neutral regulations that impact the use of their limited public forums or promote the educational mission of the university without a purpose to limit particular expression.

3. The First Amendment Also Protects CUNY's Right To Speech and Association

Although the Constitution protects the rights of CUNY community members to exercise their First Amendment rights, it also protects the University's right to engage in its own speech—even when that speech is controversial or at odds with the views of members of its communities. When the public university is the speaker, such speech falls within the ambit of government speech—rather than private speech. “When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”¹¹⁷ “That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech.”¹¹⁸ “[G]overnment statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas.”¹¹⁹

¹¹⁷ *Walker v. Tex. Div., Sons of Confederate Veterans*, 576 U.S. 200, 207 (2015).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

“[W]hen the State is the speaker, it may make content-based choices.”¹²⁰ “When the University determines the content of the education it provides, it is the University speaking, and [courts] have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”¹²¹ Similarly, when a university “appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”¹²²

Such principles accord with what Justice Frankfurter identified long ago as “‘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.”¹²³ Consistent with the government speech doctrine, “[a] university’s academic independence is protected by the Constitution, just like a faculty member’s own speech.”¹²⁴ In fact, courts have noted that universities must be permitted to consider faculty member speech in deciding who to employ, “for it is speech that lies at the core of scholarship, and every academic decision is in the end a decision about speech.”¹²⁵

Consistent with the government speech doctrine, public universities are entitled to devote resources and support to speech that they choose to prioritize and express their disagreement with speakers or speech that occurs on campus. In addition, many universities are increasingly taking steps to control the use of their brand or trademarks in order to more clearly convey when speech

¹²⁰ *Rosenberger*, 515 U.S. at 833.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J.).

¹²⁴ *Feldman v. Ho*, 171 F.3d 494, 495 (7th Cir. 1999).

¹²⁵ *Id.* at 496.

is the product of private student groups rather than the university and avoid confusion about whether the university endorses or supports the speech in question.

In summary, the government speech doctrine, as applied to public universities, recognizes the importance of affording state universities the right and opportunity to speak in their own voice and to advance the viewpoint and content of their choice in furtherance of their academic mission, subject to accountability through the political process.

B. Title VI of the Civil Rights Act of 1964

Under Title VI of the Civil Rights Act of 1964 (“Title VI”), “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹²⁶ “The purpose of Title VI is simple: to ensure that public funds are not spent in a way that encourages, subsidizes, or results in discrimination on these bases.”¹²⁷ Each federal agency enforces Title VI with respect to its own funding recipients.¹²⁸ Accordingly, the Department of Education, through its OCR, is the primary federal agency that enforces Title VI against schools, colleges, and universities. According to guidance from OCR, while “[t]here are some private schools that do not receive any federal assistance, and Title VI does not apply to

¹²⁶ Title VI Statute, 42 U.S.C §§ 2000d - 2000d-7, available at <https://www.govinfo.gov/content/pkg/USCODE-2008-title42/html/USCODE-2008-title42-chap21-subchapV.htm>

¹²⁷ <https://www.justice.gov/crt/fcs/T6Manual6#101>

¹²⁸ *Id.* at 2000d-1 (“Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.”).

them,” “[a]ll public colleges and universities and virtually all private colleges and universities are covered because they receive such assistance by participating in federal student aid programs.”¹²⁹

Title VI bars intentional discrimination.¹³⁰ Intentional discrimination occurs when the recipient acted, at least in part, because of the actual or perceived race, color, or national origin of the alleged victims of discriminatory treatment.¹³¹ While discriminatory intent need not be the only motive, a violation occurs when the evidence shows that the entity adopted a policy at issue “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”¹³² Institutions may be liable under Title VI when they treat students differently because of their race or national origin (known as a disparate treatment claim) and when they fail to respond appropriately to racial or ethnic harassment that is so severe, pervasive, and objectively offensive that it deprives students of access to educational benefits or opportunities (known as a hostile educational environment claim).¹³³

By its express language, Title VI does not prohibit discrimination on the basis of religion.¹³⁴ However, OCR has made clear that “Title VI protects students of any religion from

¹²⁹ <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html#racedisc3>

¹³⁰ See *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 607–08 (1983); *Alexander v. Choate*, 469 U.S. 287, 292–93 (1985).

¹³¹ *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 548 (3d Cir. 2011).

¹³² *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

¹³³ <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tvi-dia-202301.pdf> (“A school or college violates Title VI if it intentionally treats persons differently or otherwise causes them harm because of their race, or if a school or college creates or is responsible for a racially hostile environment.”). Guidance from the Department of Justice on how to prove Title VI violations can be found at <https://www.justice.gov/crt/fcs/T6Manual6#101>

¹³⁴ While a draft of Title VI initially included a prohibition on religious discrimination, Congress omitted that language in the final version, purportedly out of concerns that including religion would cut off sectarian colleges and universities from federal funding. See Kenneth L. Marcus,

discrimination, including harassment, based on a student’s actual or perceived: shared ancestry or ethnic characteristics, or citizenship or residency in a country with a dominant religion or distinct religious identity.”¹³⁵ This position was first expressed in a “Dear Colleague Letter” from Deputy Assistant Secretary of Education for Enforcement Kenneth L. Marcus in September 2004.¹³⁶ In that letter, it states:

“Groups that face discrimination on the basis of shared ethnic characteristics may not be denied the protection of our civil rights laws on the ground that they also share a common faith. Similarly, the existence of facts indicative of religious discrimination does not divest OCR of jurisdiction to investigate and remedy allegations of race or ethnic discrimination. OCR will exercise its jurisdiction to enforce the Title VI prohibition against national origin discrimination, regardless of whether the groups targeted for discrimination also exhibit religious characteristics. Thus, for example, OCR aggressively investigates alleged race or ethnic harassment against Arab Muslim, Sikh and Jewish students.”¹³⁷

In September 2010, the Department of Justice noted that it agreed with OCR’s 2004 pronouncement, and specifically noted that “[a]lthough Title VI does not prohibit discrimination on the basis of religion, discrimination against Jews, Muslims, Sikhs, and members of other religious groups violates Title VI when that discrimination is based on the group’s actual or perceived shared ancestry or ethnic characteristics, rather than its members’ religious practice. Title VI further prohibits discrimination against an individual where it is based on actual or

Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964, 15 Wm. & Mary Bill Rts. J. 837 (2007) at 43, available at

<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1152&context=wmborj#page=43>

¹³⁵ <https://www2.ed.gov/about/offices/list/ocr/sharedancestry.html>

¹³⁶ See OCR Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), available at

<https://web.archive.org/web/20240910005451/https://www2.ed.gov/about/offices/list/ocr/letters/religious-rights2004.pdf>

¹³⁷ *Id.* at 2.

perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.”¹³⁸

In May 2023, as the country witnessed “a nationwide rise in reports of antisemitic harassment, including in schools,” OCR issued a “Dear Colleague Letter: Addressing Discrimination Against Jewish Students.”¹³⁹ In that letter, OCR reaffirmed that it “may investigate complaints that students have been subjected to ethnic or ancestral slurs; harassed for how they look, dress, or speak in ways linked to ethnicity or ancestry (e.g., skin color, religious attire, language spoken); or stereotyped based on perceived shared ancestral or ethnic characteristics.”¹⁴⁰ The letter made clear that “[s]chools must take immediate and appropriate action to respond to harassment that creates a hostile environment” and that “OCR generally finds that a hostile environment exists where there is harassing conduct that is sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities, or privileges provided by a school.”¹⁴¹ OCR noted that “[i]f a hostile environment based on shared ancestry existed, and the school knew or should have known of the hostile environment, OCR will evaluate whether the school met its obligation under Title VI to take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile

¹³⁸ Letter to OCR from U.S Department of Justice: Title VI and Coverage of Religious Groups (Sept. 8, 2010), available at https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810_AAG_Perez_Letter_to_Ed_OCR_Title%20VI_and_Religiously_Identifiable_Groups.pdf

¹³⁹ Dear Colleague Letter: Addressing Discrimination Against Jewish Students (May 25, 2023), available at <https://web.archive.org/web/20240918072022/https://www2.ed.gov/about/offices/list/ocr/docs/antisemitism-dcl.pdf>

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

environment and its effects, and prevent harassment from recurring. In other words, a school violates Title VI when it fails to take adequate steps to address discriminatory harassment, such as antisemitic harassment.”¹⁴²

Following the May 2023 guidance, OCR published another letter “remind[ing] colleges, universities, and schools that receive federal financial assistance of their legal responsibility under Title VI of the Civil Rights Act of 1964 and its implementing regulations (Title VI) to provide all students a school environment free from discrimination based on race, color, or national origin, including shared ancestry or ethnic characteristics.”¹⁴³ OCR affirmed that “[e]very student has the right to a learning environment that is free from discrimination” and that OCR “stands ready to support schools in fulfilling this promise and to ensure every student’s right to learn without discrimination.”¹⁴⁴ It went on to state that “[a]ll students, including students who are or are perceived to be Jewish, Israeli, Muslim, Arab, or Palestinian, as well as students who come from, or are perceived to come from, all regions of the world, are entitled to a school environment free from discrimination based on race, color, or national origin.”¹⁴⁵ The letter also provided guidance that “[s]chools that receive federal financial assistance have a responsibility to address discrimination against Jewish, Muslim, Sikh, Hindu, Christian, and Buddhist students, or those of another religious group, when the discrimination involves racial, ethnic, or ancestral slurs or stereotypes; when the discrimination is based on a student’s skin color, physical features, or style

¹⁴² *Id.*

¹⁴³ Dear Colleague Letter: Discrimination, including Harassment, Based on Shared Ancestry or Ethnic Characteristics (Nov. 7, 2023), available at <https://web.archive.org/web/20240827121629/https://www.ed.gov/about/offices/list/ocr/letters/colleague-202311-discrimination-harassment-shared-ancestry.pdf>

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

of dress that reflects both ethnic and religious traditions; and when the discrimination is based on where a student came from or is perceived to have come from, including discrimination based on a student’s foreign accent; a student’s foreign name, including names commonly associated with particular shared ancestry or ethnic characteristics; or a student speaking a foreign language.”¹⁴⁶ OCR also made clear that “[h]arassing conduct can be verbal or physical and need not be directed at a particular individual” and that it “interprets Title VI to mean that the following type of harassment creates a hostile environment: unwelcome conduct based on shared ancestry or ethnic characteristics that, based on the totality of circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from the recipient’s education program or activity.”¹⁴⁷

In March 2024, in response to rising complaints of discrimination against students, including against Muslim, Arab, Sikh, South Asian, Hindu, and Palestinian students in schools, OCR published a “Dear Colleague Letter: Addressing Discrimination Against Muslim, Arab, Sikh, South Asian, Hindu and Palestinian Students.”¹⁴⁸ In that letter, OCR again reminded schools of their “legal obligation under Title VI of the Civil Rights Act of 1964 and its implementing regulations (Title VI) to provide all students a school environment free from discrimination based on race, color, or national origin, including shared ancestry or ethnic characteristics.”¹⁴⁹

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Dear Colleague Letter: Addressing Discrimination Against Muslim, Arab, Sikh, South Asian, Hindu, and Palestinian Students (Mar. 14, 2024), available at <https://web.archive.org/web/20240917102503/https://www2.ed.gov/about/offices/list/ocr/letters/colleague-202403-massahp.pdf>

¹⁴⁹ *Id.*

Most recently, in May 2024, OCR issued comprehensive guidance related to “Title VI’s protections against discrimination based on race, color, and national origin [which] encompass antisemitism and other forms of discrimination when based on shared ancestry or ethnic characteristics.”¹⁵⁰ The guidance contained a number of illustrative examples intended “to help schools carry out Title VI’s requirements.”¹⁵¹ In that letter, OCR noted that “[n]othing in Title VI or regulations implementing it requires or authorizes a school to restrict any rights otherwise protected by the First Amendment to the U.S. Constitution” and that “OCR enforces the laws within our jurisdiction consistent with the First Amendment.”¹⁵² However, OCR made clear that “the fact that harassment may involve conduct that includes speech in a public setting or speech that is also motivated by political or religious beliefs . . . does not relieve a school of its obligation to respond under Title VI . . . if the harassment creates a hostile environment in school for a student or students.”¹⁵³ OCR also maintains on its website a “Shared Ancestry or Ethnic Characteristics” resource guide,¹⁵⁴ which includes a fact sheet that provides examples of the type of antisemitic conduct that could, depending on the circumstances, raise Title VI concerns.¹⁵⁵

¹⁵⁰ Dear Colleague Letter: Title VI and Shared Ancestry or Ethnic Characteristics Discrimination (May 7, 2024), available at <https://www.whitehouse.gov/wp-content/uploads/2024/05/colleague-202405-shared-ancestry.pdf>

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴

<https://web.archive.org/web/20240917152206/https://www2.ed.gov/about/offices/list/ocr/sharedancestry.html>

¹⁵⁵

<https://web.archive.org/web/20240918191458/https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-shared-ancestry-202301.pdf>

In addition to issuance of guidance, OCR has broad authority to prevent racial and national origin discrimination by imposing obligations such as recordkeeping and reporting requirements.¹⁵⁶ Under Title VI, OCR may secure Title VI compliance via “any . . . means authorized by law.”¹⁵⁷ In the event OCR finds that an institution has violated Title VI, it can seek various remedies, including ordering the institution to change its policies, compensate injured students, and cooperate with OCR monitoring going forward. Under Title VI, OCR must first attempt to reach a cooperative resolution to any complaint.¹⁵⁸ However, OCR does have the ability in extreme situations to seek to terminate an institution’s federal funding.¹⁵⁹ OCR can also refer cases to the Civil Rights Division at the Department of Justice for enforcement in court,¹⁶⁰ and students who believe their schools have violated Title VI can file complaints with OCR or bring suit directly in federal court. Prevailing plaintiffs in Title VI claims can receive injunctive relief, compensatory damages, and attorneys’ fees.¹⁶¹

¹⁵⁶ 34 CFR 100.6, available at <https://www.ecfr.gov/current/title-34/subtitle-B/chapter-I/part-100/section-100.6>

¹⁵⁷ Title VI Statute, 42 U.S.C §§ 2000d-1, available at <https://www.govinfo.gov/content/pkg/USCODE-2008-title42/html/USCODE-2008-title42-chap21-subchapV.htm>

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (“Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.”).

¹⁶⁰ 34 CFR 100.8, available at [https://www.ecfr.gov/current/title-34/subtitle-B/chapter-I/part-100/section-100.8#p-100.8\(a\)\(1\)](https://www.ecfr.gov/current/title-34/subtitle-B/chapter-I/part-100/section-100.8#p-100.8(a)(1))

¹⁶¹ 42 U.S.C. § 1988.

C. Executive Order 13889 on Combatting Antisemitism

On December 11, 2019, then-President Trump issued Executive Order 13889 on Combatting Antisemitism.¹⁶² In the Executive Order, the President stated that “[i]t shall be the policy of the executive branch to enforce Title VI against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI.”¹⁶³ As part of ensuring “robust” enforcement of Title VI, the Executive Order also provides that “[i]n enforcing Title VI, and identifying evidence of discrimination based on race, color, or national origin, all executive departments and agencies (agencies) charged with enforcing Title VI shall consider . . . (i) the non-legally binding working definition of anti-Semitism adopted on May 26, 2016, by the International Holocaust Remembrance Alliance (IHRA), which states, ‘Antisemitism 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’; and (ii) the ‘Contemporary Examples of Anti-Semitism’ identified by the IHRA, to the extent that any examples might be useful as evidence of discriminatory intent.”¹⁶⁴

To be clear, the Executive Order does not define antisemitism and thus does not adopt the IHRA definition as the law of the land. Indeed, it expressly refers to the IHRA definition as a “non-legally binding working definition of antisemitism.”¹⁶⁵ Additionally, the Executive Order states that in considering the IHRA definition and contemporary examples of antisemitism

¹⁶² <https://www.govinfo.gov/content/pkg/DCPD-201900859/pdf/DCPD-201900859.pdf>

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

identified by IHRA, “agencies shall not diminish or infringe upon any right protected under Federal law or under the First Amendment.”¹⁶⁶

While the Executive Order is the first presidential directive to all federal agencies affirming that antisemitic discrimination may violate Title VI and requiring all federal agencies to consider the IHRA definition in enforcing Title VI, OCR has taken the position that the Executive Order does not change how OCR will handle complaints of discrimination involving antisemitism.¹⁶⁷

According to OCR:

“OCR has long recognized that anti-Semitism may violate Title VI, including in 2004 and 2010 guidance documents, which explained that Title VI reaches many instances of discrimination based on a student’s actual or perceived shared ancestry or ethnic characteristics. In enforcing Title VI, OCR has investigated complaints of discrimination alleging anti-Semitism in schools and colleges, and has recently considered the IHRA definition in individual investigations, as appropriate. This enforcement approach is consistent with the Executive Order. Under the Executive Order, OCR will continue to investigate anti-Semitism consistent with OCR’s jurisdictional authority, case processing procedures, the applicable Title VI legal framework, and constitutional principles, just as OCR does in all its investigations.”¹⁶⁸

Executive Order 13889 remains in effect under the current administration. Accordingly, in complying with its obligations under Title VI and reviewing alleged incidents of antisemitism, Executive Order 13889 in essence requires that CUNY consider the IHRA definition of

¹⁶⁶ *Id.*

¹⁶⁷ Questions and Answers on Executive Order 13899 (Combating Anti-Semitism) and OCR’s Enforcement of Title VI of the Civil Rights Act of 1964, available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-anti-semitism-20210119.pdf>

¹⁶⁸ *Id.*

antisemitism.¹⁶⁹ In Section VI, I discuss in detail various issues surrounding the definition of antisemitism.

¹⁶⁹ In addition to federal law, NY Executive Law § 296(4) states that “it shall be an unlawful discriminatory practice for an educational institution to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, age, marital status, or status as a victim of domestic violence, except that any such institution which establishes or maintains a policy of educating persons of one sex exclusively may admit students of only one sex.” NY Executive Law § 292 defines an educational institution to include any public university.

VI. THE DEFINITION OF ANTISEMITISM

From the outset of my assignment, I received numerous questions regarding whether I would be recommending that CUNY adopt a definition of antisemitism and, if so, what it would be. While I understood all along that, given the robust debate surrounding the issue, my report would contain a recommendation related to the issue of definitions, I believed it was important that my team and I not conduct our review “based” on any particular definition of antisemitism. I made this decision because I believed that applying *ex ante* a specific definition of antisemitism could deter participation in interviews by those who disagreed with the definition being used and could also cause some interviewees to refrain from identifying certain issues they experienced because they did not believe it comported with our working definition.

During the course of my review, numerous individuals and organizations shared their views as to whether CUNY should adopt a definition of antisemitism and, if so, what that definition should be. In those conversations, three specific definitions tended to be referenced: the International Holocaust Remembrance Alliance’s (“IHRA”) working definition of antisemitism,¹⁷⁰ the Jerusalem Declaration of Antisemitism,¹⁷¹ and the Nexus Document.¹⁷²

A. IHRA Working Definition of Antisemitism

What is now known as the IHRA working definition of antisemitism was initially developed around 2004, when the European Union’s European Monitoring Centre on Racism and Xenophobia (“EUMC”) issued a report that acknowledged the difficulty of measuring the

¹⁷⁰ <https://holocaustremembrance.com/resources/working-definition-antisemitism>

¹⁷¹ <https://jerusalemdeclaration.org/>

¹⁷² <https://nexusproject.us/the-nexus-document/>

prevalence of antisemitism in different countries.¹⁷³ According to Kenneth Stern, one of the individuals who worked on the development of the EUMC definition, the definition was created “as a tool for data collectors in European countries to identify what to include and exclude from their reports about antisemitism, and to have a common frame of reference so that data might be compared across borders.”¹⁷⁴ On May 26, 2016, the IHRA Plenary in Bucharest adopted a “non-legally binding working definition of antisemitism,” which reads as follows:

“Antisemitism 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.”¹⁷⁵

In addition to the specific definition, IHRA also provides a listing of 11 illustrative examples of antisemitism, a number of which touch upon issues related to Israel.¹⁷⁶ As the definition states, “[m]anifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic.”¹⁷⁷

Various international organizations and 43 United Nations member states have adopted or endorsed to differing extents the IHRA working definition of antisemitism.¹⁷⁸ In the United States, on December 11, 2019, then-President Trump signed an executive order that specifies that agencies

¹⁷³ Press, Eyal, “The Problem with Defining Antisemitism.” *The New Yorker*, March 13, 2024 <https://www.newyorker.com/news/persons-of-interest/the-problem-with-defining-antisemitism>

¹⁷⁴ Stern, Kenneth S., “Should a major university system have a particular definition of anti-Semitism?” *The Jewish Journal*, June 22, 2015. <https://jewishjournal.com/commentary/opinion/175207/>

¹⁷⁵ <https://holocaustremembrance.com/resources/working-definition-antisemitism>

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

responsible for enforcement of Title VI of the Civil Rights Act of 1964 must consider the IHRA working definition of antisemitism, as well as the IHRA list of Contemporary Examples of Anti-Semitism, “to the extent that any examples might be useful as evidence of discriminatory intent.”¹⁷⁹ On May 25, 2023, the Biden Administration announced the U.S. National Strategy to Counter Antisemitism, in which it noted that “[t]here are several definitions of antisemitism, which serve as valuable tools to raise awareness and increase understanding of antisemitism. The most prominent is the non-legally binding ‘working definition’ of antisemitism adopted in 2016 by the 31-member states of the International Holocaust Remembrance Alliance (IHRA), which the United States has embraced.”¹⁸⁰

The IHRA definition has nonetheless been met with opposition. In a Joint Letter to UN Secretary-General António Guterres and Under Secretary-General Miguel Ángel Moratinos, 104 civil society organizations urged the UN not to adopt the IHRA definition as it developed its own plans to address antisemitism.¹⁸¹ According to the letter, “[i]n practice, however, the IHRA definition has often been used to wrongly label criticism of Israel as antisemitic, and thus chill and sometimes suppress, non-violent protest, activism and speech critical of Israel and/or Zionism,

¹⁷⁹ Executive Order on Combating Anti-Semitism, issued December 11, 2019. <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-anti-semitism/>

¹⁸⁰ The U.S. National Strategy to Combat Antisemitism, issued May 25, 2023, at 13. <https://www.whitehouse.gov/wp-content/uploads/2023/05/U.S.-National-Strategy-to-Counter-Antisemitism.pdf> In addition, the text notes that “the Administration welcomes and appreciates the Nexus Document and notes other such efforts.” The Nexus Document is discussed *infra*.

¹⁸¹ Human Rights and other Civil Society Groups Urge United Nations to Respect Human Rights in the Fight Against Antisemitism, Joint Letter to UN Secretary-General António Guterres and Under Secretary-General Miguel Ángel Moratinos, April 20, 2023 <https://www.hrw.org/news/2023/04/04/human-rights-and-other-civil-society-groups-urge-united-nations-respect-human>

including in the US and Europe.”¹⁸² An Open Statement from Concerned Jewish Faculty Against Antisemitism, which has purportedly received 1300 signatures, calls for the rejection of any attempts to codify IHRA into federal law because “[c]riticism of the state of Israel, the Israeli government, policies of the Israeli government, or Zionist ideology is not—in and of itself—antisemitic.”¹⁸³

B. The Jerusalem Declaration

In response to such criticism, other definitions of antisemitism, such as the Jerusalem Declaration on Antisemitism (“JDA”), were promulgated. According to its website,

“[t]he Jerusalem Declaration on Antisemitism is a tool to identify, confront and raise awareness about antisemitism as it manifests in countries around the world today. It includes a preamble, definition, and a set of 15 guidelines that provide detailed guidance for those seeking to recognize antisemitism in order to craft responses. It was developed by a group of scholars in the fields of Holocaust history, Jewish studies, and Middle East studies to meet what has become a growing challenge: providing clear guidance to identify and fight antisemitism while protecting free expression.”¹⁸⁴

According to the Jerusalem Declaration’s preamble, the Jerusalem Declaration “responds to ‘the IHRA Definition,’” and aims “(1) to strengthen the fight against antisemitism by clarifying what it is and how it is manifested, (2) to protect a space for an open debate about the vexed question of the future of Israel/Palestine.”¹⁸⁵ The Jerusalem Declaration includes the following definition of antisemitism: “Antisemitism is discrimination, prejudice, hostility or violence against Jews as Jews (or Jewish institutions as Jewish).”¹⁸⁶ Additionally, the Jerusalem Declaration

¹⁸² *Id.*

¹⁸³ <https://concernedjewishfaculty.org/signatories/>

¹⁸⁴ <https://jerusalemdeclaration.org/>

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

includes as guidance lists of conduct related to Israel and Palestine that it views as antisemitic (including “[d]enying the right of Jews in the State of Israel to exist and flourish, collectively and individually, as Jews, in accordance with the principle of equality”) and that it views as not antisemitic (including “[c]riticizing or opposing Zionism as a form of nationalism, or arguing for a variety of constitutional arrangements for Jews and Palestinians in the area between the Jordan River and the Mediterranean. It is not antisemitic to support arrangements that accord full equality to all inhabitants ‘between the river and the sea,’ whether in two states, a binational state, unitary democratic state, federal state, or in whatever form.”)¹⁸⁷ The Jerusalem Declaration was initially signed by 210 scholars and now has approximately 350 signatories.¹⁸⁸

Like the IHRA definition, the Jerusalem Declaration has met criticism. Some have attacked the Jerusalem Declaration on the basis that though it “situates itself as the liberal replacement to the conservative International Holocaust Remembrance Alliance’s (IHRA) Working Definition of Antisemitism,” the Declaration is in actuality “an orientalist text that fails to produce true opposition to the core problem of the IHRA definition: the silencing and erasure of Palestine and Palestinians.”¹⁸⁹ At the same time, supporters of the IHRA definition have criticized the Jerusalem Declaration and noted that though “[s]ome of the JDA’s language could potentially be helpful as a complement to the IHRA Definition. However, other sections are deeply

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Ayyash, Mark Muhannad, “The Jerusalem Declaration on Antisemitism is an orientalist text.” Al Jazeera, April 21, 2021. <https://www.aljazeera.com/opinions/2021/4/21/the-jerusalem-declaration-on-antisemitism-is-an-orientalist-text>

harmful, as they serve to dismiss concerns about various forms of antisemitism rather than empowering Jews and others to stand up to this hatred.”¹⁹⁰

C. The Nexus Document

A third major definition of antisemitism is contained in the Nexus Document, which was drafted by the Nexus Task Force in 2019. According to its website, “[t]he Nexus Task Force analyzes issues at the intersection of Israel and antisemitism. It drafted a White Paper, Understanding Antisemitism at its Nexus with Israel and Zionism, which endeavors to define antisemitism so that it is relevant to the current context worldwide — especially with regard to the relationship between antisemitism, and Israel and Zionism.”¹⁹¹ According to the Nexus Project, the Nexus definition of antisemitism “is designed as a guide for policymakers and community leaders as they grapple with the complexities at the intersection of Israel and antisemitism.” It notes that “[a]s an embodiment of collective Jewish organization and action, Israel is a magnet for and a target of antisemitic behavior. Thus, it is important for Jews and their allies to understand what is and what is not antisemitic in relation to Israel.”¹⁹² The Nexus Document defines antisemitism as follows:

“Antisemitism consists of anti-Jewish beliefs, attitudes, actions or systemic conditions. It includes negative beliefs and feelings about Jews, hostile behavior directed against Jews (because they are Jews), and conditions that discriminate against Jews and significantly impede their ability to participate as equals in political, religious, cultural, economic, or social life.”¹⁹³

¹⁹⁰https://www.standwithus.com/files/ugd/46fc49_4b96b18ebc4c42f2ab340d538af8f179.pdf?in dex=true. Among others, many have criticized the Jerusalem Declaration’s guidance that “Boycott, divestment and sanctions are commonplace, non-violent forms of political protest against states. In the Israeli case they are not, in and of themselves, antisemitic.”

¹⁹¹ <https://nexusproject.us/nexus-task-force/>

¹⁹² <https://nexusproject.us/the-nexus-document/>

¹⁹³ *Id.*

Despite promulgating its own definition of antisemitism, the Nexus Project states that “[u]sing a single ‘all-purpose’ definition stifles debate about US policy in Israel and the Middle East. It detracts from the fight against extremism, wherever it may be.”¹⁹⁴ The Nexus project advocates for the full implementation of President Biden’s National Strategy to Counter Antisemitism and also advocates “against the use of false accusations of antisemitism as political weapons.”¹⁹⁵ The National Strategy to Counter Antisemitism states specifically that “the Administration welcomes and appreciates the Nexus Document and notes other such efforts.”¹⁹⁶

As is the case with other definitions of antisemitism, the Nexus Document has faced significant criticism. One of the major criticisms directed at the Nexus Document is that while the IHRA definition notes that “[a]pplying double standards by requiring of [Israel] a behavior not expected or demanded of any other democratic nation” is an example of antisemitic behavior,¹⁹⁷ the Nexus Document takes the opposite approach and notes that “[p]aying disproportionate attention to Israel and treating Israel differently than other countries is not prima facie proof of antisemitism. (There are numerous reasons for devoting special attention to Israel and treating Israel differently, e.g., some people care about Israel more; others may pay more attention because Israel has a special relationship with the United States and receives \$4 billion in American aid).”¹⁹⁸

¹⁹⁴ <https://nexusproject.us/>

¹⁹⁵ *Id.*

¹⁹⁶ The U.S. National Strategy to Combat Antisemitism, issued May 25, 2023, at 13. <https://www.whitehouse.gov/wp-content/uploads/2023/05/U.S.-National-Strategy-to-Counter-Antisemitism.pdf>

¹⁹⁷ <https://holocaustremembrance.com/resources/working-definition-antisemitism>

¹⁹⁸ <https://nexusproject.us/the-nexus-document/>

D. What Role Should Definitions of Antisemitism Play at CUNY?

On June 12, 2022, Governor Hochul issued a Proclamation concerning the definition of antisemitism.¹⁹⁹ In that Proclamation, the Governor noted that while she had found “no exhaustive definition of antisemitism—which can take many forms, the International Holocaust Remembrance Alliance (IHRA) Working Definition of Antisemitism is a valuable tool used to determine contemporary manifestations of antisemitism” and that the use of the IHRA definition, though not exhaustive, “will increase culturally responsible awareness and understanding of the parameters of a contemporary anti-discrimination tool.”²⁰⁰ The Governor noted that the definition had been adopted by “numerous government entities and municipalities as well as the US Department of State” and proclaimed that her “administration believes that the IHRA working definition of antisemitism is a vital resource in the struggle against antisemitism, and that it will facilitate constructive discourse, further understanding, and enable a more thoughtful response to this harmful behavior that impacts us all.”²⁰¹

I believe that the Governor’s Proclamation accurately states the beneficial role that the IHRA definition can play in helping to curb antisemitism at CUNY. That is because the IHRA definition recognizes the connection between the Holocaust and modern-day antisemitism. Not only does the IHRA definition define antisemitism appropriately as including the denial or minimalization of the Holocaust, but it also, in my opinion, implicitly recognizes that the State of Israel became a home to many throughout Europe who were not welcome or able to return to their homes after the Holocaust and that, as incidents of antisemitism across the globe rise today, Jews

¹⁹⁹ https://www.governor.ny.gov/sites/default/files/2022-06/IHRA_Antisemitism_Definition_Proclamation-2022.pdf

²⁰⁰ *Id.*

²⁰¹ *Id.*

here and abroad look to Israel as a place where they potentially could go if ever they faced similar threats. I believe that this framework can help the CUNY community understand how calls for the destruction of the State of Israel or its citizens are received by some Jews. Relatedly, I believe the IHRA definition helps explain why using the term “Zionist” can be the equivalent of referring to someone as “Jewish” and “Israeli” and why targeting speech or conduct at “Zionists” can be the same as targeting conduct at “Jews” and “Israelis.” As the IHRA definition helps explain, for many people, Zionism is a fundamental part of their Jewish identity, and thus an attack on Zionists may be antisemitic the same way an attack on Jews or Israelis would be. This, of course, is something different from criticizing the policies or actions of the government of Israel. Whether through teaching IHRA as part of educating the community on the applicable law, or otherwise using IHRA to explain the relationship between certain attacks on the State of Israel and antisemitism, I concur that the definition can be a vital resource to facilitate constructive discourse and understandings on these complex issues.

E. Should CUNY Adopt a Definition of Antisemitism?

I believe unequivocally in the rule of law. And as a former judge who has committed his life to the principle of fairness, I believe that people need to know and understand what the law is if they are expected to follow it and face penalties for transgressions. However, that does not ultimately lead me to conclude that CUNY must adopt a definition of antisemitism. To be clear, if CUNY ultimately determines that it would benefit from adopting a definition of antisemitism, I would find no fault in CUNY doing so. But I do not believe that CUNY need adopt a definition of antisemitism, let alone any specific definition of antisemitism, in order to ensure that it provides its community with an environment safe from antisemitism and discrimination. My view is based on the following:

First, it is unreasonable to assume that individual members of the CUNY community would be able to guide their actions based on the nuances of a particular definition of antisemitism without further explanation. In a 2021 article, Michael Starr noted that “[f]or outsiders to the conflict, it’s hard to understand what the fight is about. The IHRA, JDA, and Nexus definitions have many similarities and overlaps. It is in the distinctions, views on double standards, self-determination and legitimate criticism, that counter-antisemitism activists and political activists clash.”²⁰²

Second, though the rule of law requires that people who engage in the same behavior be treated similarly, that can be achieved through increased centralization within CUNY—which I separately recommend.

Third, during my review, I heard from individuals on all sides of this issue that imposing definitions could have significant negative repercussions. Some told us that they believed CUNY’s adoption of a definition of antisemitism could limit the ability of administrators to address issues of concern that fall outside the scope of a prescribed definition. Others believed that adopting a definition of antisemitism could chill free speech and prevent the exchange of divergent ideas that is often part of a successful education. While I do not necessarily agree with all the feared consequences of adopting a definition of antisemitism, it is noteworthy that so many across a spectrum of viewpoints share concerns about adopting a definition.

Fourth, as a practical matter, I do not believe a formal definition of antisemitism is needed in order to adjudicate the bulk of incidents occurring on campuses. During the course of my

²⁰² Starr, Michael, “War of the words: The conflict between definitions of antisemitism.” The Jerusalem Post, April 22, 2021. https://www.jpost.com/diaspora/antisemitism/war-of-the-words-the-conflict-between-definitions-of-antisemitism-665935#google_vignette

review, many of the incidents that came to my attention were plainly antisemitic under any definition. For example, my team and I learned of incidents involving the carving of swastikas into bathroom stalls, the intentional, forcible removal of a student's yarmulke, and rhetoric around "cleansing" Jews and Zionists from campus. No formal definition of antisemitism is needed to determine this abhorrent conduct is impermissible and must be disciplined.

Fifth, the reality is that adoption of a definition of antisemitism is going to be controversial and lead to unnecessary conflict at CUNY. Moreover, as a public university, members of the CUNY community should not be guided by what its chief diversity officers, school presidents, or Board of Trustees personally believe constitute antisemitism. Rather, CUNY's faculty, students, administrators, and other personnel should determine what constitutes antisemitism based on the current requirements of the law, which recognize that the IHRA definition should be considered in determining whether conduct is antisemitic. Even in the absence of a formal definition, CUNY can and should teach its community about the requirements of the law.

Finally, I fundamentally do not believe that it is within my mandate to dictate to CUNY what constitutes antisemitism. Having reviewed all three major definitions of antisemitism, along with others that were proposed to me during this process, I recognize the difficulties and nuances surrounding this issue of definitions. Rather than impose on CUNY a particular definition of antisemitism, I believe CUNY is best guided by following the requirements of the law.

F. What Steps Should CUNY Take in the Absence of Choosing to Adopt a Formal Definition of Antisemitism?

Regardless of whether CUNY chooses to adopt a formal definition of antisemitism, it must take steps to ensure that all similar conduct be treated similarly. What constitutes antisemitism at

Hunter should be no different than what constitutes antisemitism at the College of Staten Island. That uniformity can be achieved through more centralization and uniformity in training.

The training at CUNY should center on the requirements of the law. While there can be a lot of debate about what the law should be, there should be universal agreement that the law must be followed as it currently stands.²⁰³ Requiring that CUNY train its community on the requirements of the law, rather than a specifically-adopted definition of antisemitism, also allows CUNY to more quickly adapt to a changing environment.

²⁰³ In Section V, I set forth the current law with respect to Title VI, including the interplay between Title VI and Executive Order 13889, which remains in effect.

VII. CUNY'S POLICIES AND PROCEDURES

As noted above, in addition to our interview work, on-campus climate examinations, and analysis of the proper legal framework related to the intersection of free speech and hate speech, per the Governor's mandate, my team also analyzed CUNY's written policies and procedures relevant to issues of antisemitism and discrimination.²⁰⁴ While CUNY and its individual schools have numerous policies that touch upon issues related to antisemitism and discrimination, my team and I focused on the following:

- CUNY's Policy on Equal Opportunity and Non-Discrimination
- CUNY's Policy On Acceptable Use Of Digital Assets And Resources
- CUNY's Guidance Memorandum Regarding Protocol For Responding To Hate Crime Incidents
- CUNY Procedures for Implementing Reasonable Accommodations and Academic Adjustments
- The Henderson Rules

²⁰⁴ <https://www.governor.ny.gov/news/following-surge-hate-and-bias-crimes-governor-hochul-deploys-all-available-state-resources> I note that in addition to my analysis of CUNY's policies and procedures, the Brandeis Center has separately conducted a review of a selection of policies and procedures at CUNY, which it has provided to CUNY. While I have reviewed the Brandeis Center's memorandum, my team and I conducted our analysis independently, and the recommendations here reflect my views irrespective of what the Brandeis Center may have observed or concluded.

A. The City University of New York Policy on Equal Opportunity and Non-Discrimination

1. Background

CUNY’s primary policy for addressing issues related to antisemitism and discrimination is its Policy on Equal Opportunity and Non-Discrimination (“EOND Policy”).²⁰⁵ The EOND Policy was last amended as of January 1, 2015. As the EOND Policy states,

“It is the policy of the University—applicable to all colleges and units— to recruit, employ, retain, promote, and provide benefits to employees (including paid and unpaid interns) and to admit and provide services for students without regard to race, color, creed, national origin, ethnicity, ancestry, religion, age, sex (including pregnancy, childbirth and related conditions), sexual orientation, gender, gender identity, marital status, partnership status, disability, genetic information, alienage, citizenship, military or veteran status, status as a victim of domestic violence/stalking/sex offenses, unemployment status, or any other legally prohibited basis in accordance with federal, state and city laws.”²⁰⁶

In addition, the EOND Policy makes clear that CUNY’s policy is “to provide reasonable accommodations when appropriate to individuals with disabilities, individuals observing religious practices, employees who have pregnancy or childbirth-related medical conditions, or employees who are victims of domestic violence/stalking/sex offenses” and to “prohibit[] retaliation for reporting or opposing discrimination, or cooperating with an investigation of a discrimination complaint.”²⁰⁷ Of critical importance, the EOND Policy states, albeit in a footnote, that “[a]s a public university system, CUNY adheres to federal, state and city laws and regulations regarding non-discrimination and affirmative action. Should any federal, state, or city law or regulation be

²⁰⁵ <https://www.cuny.edu/about/administration/offices/legal-affairs/policies-resources/equal-opportunity-and-non-discrimination-policy/>

²⁰⁶ *Id.*

²⁰⁷ *Id.*

adopted that prohibits discrimination based on grounds or characteristics not included in this Policy, discrimination on those additional bases will also be prohibited by this Policy.”²⁰⁸

The EOND Policy identifies prohibited conduct as discrimination and harassment. It defines discrimination as “treating an individual differently or less favorably because of his or her protected characteristics—such as race, color, religion, sex, gender, national origin, or any of the other bases prohibited by this Policy” and describes harassment as “a form of discrimination that consists of unwelcome conduct based on a protected characteristic that has the purpose or effect of unreasonably interfering with an individual’s work or academic performance or creating an intimidating, hostile or abusive work or academic environment.”²⁰⁹ The EOND Policy notes that harassment can be spoken, written, visual, and/or physical and that the policy covers prohibited harassment based on all protected characteristics other than sex—which is addressed in a separate policy.

The EOND Policy establishes that each CUNY school must have a chief diversity officer “who shall be responsible for, among other things, addressing discrimination and retaliation complaints under this Policy.”²¹⁰ The document then sets forth the procedures for reporting, investigating and resolving complaints of discrimination or retaliation. Of note, the policy instructs individuals who believe they have experienced discrimination and/or retaliation to “promptly contact the Chief Diversity Officer at their location to discuss their concerns, with or without filing a complaint,” who will inform the complainant of the options available.²¹¹ Chief

²⁰⁸ *Id.* at n.1.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

diversity officers are provided with basic guidance for how to conduct investigations, including a suggested timetable for conducting such investigations. The policy also explains what chief diversity officers should do when complaints are withdrawn or made anonymously and what to do after an investigation is completed.²¹²

2. Concerns Regarding the EOND Policy and How To Improve It

At a high level, CUNY's EOND Policy appropriately states that CUNY operates in an equal opportunity and non-discriminatory manner, provides reasonable accommodations when appropriate, and prohibits discrimination, harassment and retaliation. However, there are areas in which CUNY's EOND Policy can be updated to provide more clarity to the CUNY community.

First, though CUNY makes clear that it adheres to relevant federal, state, and city law and that its EOND Policy applies to protected classifications, even if not spelled out in the Policy, CUNY should update the EOND Policy to comport with current law and better inform its community of prohibited conduct.²¹³ One area in which CUNY should consider updating its EOND Policy is with respect to the definition of discrimination. As noted above, CUNY defines discrimination as treating an individual differently or less favorably “because of his or her protected characteristics—such as race, color, religion, sex, gender, national origin.”²¹⁴ However, a review of Department of Education guidance on Title VI of the Civil Rights Act of 1964 suggests

²¹² *Id.*

²¹³ As I note throughout, some of CUNY's policies have not been updated in years. I understand that given CUNY's bureaucratic structure, it might not have been simple to update CUNY's policies and procedures. I am not taking a position as to whether CUNY had a legitimate reason for not updating certain policies and procedures. I only am stating that CUNY needs to do better moving forward, and to the extent there are impediments to CUNY doing so, it must remove those speed bumps.

²¹⁴ *Id.*

that CUNY’s definition of discrimination may be too narrow because it does not expressly note that it protects against “actual or perceived” characteristics and also applies to shared ancestral or ethnic characteristics.²¹⁵

CUNY should also consider updating the definition of harassment in the EOND Policy. CUNY’s definition of harassment is limited to conduct “that has the purpose or effect of unreasonably interfering with an individual’s work or academic performance or creating an intimidating, hostile or abusive work or academic environment.”²¹⁶ However, interpretations of federal law do not limit harassment to “unreasonable” interference with an individual’s ability to participate in an academic environment, but rather note that harassment “creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.”²¹⁷

It is noteworthy that in a February 15, 2024, memorandum to CUNY deans and presidents, Derek Davis, CUNY’s General Counsel, wrote “to emphasize the importance of the responsibility to prevent, investigate, and respond to allegations of harassment and discrimination and to enforce the requirements of the Title VI, Title VII, Title IX, and CUNY’s own Equal Opportunity and

²¹⁵ <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html> (“Discrimination on the basis of race, color, or national origin includes discrimination based on a person’s actual or perceived race, color, national origin, ethnicity, or ancestry. This includes discrimination based on the country, world region, or place where a person or his or her ancestors come from; a person’s limited English proficiency or English learner status; or a person’s actual or perceived shared ancestry or ethnic characteristics, including membership in a religion that may be perceived to exhibit such characteristics (such as Hindu, Jewish, Muslim, and Sikh individuals).”)

²¹⁶ <https://www.cuny.edu/about/administration/offices/legal-affairs/policies-resources/equal-opportunity-and-non-discrimination-policy/>

²¹⁷ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>

Non-Discrimination Policy.”²¹⁸ Davis specifically noted that in light of recent federal guidance, he was “provid[ing] a refresher concerning Title VI’s standards with particular regard to Shared Ancestry and Ethnic Characteristics.”²¹⁹ The February 15 memorandum correctly addresses both the “actual and perceived characteristics” and the “interference” points noted above, indicating that CUNY employs definitions consistent with federal law.

To be clear, I have not heard specific complaints that CUNY’s definitions of discrimination and harassment have led to complaints being improperly dismissed. However, given that chief diversity officers undoubtedly make decisions by referencing the EOND Policy, CUNY would be well-advised to provide those individuals with guidance that is explicitly in line with current laws—rather than relying on the presumption that chief diversity officers are up to date on how applicable law diverges from CUNY’s written policies. Certainly, given CUNY’s memorandum acknowledging the need to comply with Title VI’s requirements and federal guidance regarding the same, there is no reason why CUNY’s EOND Policy should not be updated accordingly.

Second, the EOND Policy as currently drafted directs complainants to speak with a chief diversity officer as their first step after experiencing potential discrimination or retaliation. By doing so, the EOND Policy can be interpreted to suggest to complainants that they speak to chief diversity officers *before* lodging a complaint through the Portal or another means. By doing so, there is a risk that complaints will not be lodged at all if potential complainants question the chief

²¹⁸ <https://www.cuny.edu/wp-content/uploads/sites/4/page-assets/about/administration/offices/legal-affairs/policies-resources/OCR-Guidance-Title-VI-Discrimination-Based-on-Shared-Ancestry-and-Ethnic-Characteristics-021524.pdf>

²¹⁹ *Id.*

diversity officer's reception of their complaint either based on actual or perceived evaluations of competence, effectiveness, bias, or demeanor.

Third, the EOND Policy should be amended to provide more guidance to chief diversity officers and others regarding how an investigation should take place and what should be considered. As currently formulated, the EOND Policy does not provide sufficient clarity to chief diversity officers as to the mechanics of conducting an investigation. That unfortunately can lead to unevenness in terms of how antisemitism and discrimination complaints are handled and resolved.

Fourth, the EOND Policy should be updated to explain explicitly to complainants how complaints lodged through the Portal are handled. I note that the EOND Policy was last updated approximately eight years before the Portal was created. As such, the EOND Policy does not account for the way that many complaints are initiated today. Similarly, the EOND Policy does not explain how hate crime incidents are to be handled or whether those incidents should be treated similarly or distinctly from more traditional complaints of discrimination, harassment, or retaliation identified in the EOND Policy. Given recent New York laws addressing issues related to hate crime incidents, it is imperative that CUNY provide clear guidance on these issues.

Finally, the EOND Policy should be amended to make clear how claims of discrimination or harassment allegedly perpetrated by student organizations will be investigated and adjudicated. According to CUNY's bylaws, a complaint may be filed with the chief student affairs officer by anyone affiliated with CUNY who believes a student organization may have violated any of CUNY's bylaws, New York City law, New York State law, or federal law.²²⁰ Those bylaws

²²⁰ CUNY bylaws Art. XV. <https://policy.cuny.edu/bylaws/article-xv/>

provide that the chief student affairs officer will investigate the complaint and “report the results of that investigation along with a recommendation for appropriate action to the complainant and the student government which shall take action as it deems appropriate.”²²¹ It is unclear how those bylaws interact with the EOND Policy that sets forth that complaints involving discrimination and harassment will be investigated by chief diversity officers and thus may confuse potential complainants about how to properly register complaints.²²²

B. The CUNY Policy on Acceptable Use of Digital Assets and Resources

1. Background

Earlier this year, CUNY updated its 2015 Policy On Acceptable Use Of Computer Resources, renaming it the Policy On Acceptable Use of Digital Assets And Resources (“Digital Assets Policy”).²²³ CUNY defines Digital Assets and Resources to mean:

“all CUNY owned, licensed, or managed hardware, software, cloud solutions and the tools and processes that integrate with those systems, the data that is created by or resides in these systems and the applications they support. This includes, but is not limited to, desktop and laptop computers, mobile devices that allow or are capable of storing and transmitting information (e.g., cell phones, tablets), computer systems, unified communications and telephony solutions, servers, software, network facilities, databases, memory, memory sticks, portable hard drives and associated peripherals and software. This definition includes the use of these resources on the network via a virtual, physical, or wired or wireless, connection regardless of the ownership of the device connected to the network.”²²⁴

²²¹ *Id.*

²²² To the extent the bylaws do place authority in chief student officers and student government to investigate and resolve claims of antisemitism and discrimination against student organizations, those bylaws should be amended if possible. During my review, I heard complaints about instances of antisemitism and discrimination by student organizations. Such allegations of antisemitism and discrimination must be investigated and resolved the same way complaints against individuals are reviewed and resolved.

²²³ <https://www.cuny.edu/wp-content/uploads/sites/4/page-assets/about/administration/offices/legal-affairs/policies-resources/Computer-Use-1.pdf>

²²⁴ *Id.* at 10.

The Digital Assets policy is intended to guide CUNY’s “use of its digital assets and resources, is intended to maintain the continuity of CUNY’s IT and business operations, and protect the University, and its students, faculty, and staff.”²²⁵ Though large portions of the policy are aimed at addressing issues relevant to cybersecurity and privacy, the Digital Assets Policy makes clear that it is impermissible to use “CUNY Digital Assets and Resources to engage in abuse of others, such as sending harassing, obscene, threatening, abusive, deceptive, defamatory, or anonymous messages within or outside CUNY.”²²⁶ The Digital Assets Policy also states that though “CUNY names, trademarks, brand, and logos belong to the University and are protected by law” and “[u]sers of CUNY Digital Assets and Resources may not state or imply that they speak on behalf of CUNY or use a CUNY name, trademark, brand, or logo without first receiving permission to do so from the appropriate CUNY authority,” “CUNY employees and students may indicate their CUNY affiliation on email, other correspondence, and in academic or professionally-related research, publications, or professional appearances, so long as they do not state or imply that they are speaking on behalf of the University.”²²⁷ Additionally, the Digital Assets Policy sets forth enforcement procedures, including penalties for violations.²²⁸

2. Concerns Regarding the Digital Assets Policy and How To Improve It

While the Digital Assets Policy appears to prohibit the use of CUNY equipment to engage in harassing behavior, including antisemitism, and the use of CUNY trademarks in connection with inappropriate emails or correspondence, it is not broad enough to address some of the complex

²²⁵ *Id.* at 1.

²²⁶ *Id.* at 3.

²²⁷ *Id.* at 5.

²²⁸ *Id.* at 8.

issues involving the use of technology in connection with antisemitism and discrimination. During interviews, I was told of incidents in which CUNY students used social media accounts that were identified as being associated with CUNY or a specific CUNY school to post antisemitic or hate speech. It is unclear whether the Digital Assets Policy prevents students at CUNY from using the CUNY name or logo (or that of a specific school) in connection with personal social media accounts or social media accounts associated with CUNY student organizations that post antisemitic content. Moreover, it is unclear whether CUNY's policies related to discipline would permit CUNY from taking action against students who use CUNY's trademarks in connection with social media accounts that post antisemitic or hate speech.

CUNY's technology policies must be updated in order to provide the CUNY community with clear guidance as to the acceptable use of social media. While CUNY has some limited social media guidelines, those guidelines appear to apply only to "social media accounts created or managed by programs and offices within CUNY Central Office."²²⁹ The guidance suggests that social media issues related to individual CUNY colleges are guided by the communications and marketing office at the individual school, and is silent on appropriate conduct related to CUNY student organizations and personal accounts of CUNY students and faculty.

Additionally, CUNY's Digital Assets Policy must also address conduct like doxxing, which can have a serious impact on the safety of affected individuals. While I recognize that CUNY recently updated its Digital Assets Policy, that cannot excuse CUNY from addressing these critical issues. More generally, in today's ever-evolving technological world, CUNY should

²²⁹ <https://www.cuny.edu/about/administration/offices/communications-marketing/social-media-guidelines/#personal>

update its technology policy more frequently than every eight or nine years—which appears to be its historical pattern.

C. Guidance Memorandum Regarding Protocol for Responding to Hate Crime Incidents

1. Background

In addition to its formal policies related to combatting antisemitism and discrimination, CUNY also has issued guidance for how hate crimes should be addressed. This guidance was set forth in an October 19, 2023, memorandum issued by Derek Davis, CUNY’s General Counsel, and Kareem Peat, CUNY Title IX Director to all CUNY presidents and deans, counsel, chief diversity officers, public safety directors, campus security officers and Title IX coordinators (“Guidance Memorandum”).²³⁰

The Guidance Memorandum was distributed in response to Governor Hochul signing into law 2023 legislation (S.2060-A/A.3694-A) requiring colleges that receive state funding to modernize and enhance their disclosure of hate crimes on campus.²³¹ The law, which amended New York State Education Law Article 129-A (“Article 129-A”), also created a clear obligation for colleges to “investigate potential hate crimes and report them to law enforcement.”²³² The Guidance Memorandum makes clear that the 2023 legislation supplements CUNY’s existing responsibilities under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.

²³⁰ While the Guidance Memorandum does not appear to be available on CUNY’s website, some CUNY schools appear to have incorporated the guidance into portions of their individual websites. See, e.g., <https://www.gc.cuny.edu/public-safety-and-security/hate-crimes>

²³¹ <https://www.governor.ny.gov/news/governor-hochul-announces-more-51-million-improve-safety-and-security-organizations-risk-hate>

²³² *Id.*

The Guidance Memorandum sets forth a protocol for responding to hate crime incidents, which encourages students, staff, and faculty to notify their respective Campus Security Authority or Department of Public Safety Officer if they experience or witness a hate crime incident.²³³ Once those entities are notified of a hate crime incident, they are instructed to:

- Inform the alleged victim of the resources available to them;
- Prepare an incident report for submission into the various campus systems for logging;
- Confirm the relevant school dean or president has been notified that a hate crime incident has been reported;
- Contact the NYPD; and
- Update the relevant crime logs once the NYPD determines whether the conduct qualifies as a hate crime.

Additionally, the Guidance Memorandum identifies the applicable definition of a hate crime as contained in New York State Penal Law Section 485.05 and reminds each CUNY school of its obligations to report hate crime statistics. Finally, the Guidance Memorandum contains a section on prevention and education efforts that states that:

“Incoming students will receive training on hate crime prevention measures through programs that promote discussion, encourage reporting and facilitate prevention of such incidents. Incoming students will also be informed of campus crime statistics and campus safety policies and procedures during the onboarding process. The college’s Advisory Committee on Campus Security will continue to review campus security policies and procedures for educating students, staff and faculty about reporting and preventing hate crimes.”²³⁴

²³³ <https://www.gc.cuny.edu/public-safety-and-security/hate-crimes>

²³⁴ <https://www.gc.cuny.edu/public-safety-and-security/hate-crimes>

2. Concerns Regarding the Guidance Memorandum and How to Improve It

Though the Guidance Memorandum reflects that CUNY's policy is to treat hate crime incidents in accordance with applicable law, the document can and should be updated to be more effective.

First, the Guidance Memorandum must clearly explain to students, staff, and faculty the relationship between reporting hate crime incidents to Campus Security Authorities or Department of Public Safety Officers and reporting incidents of discrimination and retaliation through the Portal. Based on the Guidance Memorandum, it is unclear what types of incidents should be reported directly to Campus Security Authorities or Department of Public Safety Officers as opposed to through the Portal. It also is unclear from the Guidance Memorandum whether reporting an incident through the Portal means it will be treated as a hate crime incident or whether that decision will be made by a chief diversity officer. This lack of clarity is particularly concerning because many have noted to me that complaints lodged in the Portal are unaddressed.

Second, the Guidance Memorandum should inform those who report hate crimes of the resources that are available to them. At present, the Guidance Memorandum only instructs Campus Security Authorities and Department of Public Safety Officers to inform potential victims of hate crimes of the resources available to them. There is no reason the memorandum itself should not list out those resources. I note that the CUNY Graduate Center's webpage on hate crimes not only contains, in large part, the Guidance Memorandum but also includes additional sections identifying counseling and support services, as well as additional resources, for victims.

Third, once updated, the Guidance Memorandum needs to be available on CUNY's main website and on individual school websites. As of now, the Guidance Memorandum does not

appear to be available to students on CUNY's website or many individual school's websites, even though it lays out a protocol that includes encouraging all students, staff, and faculty to report hate crime incidents. It is particularly important that the Guidance Memorandum be available on CUNY's websites if CUNY intends for hate crimes to be reported in a distinct fashion from discrimination and retaliation. In that regard, I note that CUNY's Portal clearly informs those reporting sexual harassment or sexual violence that there are different procedures they should follow than using the Portal.²³⁵

Finally, CUNY personnel must be given specific training regarding what constitutes a hate crime and how a hate crime incident should be reported. While the Guidance Memorandum states that incoming CUNY students will receive training on hate crime prevention measures, it is unclear whether that training will help explain the nuances of what constitutes a hate crime and how one should be reported. Moreover, that same type of training must be provided to faculty, staff, and all those at CUNY who may have to take actions with respect to hate crime incidents.

D. CUNY Procedures for Implementing Reasonable Accommodations and Academic Adjustments

CUNY has Procedures for Implementing Reasonable Accommodations and Academic Adjustments, which include a section on religious accommodations.²³⁶ Based on my review of that policy, I believe it adequately addresses the issue of reasonable accommodations and, though CUNY should periodically review the policy to ensure it remains up to date, I do not believe it needs to be modified at this time.

²³⁵ <https://www.cuny.edu/about/administration/offices/hr/discrimination-and-retaliation-report-form/>

²³⁶ <https://www.cuny.edu/about/administration/offices/legal-affairs/policies-resources/reasonable-accommodations-and-academic-adjustments/i-policy-statement/>

E. Henderson Rules

1. Background

CUNY’s bylaws state that “[e]ach student enrolled or in attendance in any college, school or unit under the control of the board and every student organization, association, publication, club or chapter shall obey (1) the laws of the city, state and nation; (2) the bylaws and resolutions of the board, including the rules and regulations for the maintenance of public order pursuant to article 129-a of the education law (‘Henderson Rules’); and (3) the governance plan, policies, regulations, and orders of the college.”²³⁷ The Henderson Rules require that colleges promulgate rules “for the maintenance of public order on college campuses and other college property used for educational purposes and provide a program for the enforcement thereof.”²³⁸ Though CUNY’s website does not contain an official set of the Henderson Rules, many CUNY schools provide their students, faculty, and staff with clear guidance on the Henderson Rules.²³⁹

Though there are differences in how CUNY schools describe the Henderson Rules, as they relate to the issues involved in this review, they generally provide that:

- A member of the academic community shall not intentionally obstruct and/or forcibly prevent others from the exercise of their rights. Nor shall he interfere with the institution’s educational processes or facilities, or the rights of those who wish

²³⁷ CUNY bylaws, Art. XV <https://policy.cuny.edu/bylaws/article-xv/>

²³⁸ NY Educ L § 6430 (2023).

²³⁹ *See, e.g.*, <https://hunter.cuny.edu/public-safety/policies/henderson-rules-to-maintain-public-order-and-campus-codes-of-conduct/> ; <https://www.jjay.cuny.edu/about/governance-senior-leadership/finance-administration/public-safety/policies-procedures/cuny-henderson-rules> ; <https://www.qc.cuny.edu/scsl/wp-content/uploads/sites/75/2021/02/CITY-UNIVERSITY-OF-NEW-YORK-Henderson-Rules.pdf> ; https://www.kbcc.cuny.edu/studentaffairs/student_conduct/henderson_rules.html

to avail themselves of any of the institution's instructional, personal, administrative, recreational, and community services.

- Individuals are liable for failure to comply with lawful directions issued by representatives of the University/College when they are acting in their official capacities.
- Unauthorized occupancy of University/College facilities or blocking access to or from such areas is prohibited. Permission from appropriate college authorities must be obtained for removal, relocation, and use of University/College equipment and/or supplies.
- Theft from, or damage to University/College premises or property, or theft of or damage to property of any person on University/College premises is prohibited.
- Each member of the academic community or an invited guest has the right to advocate his position without having to fear abuse, physical, verbal, or otherwise, from others supporting conflicting points of view. Members of the academic community and other persons on the college grounds shall not use language or take actions reasonably likely to provoke or encourage physical violence by demonstrators, those demonstrated against, or spectators.²⁴⁰

2. How To Improve CUNY's Use Of The Henderson Rules

In my opinion, the Henderson Rules provide a solid building block for advising members of the CUNY community of their obligations to respect each other and CUNY as an institution. CUNY should consider promulgating central guidance with respect to the Henderson Rules to

²⁴⁰ *Id.*

remove the possibility that individual schools may provide conflicting explanations of the Henderson Rules. Such guidance could involve explaining time, place, and manner restrictions on expressive activities on campuses.

I note that in 2016, CUNY's Board of Trustees considered, but did not ultimately adopt, a policy on freedom of expression and expressive conduct. Though I do not believe the policy CUNY considered in 2016 provided sufficient guidance regarding the complex issues surrounding the intersection between permissible speech and prohibited conduct on campus, the policy appeared to provide direction on the types of restrictions CUNY could institute as part of the Henderson Rules, while at the same time reinforcing CUNY's commitment to academic freedom.²⁴¹ CUNY would be well-served to consider whether it should adopt a policy that makes clear that CUNY is committed to academic freedom and the free exchange of ideas and expression of all points of view for members of the CUNY community, while at the same time reinforcing and amplifying on the Henderson Rules and providing specifics on time, place, and manner restrictions that can be instituted to prevent interference with education processes. Though compliance with the First Amendment at CUNY is non-negotiable, we cannot expect that all members of the CUNY community will understand the bounds of the law. It is incumbent on CUNY to undertake the difficult task of providing guidance that will help ensure that members of the CUNY community foster a climate of mutual respect, even when they exchange ideas that some may view as disagreeable or offensive.

²⁴¹ <https://www.bcc.cuny.edu/wp-content/uploads/2019/02/freedom-of-expression-and-expressive-conduct-08.26.16-1.pdf>

F. Targeted Communications and Outreach

There is no doubt that CUNY's formal policies and procedures must at all times comply with applicable laws, even if that means allowing for expressions of ideas and statements with which leadership of CUNY may disagree. However, the same First Amendment protections that are afforded to faculty and students are also afforded to CUNY's leadership, including individual presidents and deans. During the course of my review, I noted instances where various leaders within CUNY sought to use their own free speech to address issues related to antisemitism and discrimination and counter speech by others with respect to which they disagreed.

For example, while certain CUNY faculty and student membership groups have called for the support of the Boycott, Divestment, and Sanctions ("BDS") movement against Israel, Chancellor Matos Rodríguez has denounced such resolutions and stated that they do not reflect CUNY's viewpoints. In fact, the Chancellor has made clear that CUNY does not support and, in fact, cannot participate in BDS activities and is required by New York State executive order to divest public funds from any companies that do.²⁴² Similarly, the Chancellor rejected calls from groups to end academic exchange programs with Israel, and indicated plans to take another delegation of presidents to Israel and sign educational exchange and collaboration agreements with several Israeli universities.²⁴³ And, in the aftermath of the October 7 terrorist attacks by Hamas, the Chancellor and numerous presidents and deans issued statements of various kinds.²⁴⁴ I note

²⁴² <https://www.cuny.edu/news/statement-by-chancellor-matos-rodriguez-on-the-support-of-a-bds-resolution-by-faculty-and-student-organizations-at-the-cuny-school-of-law/>

²⁴³ <https://www.cuny.edu/about/administration/offices/transformation/diversity-equity-and-inclusion-hub/combating-antisemitism/>

²⁴⁴ See, e.g., <https://www.cuny.edu/about/chancellor/letters/10-11-23-grappling-with-the-attacks-on-israel/>; <https://www.cuny.edu/about/chancellor/letters/10-25-23-coping-during-these-difficult-times/>; <https://www.brooklyn.edu/bc-brief/statement-from-brooklyn-college-president-michelle-j-anderson/>; <https://www.ccnycuny.edu/presidentsoffice/blog/statement-violence-israel>

that many of those statements have predictably been criticized as being either too partisan or not forceful enough. But in my view, the fact that the Chancellor and others have been castigated for taking principled positions on public issues that impact the University is not a reason for leadership to be silent moving forward when their voices need to be heard.

Whether any member of CUNY's leadership or individual president or dean should speak up on these issues is a decision for that individual and the University to make in a careful and deliberative manner. I only note that as CUNY deals with evolving issues, leadership does have the ability to make appropriate statements outside of its formal policies and procedures to disapprove of or condemn speech that it believes, while not violative of applicable law, is inconsistent with CUNY's values or obligations. When that is the case, I would suggest it is their duty to do so. Standing on the sidelines is not an option when the very value system and future of a great public university are at stake. Indeed, the Department of Education, Office of Civil Rights has provided specific guidance along these lines:

“The fact that discriminatory harassment involves speech, however, does not relieve the school of its obligation to respond if the speech contributes to a hostile environment. Schools can protect students from such harassment without running afoul of students’ and staff First Amendment rights. For instance, in a situation where the First Amendment prohibits a public university from restricting the right of students to express persistent and pervasive derogatory opinions about a particular ethnic group, the university can instead meet its obligation by, among other steps, communicating a rejection of stereotypical, derogatory opinions and ensuring that competing views are heard.”²⁴⁵

²⁴⁵ <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html>

VIII. KEY OBSERVATIONS

During the course of the review, my team and I learned a great deal about CUNY, its problems, and how its leaders are attempting to address issues of antisemitism and discrimination. While it would be impossible to include in this report everything we learned, my team and I appreciate all those who shared with us their insights and experiences. For purposes of this report, I highlight some key observations that inform the recommendations I provide at the end of this report.

A. CUNY's Structure Contributes to Difficulties In Handling Issues Concerning Antisemitism and Discrimination

In Section IV, I set forth in detail CUNY's rich history. What that review makes clear is that CUNY is a unique institution. The plurality of CUNY's 25 distinct institutions are senior colleges, though CUNY also contains a number of community colleges and graduate and professional schools. CUNY's history reflects that some of its schools operated independently before being added under the CUNY umbrella. Indeed, while CUNY's origins trace back to 1847, it was not until over 100 years later, in 1961, under the Amendment to the New York State Education Law, that seven New York City colleges were integrated into what today is considered CUNY.²⁴⁶ Moreover, at least initially, some of those schools that became part of CUNY had very distinct missions. For example, the Female Normal and High School, which was founded in 1869 and later became known as Hunter College, was created with the purpose of training young women to become teachers.²⁴⁷

²⁴⁶ <https://www.cuny.edu/about/history/creation-of-the-modern-university/>

²⁴⁷ <https://www.cuny.edu/about/history/origins-and-formative-years/>

One of the many wonderful aspects of CUNY is that its various institutions are unique from one another. A student applying to college can choose one of the 11 senior colleges or seven community colleges not just based on location but also based on the areas of study or departments in which the school excels, and the type of campus and learning environment that best meets the student's needs. Similarly, faculty can choose where to teach based on whether the individual school has a developed program in the member's discipline. Part of the reason CUNY is able to provide students and faculty these important options is because each school has its own leadership structure with the autonomy to make decisions that shape the environment of the school. In my opinion, that is something that CUNY should not change.

The issue of centralization versus autonomy within and among the 25 institutions that comprise CUNY was, and continues to be, a constant area of focus and debate. During former Chancellor Goldstein's tenure in the early 2000s there was an effort to centralize and consolidate decision-making. By contrast, in recent years under Chancellor Matos Rodríguez, the pendulum has swung back towards providing individual presidents and deans with more autonomy. While autonomy may be appropriate—and even preferred—in many aspects of running a school, a key finding of my review suggests that CUNY needs to have more uniformity when addressing issues of antisemitism and discrimination.

A central tenet of the law is that all people should be subject to the same set of laws and legal procedures, and the law should be enforced equally. I believe everyone at CUNY must, to the greatest extent possible, be afforded that level of consistency. Members of the CUNY community exercising their First Amendment rights to protest peacefully should not be subject to discipline because they do so on one campus as opposed to another. And similarly, antisemitic or Islamophobic harassment cannot be countenanced because of the school where it occurred. All

CUNY schools are subject to the same laws, and CUNY owes it to its members to provide equal treatment under those laws.

Through my review, I observed three key ways in which CUNY's lack of centralization contributes to difficulties in dealing with antisemitism and discrimination in a consistent and effective manner.

First, schools have the ability to adopt different policies and procedures when it comes to issues surrounding antisemitism and discrimination. This has the potential to create different rules for the same conduct occurring at different schools.²⁴⁸ Of course, when it comes to issues like time, place, and manner restrictions on conduct, schools must have flexibility to adapt general rules to account for the unique attributes of their campuses and schedules.²⁴⁹ But that cannot mean that the same conduct can be adjudicated under a different standard depending on the school where it occurred.

Second, each school has the ability to emphasize generally applicable CUNY policies on its own individual website in ways that may provide more or less guidance to members of that school, or leave members with the impression that the school prioritizes one issue over another. For instance, while the Henderson Rules are universally applicable to each school within

²⁴⁸ For instance, I understand that City College of New York is in the process of updating its social media policy to better deal with some of the problems it faces with respect to discrimination and hate and social media. As a result of that policy, the CCNY community may be subject to different social media rules than those on other campuses. To be clear, it may be that CCNY's policy ultimately is better than CUNY's policy. But, if that is the case, it should be adopted throughout CUNY and not limited to CCNY.

²⁴⁹ Brooklyn College includes in its Student Handbook a "Policy on Freedom of Speech and Campus Demonstrations" that provides some basic guidance on time, place, and manner restrictions. https://www.brooklyn.edu/wp-content/uploads/Student_Handbook.pdf at 61–62.

CUNY,²⁵⁰ it is not apparent to me that the Henderson Rules are posted on each school’s website or, to the extent they are, it is not done so in an equally accessible manner and with the same verbiage. For example, while John Jay’s enunciation of the Henderson Rules contains the full text, including a multi-paragraph introduction explaining the rationale behind the rules,²⁵¹ Queens College merely provides the 11 enumerated rules without any preamble, definitions, or identification of penalties prescribed for violations of the rules.²⁵² It would certainly be reasonable to conclude a school is more or less committed to those rules depending on where it posts those rules on its website, what text it includes, and when the school last reaffirmed its commitment to those rules.²⁵³

Third, complaints about antisemitism are investigated primarily by the chief diversity officer at the school level without much central guidance from CUNY as to how investigations should be conducted. CUNY’s Equal Opportunity and Non-Discrimination Policy provides

²⁵⁰ CUNY bylaws, Art. XV <https://policy.cuny.edu/bylaws/article-xv/> (noting that “[e]ach student enrolled or in attendance in any college, school or unit under the control of the board and every student organization, association, publication, club or chapter shall obey . . . the bylaws and resolutions of the board, including the rules and regulations for the maintenance of public order pursuant to article 129-a of the education law (‘Henderson Rules’).”)

²⁵¹ <https://www.jjay.cuny.edu/about/governance-senior-leadership/finance-administration/public-safety/policies-procedures/cuny-henderson-rules>

²⁵² <https://www.qc.cuny.edu/scsl/wp-content/uploads/sites/75/2021/02/CITY-UNIVERSITY-OF-NEW-YORK-Henderson-Rules.pdf>.

²⁵³ Additionally, this lack of uniformity with respect to posting can create real confusion. In 2016, CUNY considered, but did not ultimately adopt, a Policy on Freedom of Expression and Expressive Conduct. But, for reasons that are not readily apparent to me, Bronx Community College’s website contains a copy of that proposed policy, including the prefatory language at the time identifying the document as the “The City University of New York – Policy on Freedom of Expression and Expressive Conduct” and stating that the Board of Trustees approved the policy. <https://www.bcc.cuny.edu/wp-content/uploads/2019/02/freedom-of-expression-and-expressive-conduct-08.26.16-1.pdf>. Individuals searching for a CUNY policy on freedom of expression through a search engine are directed to the document and may be left with the impression that CUNY has such a policy when it does not.

virtually no concrete direction to chief diversity officers on how to conduct investigations. In fact, all it provides is a recommendation that the chief diversity officer interview the complainant and the alleged perpetrator, inform them of the process and that retaliation is not prohibited, and collect other evidence.²⁵⁴

While multiple presidents and chief diversity officers explained to me why they believe it is beneficial to have investigations conducted at the campus (rather than CUNY central) level, the lack of centralization with respect to how those investigations are conducted creates the foundation for inconsistency across schools. Indeed, as I note in other parts of this report, I am concerned that a chief diversity officer at an individual school may determine whether purported conduct violates policy based on that officer's personal view of what constitutes antisemitism—irrespective of what the law requires—and without guidance or adequate training from CUNY central. That cannot be the case. Relatedly, because of the lack of centralization of the investigative process, leadership at certain schools with more reported incidents of antisemitism and discrimination feel under-resourced and, therefore, unable to investigate adequately and respond timely to those reports, while other schools with fewer reported incidents can more promptly address incidents. It is no surprise that schools with backlogs of complaints are more likely to become safe havens for perpetrators of antisemitism and discrimination.

To be fair, CUNY recognizes the need for uniformity in dealing with issues of antisemitism and discrimination. The very first point that CUNY makes on the Portal's landing page is that CUNY "is committed to addressing discrimination and retaliation reports promptly, consistently,

²⁵⁴ <https://www.cuny.edu/about/administration/offices/legal-affairs/policies-resources/equal-opportunity-and-non-discrimination-policy/>

and fairly.”²⁵⁵ However, despite that recognition, CUNY in practice has not done as much as it can (or should) do to ensure that uniformity. That must change. In my recommendations below I lay out steps CUNY should take to remedy that problem.

B. Differences Among Schools Partially Explain Relative Rates of Antisemitism

Not all CUNY schools have the same number or degree of complaints about antisemitic incidents. Indeed, while some schools seem overwhelmed with complaints of improper conduct, at other schools antisemitism complaints appear infrequently. Governor Hochul’s request that I examine the culture on CUNY campuses provided me and my team an opportunity to explore why antisemitism may be more or less prevalent at different schools.

1. Critical Differences Between Schools

In examining what differences among schools contribute to the number of reported incidents of antisemitism and discrimination, a few things stood out.

a. Location

The location of a CUNY school can have a significant impact on whether that school is likely to experience incidents of hate. This is because a number of incidents involving antisemitism and discrimination at CUNY involve people not affiliated with CUNY. Schools in Manhattan, like Hunter College and John Jay College of Criminal Justice, are in the middle of New York City and are easily accessible to members of the public through mass transit. Without clearly defined campus boundaries, members of the public can easily join protests occurring on city streets and cause mischief. In contrast, schools located in boroughs with less accessibility through mass transit or with delineated campus boundaries offset from public sidewalks are

²⁵⁵ <https://www.cuny.edu/about/administration/offices/hr/discrimination-and-retaliation-report-form/>

generally more difficult to access, except via automobile or through campus gates. As a result, those schools may be less appealing to organizations or individuals interested in creating conflicts on campuses. Furthermore, the location of a school contributes to its demographics, as many CUNY schools draw from their surrounding neighborhoods. To the extent those neighborhoods tend to be homogeneous, that may contribute to fewer incidents of hate. For example, in a largely Jewish community, there may be fewer people who are inclined to engage, or feel comfortable engaging, in hateful conduct or speech against Jews.

b. Campus Layout

The physical layout of a campus can also impact how likely it is for a particular school to attract protests or other activities that could lead to incidents of hate, including antisemitism. For example, CUNY schools in Manhattan and other more urban parts of New York City tend to have “vertical campuses” with few entrances. As a result, protestors congregating near or around the vertical campus often block the sole entrance/egress to such buildings and can block students from attending classes or otherwise disrupt their school-related activities. In contrast, it is more difficult for protestors to disrupt school activities at CUNY schools that are spread out on more traditional college campuses and set behind multiple campus gates. The differing layouts also carry with them security implications, as it is easier to limit non-members of the CUNY community from entering certain types of campuses as opposed to others.

c. Demographics

Student demographics play a complicated role when it comes to antisemitism, discrimination, and other forms of hate at CUNY. While CUNY schools generally do not maintain information about students’ religious affiliations, they do have some informal estimates from student or religious organizations. Based on that information and other demographic information

the schools do maintain, it seems that schools with relatively small Jewish *and* Muslim populations tend to have fewer reported incidents of antisemitism and Islamophobia. At schools that have a large and vocal Jewish population *or* a large and vocal Muslim population (but not both), we observed fewer reported incidents of religious-based hate. However, we heard a consistent complaint that school leadership at such schools appear to have, in certain instances, created an environment that caters to that larger demographic. That, if true, is problematic because it leads to those institutions being places where students of a particular religion or ancestry that is the minority may feel unwelcome. At schools with sizeable populations of both Jewish and Muslim students, we tended to observe an elevated number of reported complaints. This may be because the larger communities are more organized and have more resources, and hence create more opportunities for incidents, whether at rallies or student-organized events. I note, however, that these same schools present the best opportunities for constructive dialogues and interfaith programming.

d. Type of School

Students attend CUNY institutions for a variety of reasons. Some seek a traditional full-time four-year college or graduate school experience, while others are focused on getting a degree while also working a full-time job and/or taking care of their families. During the course of my review, my team and I observed that “commuter schools” where many of those matriculating had full-time jobs or families at home, tended to have fewer incidents of antisemitism. As the presidents and deans at those institutions reported, their students view their schools as locations the students go to for classes, and then leave. Thus, even to the extent students at those schools might have strong views on certain political issues, they do not stay on campus and engage in the types of activities that on occasion escalate and lead to conflict. For this reason, as a general

matter, we observed that many community colleges and some graduate schools had fewer incidents of antisemitism, discrimination or other forms of hate. Of course, there are notable exceptions; schools like the Borough of Manhattan Community College and Kingsborough Community College have had highly publicized allegations of incidents involving claims of antisemitism, bigotry, harassment of students and retaliation against faculty members, some of which have resulted in discipline or litigation.²⁵⁶ And CUNY School of Law, which is ranked as the nation’s top public interest law school, has student activism built into its core mission—setting it apart from many other graduate schools within CUNY.²⁵⁷

2. Even in Schools More Likely to Have Incidents of Antisemitism and Discrimination, Strong Leadership Can Still Help Prevent Hate From Flourishing on Campus

The above is not to say that the prevalence of antisemitism on a specific campus is merely a function of factors like location, campus layout, and demographics. Leadership plays an important role as well. A strong president or dean can help instill in students the sense of shared community and mutual respect that can deter acts of antisemitism or discrimination. Moreover, that same leader can make clear that the school in question will not tolerate acts of hate of any kind and hire faculty and other personnel who quell discord and promote positive dialogue among those

²⁵⁶ <https://nypost.com/2023/08/12/profs-claim-retaliation-over-palestine-display-complaints/>. In February 2024, BMCC also had an incident in which a black baby doll that was used in a classroom as a teaching device was found hanging from a rope. That matter was promptly investigated, and local law enforcement was brought in to assist. *See* https://www.bmcc.cuny.edu/presidents_updates/recent-incident-at-bmcc-update/

²⁵⁷ <https://www.law.cuny.edu/about-us/mission/> (“CUNY Law is built on a tradition of radical lawyering: movements for social change are built with leadership and collaboration from the people and communities who have experienced injustice. Our consistently high rankings in the diversity of our faculty and student body exemplify our mission. Realized through intentional, holistic recruitment and our status as a top clinical education program, our community is one of activists, organizers, scholars, and advocates.”).

with differing viewpoints. Given that the prevalence of antisemitism on a campus may depend, to a large degree, on factors that cannot be easily controlled, I believe it is especially important that campus leadership take all steps they can to provide a positive example and create an inclusive and respectful environment. I am pleased to note that during the course of my review, I met with numerous presidents who lead by example, speak out against hate in all its forms, and promote open dialogue between those with differing viewpoints.²⁵⁸

C. The Discrimination and Retaliation Reporting Portal Has Failed

1. The Creation of the Portal

On January 30, 2023, CUNY “announced the launch of a centralized online portal for staff and students to report instances of discrimination and retaliation, covering cases of hate speech and violence, as the system responds to a national rise in antisemitism.”²⁵⁹ According to the announcement, the Portal was intended to “standardize reporting across the system” and allow the information to be shared with college presidents and deans.²⁶⁰ The reports from the Portal also were intended to “serve as a basis for the development of policy and training as needed,” and “allow the University to conduct detailed analyses of the reported incidents, identifying trends and patterns so that the system can enhance its diversity, equity and inclusion programming.”²⁶¹

²⁵⁸ In interviews, I asked each president or dean to identify for me any statements they put out following October 7 and explain their rationale in publishing the statements they did. In many instances, I was quite impressed with not only the substance of the statements made but also the thought that went in to presenting statements to diverse student and faculty bodies with divergent opinions.

²⁵⁹ <https://www1.cuny.edu/mu/forum/2023/01/30/cuny-launches-online-portal-for-students-and-staff-to-report-community-acts-of-discrimination-and-retaliation/>

²⁶⁰ *Id.*

²⁶¹ *Id.*

CUNY’s University-Wide Discrimination and Retaliation Reporting Portal is publicly available through CUNY’s website.²⁶² On the webpage where individuals can access the portal to fill out a complaint, it is noted that “This report will be submitted to the Chief Diversity Officer of the CUNY College or school that is implicated. The Chief Diversity Officer will review this report thoroughly and take appropriate action, which may include reaching out to the reporting individual for more information or to explore next steps.”²⁶³ When, in July of 2023, Governor Hochul signed into law legislation (S.2060-A/A.3694-A) requiring colleges that receive state funding to modernize and enhance their disclosure of hate crimes that occur on campus,²⁶⁴ Chancellor Matos Rodríguez touted the Portal as a step CUNY took earlier in the year “to make it easier for all members of our campus communities to report acts of discrimination, bigotry and hate, and for administrators to identify trends that will inform new policies, programming and preventative measures.”²⁶⁵

2. How the Portal Works

Any individual can report an incident through the Portal. The Portal operates the way many online surveys do—with most of the information provided by pre-populated checking boxes. After clicking on the button to submit a report, the individual is taken to a page that states at the top “University-Wide Discrimination and Retaliation Reporting System,” and asked to “Please select the City University of New York College/School where the report of discrimination and / or

²⁶² <https://www.cuny.edu/about/administration/offices/hr/discrimination-and-retaliation-report-form/>

²⁶³ *Id.*

²⁶⁴ <https://www.governor.ny.gov/news/governor-hochul-announces-more-51-million-improve-safety-and-security-organizations-risk-hate>

²⁶⁵ *Id.*

retaliation took place.”²⁶⁶ Below that is a list of each CUNY school, along with CUNY’s central office and an “unknown” category, from which the individual may choose. The next page of the Portal asks the individual to identify whether they experienced or witnessed the event, whether the individual who experienced the event was a current or former student or employee, applicant for employment or admission or other, and then asks for the contact information of the individual submitting the report as well as the alleged victim.²⁶⁷ Those fields can be left blank, which presumably allows for the report to be anonymous. If the individual submitting the form identifies that they are a current student, they are asked (but not required) to supply their student ID number. From there, the individual is required to provide a date for the incident, along with a description of the incident and location. The individual can also upload any documentation they choose.²⁶⁸

The next page asks the individual whether they are reporting discrimination and/or retaliation. If the individual clicks that they are reporting discrimination, they are provided with a lengthy list that identifies various potential categories of discrimination. If the individual clicks that they are reporting retaliation, they are asked to identify whether they are reporting retaliation for reporting discrimination, opposing discrimination, or for cooperating with an investigation of a discrimination report or complaint.²⁶⁹ Below is a screenshot of this of this page from the reporting system:

²⁶⁶ <https://forms.cunyfirst.cuny.edu/s3/Discrimination-and-Retaliation-Report>

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*



University-Wide Discrimination and Retaliation Reporting System

9. Are you reporting discrimination? *

- Yes
 No

10. What is your report of discrimination based on? *

- Race
- Color
- Creed
- National Origin
- Ethnicity
- Ancestry
- Religion
- Age
- Sex
- Pregnancy
- Childbirth
- Sexual orientation
- Gender
- Gender identity
- Marital status
- Partnership status
- Disability
- Genetic information
- Alienage
- Citizenship
- Military or Veteran status
- Status as a victim of domestic violence / stalking / sex offenses
- Unemployment status
- Other legally prohibited basis

11. Are you reporting retaliation? *

- Yes
 No

12. What is your report of retaliation based on? *

- Retaliation for Reporting Discrimination
- Retaliation for Opposing Discrimination
- Retaliation for cooperating with an investigation of a discrimination report or complaint

[Back](#) [Submit](#)

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From there, the individual can choose to submit the report, in which case the individual is provided with an acknowledgment thanking them for doing so and providing them with a summary

of the submitted report, which they are instructed to print or save for their records.²⁷⁰ That acknowledgment page also informs the individual that the chief diversity officer for the college the individual indicated will “review this report thoroughly and take appropriate action, which may include reaching out to the reporting individual for more information or to explore next steps.”²⁷¹ The acknowledgement page also informs the individual that “[w]hile some complaints may require extensive investigation, whenever possible, we strive to complete the investigation of a complaint within sixty (60) calendar days.”²⁷²

3. Problems with the Portal

Based on my review of the Portal and conversations with CUNY leadership, in creating the Portal, CUNY appears to have had the best of intentions. A central reporting system could ensure that complaints of antisemitism and discrimination are promptly filed in a consistent format that makes reporting easier and more effective. However, during the course of my review, I heard consistent and uniform complaints about the Portal.

First, numerous interviewees noted that the Portal operates as a “black box.” Individuals who submit a report through the Portal do not receive any acknowledgment that their report has been received separate and apart from the form page after they click to submit their report, nor do they receive any updates regarding the investigative process. This is problematic because an individual who files a complaint is left with uncertainty that the complaint is being considered and thoroughly addressed. At the same time, because the complainant filed the report online, the individual may not know who to go to for status information on the investigation. While certainly

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

this could be remedied by the individual chief diversity officers being proactive in communicating with complainants, I have not heard that to always be the case.

Second, CUNY's reporting system is less than clear. Numerous policies and procedures point members of the CUNY community in different directions when it comes to reporting claims of antisemitism and discrimination. For instance, while CUNY's webpage on reporting complaints presents the Portal as a way to directly report discrimination or retaliation, other CUNY policies point complaints in other directions.²⁷³

- CUNY's Equal Opportunity and Non-Discrimination Policy appears to direct those who may have suffered discrimination or harassment to speak with a chief diversity officer *before* filing a complaint;²⁷⁴
- CUNY has published a Guidance Memorandum that sets forth a protocol for responding to hate crime incidents, which encourages students, staff and faculty to notify their respective Campus Security Authority or Department of Public Safety Officer if they experience or witness a hate crime incident;²⁷⁵ and
- CUNY's bylaws suggest that certain complaints involving discrimination or other conduct violative of CUNY's bylaws, New York City law, New York State law or federal law, can be filed with the chief student affairs officer.²⁷⁶

²⁷³ <https://www.cuny.edu/about/administration/offices/legal-affairs/policies-resources/reporting-of-alleged-miscounduct/>

²⁷⁴ <https://www.cuny.edu/about/administration/offices/legal-affairs/policies-resources/equal-opportunity-and-non-discrimination-policy/>

²⁷⁵ <https://www.gc.cuny.edu/public-safety-and-security/hate-crimes>

²⁷⁶ CUNY bylaws Art. XV. <https://policy.cuny.edu/bylaws/article-xv/>

Additionally, individual schools can have their own reporting procedures, which can create confusion, unnecessary duplication, and drain resources away from investigating and addressing underlying complaints.

Third, because the Portal only allows for complaints about discrimination or retaliation, those who do not believe their incident falls neatly into one of those categories may be dissuaded from completing the form. On the other hand, we heard in interviews that because the Portal allows anyone, whether or not they are affiliated with CUNY, to submit complaints, and because there are no temporal limitations on when an event must have occurred (i.e., people can lodge complaints about incidents that occurred years ago), some chief diversity officers feel overburdened by the number of complaints submitted through the Portal.

Fourth, despite the fact that the Portal was touted as a tool to allow CUNY to run detailed analyses of complaints, I have been informed that the Portal cannot run queries to identify trends across campuses or even within a single school. This, combined with the fact that the Portal only allows for complaints about discrimination or retaliation, makes it an inadequate tool for analytic purposes.

D. A Number of CUNY's Policies and Procedures Are Outdated

As described more fully in Section VII, a number of CUNY's policies and procedures appear to conflict with one another and/or provide less than clear guidance to members of the CUNY community. I attribute this in large part to the fact that some of those policies have not been updated in as much as a decade. Thus, by way of one example, CUNY's Equal Opportunity and Non-Discrimination Policy, which was last updated in 2015, does not account for the Portal, which was created in 2023. As a result, victims of discrimination may rightly be confused about

how they should log a complaint, and specifically whether they should use the Portal or go first to a chief diversity officer.

Section VII above details CUNY's existing policies and procedures that touch upon antisemitism and discrimination, and highlight the ways those policies and procedures are deficient and can be improved.

E. CUNY Is Properly Concerned With Student, Faculty and Staff Safety

As observed during my review, there are inconsistencies with respect to how complaints of antisemitism and discrimination are addressed at individual schools. Nonetheless, when it comes to the issue of safety on campus, all leaders in the CUNY system, both at the central and individual school level, uniformly appear to take safety issues seriously. I was pleased to hear that, across the board, presidents, and deans coordinated closely with campus security, who often worked closely with local law enforcement whenever necessary. And, even as CUNY has had to deal with a significant escalation in the number of antisemitic incidents on campuses, there have been few incidents of reported physical violence on CUNY campuses related to antisemitism.

Historically at CUNY, safety and security has been a top priority. In 1992, CUNY founded the Department of Public Safety, which today is comprised of 21 Campus Directors, 45 Campus Assistant Directors, 52 Campus Security Specialists, 125 Campus Public Safety Sergeants, 428 Public Safety Officers with New York State Peace Officer status, and approximately 392 Campus Security Assistants.²⁷⁷ That Department engages in recruitment of campus peace officers, provides personal safety training to members of the CUNY community, and publishes guides for emergency

²⁷⁷ <https://www.cuny.edu/about/administration/offices/publicsafety/>

responses.²⁷⁸ In addition, CUNY established a Public Safety Training Academy to train peace officers employed by CUNY.²⁷⁹ That training was eventually expanded to include peace officers from 17 agencies beyond CUNY. The Public Safety Training Academy offers instructor-level courses for agencies to better train their own employees, and incoming peace officers must go through 15 weeks of training, over 500 hours, to graduate from the Academy.²⁸⁰ Individual schools have their own processes and procedures related to the Department of Public Safety.²⁸¹

In 2020, Chancellor Matos Rodríguez tasked the incoming Executive Director of Public Safety with “conducting a comprehensive review of the department’s procedures, focusing on safety while developing a better understanding of implicit and explicit biases and steps to strengthen relations between officers and the CUNY community.”²⁸² That resulted in the formation of a five-year strategic plan aimed at “enhancing community trust accountability; utilizing the most current policies and practices; delivering resources effectively and efficiently; and investing in the development of talent.”²⁸³

Despite its focus on public safety and efforts to modernize its Department of Public Safety, CUNY has room to improve with respect to safety for students from antisemitism and discrimination. During my review, I learned that certain presidents were hesitant to employ uniformed officers to protests where there were fears of potential safety incidents because they

²⁷⁸ *Id.*

²⁷⁹ <https://www.cuny.edu/about/administration/offices/publicsafety/training-academy/>

²⁸⁰ *Id.*

²⁸¹ <https://hunter-undergraduate.catalog.cuny.edu/policies-and-requirements/health-safety-policies-and-procedures/department-of-public-safety>

²⁸² <https://www.cuny.edu/about/administration/offices/publicsafety/cuny-public-safety-strategic-plan/>

²⁸³ *Id.*

believed doing so would likely result in bad publicity. That is unacceptable. I appreciate that presidents and deans must be cognizant of an array of considerations, including publicity. And they must recognize that a constant uniformed security presence can chill certain students from engaging in appropriate free speech activities (including peaceful protests) and create a tense environment on campus, and thus must be judicious in employing such resources. But safety must take priority and, as was relayed to me, uniformed officers do operate as a deterrent to those considering engaging in aggressive or violent conduct.

Further, I note that while we learned of few incidents of antisemitism at CUNY that involved physical violence against students or faculty, we did hear of some acts of violence during the recent encampments. We also were informed of limited incidents adjacent to campuses involving people who are not members of the CUNY community. While these incidents pose unique challenges for CUNY, I believe CUNY can and should consider safety plans to better prevent and/or peacefully deescalate such incidents in the future. To the extent that CUNY implements clear guidance regarding free speech and appropriate expressive conduct on campus, that might also help allay some concerns that the presence of law enforcement on campus can chill free speech.

F. Not All CUNY Students Feel Safe

During the course of my review, I heard some advocate that while it is critical that students, faculty and others in the CUNY community *be* safe on campus, it is less important that everyone *feel* safe on campus. The argument, as it was presented to me, is that whether an individual feels safe on campus is subjective, and can lead either innocently or intentionally to the blocking of permissible speech and conduct. While I certainly recognize the possibility that an individual might choose to express that they feel unsafe in an effort to censor speech or conduct that

individual disapproves of, I nonetheless believe it is critical that all students and others feel safe on campus.

While visiting various campuses, my team heard from students that they felt unsafe because they were forced to walk through active protests in order to attend classes or enter campus buildings. We also heard from others that they felt unsafe when local law enforcement came on campus in response to their attempts to protest peacefully. Issues like doxxing, which unfortunately has become prevalent in recent months, only add to feelings of a lack of safety.

At the most basic level, a student or faculty member who does not feel safe on campus might choose not to attend class. This idea that members of the CUNY community must feel safe is embodied in the Henderson Rules. Specifically, Rule 1 admonishes against engaging in activities that interfere with individuals' rights to avail themselves of university processes and facilities, and Rule 5 notes in part that "[e]ach member of the academic community or an invited guest has the right to advocate his position without having to *fear* abuse, physical, verbal, or otherwise, from others supporting conflicting points of view."²⁸⁴ Strengthening CUNY's rules around time, place, and manner restrictions to provide clarity and definitive parameters around protests of all kinds, and the application of the Henderson Rules, will help more people at CUNY feel safe. At the same time, it is important for CUNY to clarify its policies on freedom of expression such that those who view the presence of law enforcement on campus with trepidation and as a potential means to stifle their free speech, will be equipped with more security as to the activities that are appropriate on campus. CUNY's vibrant history is replete with incidents of

²⁸⁴ <https://www.jjay.cuny.edu/about/governance-senior-leadership/finance-administration/public-safety/policies-procedures/cuny-henderson-rules> (emphasis added).

peaceful protests that have effectuated major changes, including open admissions at CUNY.²⁸⁵ Students must feel safe in peacefully protesting on campus, even when they know the views they are expressing may not be shared with others on campus, including leadership.

G. CUNY Must Better Address the Use of Social Media

There is no doubt that social media can be a conduit for hate. During the course of my review, my team and I heard repeated instances in which organizations and individuals used social media to advance inappropriate hate speech. This includes content sent from personal social media accounts and accounts associated with CUNY, or falsely identified as associated with CUNY, that violated school policies and perpetuated antisemitism and discrimination. Doxxing is an example of potentially dangerous conduct that can be carried out through social media. Relatedly, I was informed of other incidents in which technology, such as group text chains and communication apps, were used to harass individuals and promote hateful viewpoints.

To call these 21st century problems would understate how rapidly evolving these threats are. Yet, as I highlight in Section VII, CUNY's policies and procedures for dealing with these abuses of technology are woefully dated. Not only must CUNY revamp its technology policies to bring them into line with the realities of 2024, but CUNY must commit to constantly evaluating and refreshing those policies so they do not ever become stale again.

H. Antisemitism at CUNY is Carried Out By a Vocal Minority

The overwhelming majority of CUNY students are focused primarily on their education. And the overwhelming majority of faculty at CUNY are focused primarily on being proper role models and stewards of knowledge. The antisemitism and discrimination that exists on CUNY

²⁸⁵ <https://www.cuny.edu/about/history/creation-of-the-modern-university/>

campuses appears to be carried out by a small, but vocal, minority of individuals. Though incidents of antisemitism, Islamophobia and hate garner a lot of public attention, and rightly so, that should not overshadow the fact that the vast majority of students and members of the CUNY community do not engage in antisemitism or discrimination of any kind and instead merely want to access the quality education CUNY affords.

I. Members of the CUNY Faculty Often Need to Do More

I cannot overstate the vital role that faculty plays at CUNY and all institutions of learning. Students turn to faculty for knowledge and guidance, not only with respect to course materials but also with respect to navigating life at CUNY and beyond. Virtually all of us can identify a teacher who impacted our lives and our development beyond the classroom.

I want to emphasize again that the majority of faculty members at CUNY are a credit to the University. Those faculty take their responsibilities to educate, mold and guide the next generation seriously. Unfortunately, however, I must acknowledge that during the course of my review I heard of too many incidents in which faculty fell short. Just by way of example, OCR confirmed that in 2021 certain faculty members at Hunter College took part in incidents that involved disrupting sessions of a required college course by commandeering the scheduled course discussion, which was occurring over Zoom, to call for the decolonization of Palestine.²⁸⁶ And my team was informed of incidents in which faculty teaching classes in areas such as math or science either diverted from their syllabi to espouse political viewpoints or reached to interject into

²⁸⁶ <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-nine-complaints-against-city-university-new-york-alleging-discrimination-based-national-origin-including-antisemitic-anti-palestinian-anti-muslim-and-anti-arab-harass>

their lessons “examples” that unnecessarily made certain students feel the professor was hostile to their shared ancestry or religion.

Faculty, of course, must be permitted to exercise their First Amendments rights and must be free to challenge students—even if that means exposing them to uncomfortable concepts. That exposure to unknown and potentially uncomfortable ideas is a critical part of a fulsome education that students should hope to get at CUNY. However, I believe that faculty must recognize the volatile and potentially dangerous times we are living in, and do what they can to take the temperature down on campus wherever possible so that students’ educations are not disrupted—or worse. Based on my review, I believe faculty often can and should do more to promote dialogue between those with differing viewpoints on critical issues and to encourage peaceful solutions to disagreements rather than inflame conflict, which we often found to be the case. As experts in areas such as history and political science, some faculty are perfectly equipped to conduct informative and peaceful discussions or debates with other faculty who express opposing views, and in the process model for students the value of communication and listening.

J. Even Those Who Disagree About the Topics of the Day, Do Agree on Many Important Issues

As a judge, I spent my career adjudicating disputes between parties that often had diametrically opposing viewpoints on certain issues. Sometimes I observed that even when litigants were in extremely contentious and adversarial proceedings, there were fundamental issues they agreed upon. After listening to hundreds of individuals discuss these complex issues of antisemitism, discrimination and hate of all kinds, I learned that despite the heightened and heated discourse that CUNY operates under today, there is more agreement among members of the CUNY community than might be apparent.

When it comes to life at CUNY, students by-in-large want to learn, and faculty want to teach, undisturbed. Most members of the CUNY community believe that peacefully protesting is appropriate behavior that holds an important place at CUNY—except when it disrupts the classroom or leads to violence or hate incidents. Members of the CUNY community, regardless of their political viewpoints, also almost universally share a commitment to safety on campus. And even when it comes to key issues related to antisemitism and discrimination, such as the role of definitions of antisemitism, individuals and groups with divergent viewpoints tend to agree. At the end of the day, I believe that all students at CUNY want to be treated fairly and equally, and the more CUNY can do to foster that sense of fairness and equality, the better the institution will be served. In addition, I believe that because of the areas of agreement, more dialogue between those with seemingly differing views can without doubt be beneficial.

IX. RECOMMENDATIONS

Based on all the work my team and I conducted, I have formulated a 13-point action plan to help CUNY better prevent and address antisemitism, discrimination, and all other forms of hate both in this academic year and beyond.

1. Increase Centralization of Resources for Dealing With Antisemitism and Discrimination by Establishing a University Wide Center, Including an Internal Monitor

Perhaps the most significant challenge that CUNY faces as it attempts to tackle antisemitism is the lack of uniformity and significant unevenness in terms of how the issue is analyzed, prevented, and addressed at various schools. To remedy this, CUNY needs more centralized resources, and I believe a new University-wide center should be created to, first and foremost, address antisemitism, discrimination and other forms of hate. The creation of the center would be an essential tool for CUNY in focusing on antisemitism and discrimination of all kinds and in promoting civil discourse and fostering inclusion and understanding. Such a center could, among other things, be a clearinghouse for ideas as to how to combat antisemitism and discrimination, and help to deploy resources to individual CUNY schools on an as-needed basis. The center could also ensure that CUNY schools promulgate applicable policies and procedures in a consistent manner, be a source for guidance to chief diversity officers and investigators to ensure uniformity in the investigative process, facilitate interfaith programming throughout CUNY, and provide training and forums to promote civil engagement.²⁸⁷ As CUNY seeks to

²⁸⁷ I note that the Harriet & Kenneth Kupferberg Holocaust Center, which is associated with Queensborough Community College, currently engages in some work that could be informative and helpful to CUNY as it develops the Center I am recommending. The stated mission of the Holocaust Center is to “use the lessons of the Holocaust to educate current and future generations about the ramifications of prejudice, racism, and stereotyping.” <https://khc.qcc.cuny.edu/>.

increase centralization with respect to issues that concern antisemitism and discrimination, it should look as a model to its own Department of Public Safety, which coordinates with officers at the school level and provides training, best practices, and other resources to that local level.

I believe the center can also serve an additional critical function. As my report makes clear, properly addressing and preventing antisemitism and discrimination needs to be an ongoing process at CUNY. While the recommendations in this report aim to put CUNY on a path to better handle incidents of hate, simply committing to adopt these recommendations is not enough. Accordingly, I recommend that within the center, CUNY appoint an internal antisemitism and hate monitor, publicly identified as such. That individual should be tasked with monitoring CUNY's compliance with these recommendations, and reviewing their effectiveness in dealing with antisemitism and discrimination. That individual should also be empowered to make additional recommendations to CUNY's General Counsel, Board of Trustees and Chancellor regarding steps CUNY can take in the future to better prevent and address issues of antisemitism, discrimination and hate of all kinds.

I discussed the formation of a center with Chairperson Thompson and others throughout my review, and note that CUNY's Board of Trustees adopted a resolution calling for the creation of a Center for Inclusive Excellence and Belonging, which is to be committed to promoting dialogue and fostering understanding, intellectual curiosity, and scholarly pursuit of cultural and religious diversity.²⁸⁸ While I am not averse to CUNY forming a center that deals with issues

²⁸⁸ <https://www1.cuny.edu/mu/forum/2024/06/27/cuny-board-of-trustees-and-chancellor-announce-creation-of-center-for-inclusive-excellence-and-belonging-in-ongoing-effort-to-combat-discrimination/>

beyond antisemitism and discrimination, I do believe it is important for the major focus of the center to be, at least in the near term, dealing with issues of antisemitism and hate.

2. Overhaul CUNY's Current System for Lodging Complaints Regarding Discrimination and Harassment

As I set forth in detail in Section VI.C, CUNY's Portal which is used to file complaints, fails in numerous respects. CUNY must revamp its Portal system so that it provides those who submit complaints with relevant information (including the name of the investigator and available resources) and regular updates as to the status of any investigation. The Portal should also be integrated on the "back end" so that investigators can use the Portal to keep track of investigative progress and receive reminders to check in with complainants, as well as notifications when a complaint has not been timely resolved. The questions within the Portal must be revised so that complainants are not limited in the types of incidents that they feel they can report. At the same time, the Portal must be able to provide reporting and analytics.

These are not changes that CUNY likely can implement with its own IT personnel. Accordingly, I recommend that CUNY engage an outside consultant to assist in implementing these recommendations and overhauling the Portal with the goal of establishing a best-in-class system. Once CUNY has a Portal that is a robust and model reporting system, CUNY will be well served to ensure that its community members have clear and consistent instructions as to which types of complaints are properly submitted via the Portal, and which are not.

3. Provide Additional Resources to Victims of Antisemitism and Discrimination Through Establishment of a Victims Advocate Program

The failures of the Portal can leave victims of antisemitism and discrimination with the feeling that their complaints and fears are not being heard or, even worse, ignored. Revamping

the Portal will help, but to truly support those in the community that have suffered, CUNY should establish a victim's advocate program. Victim advocates can, on a completely confidential basis, assist individuals in the CUNY community to navigate the investigative process, which is particularly important given the complicated reporting structure that currently exists at CUNY. My team and I spent a significant amount of time reviewing CUNY's policies and procedures and we are not sure, in all instances, as to how and to whom improper conduct is to be reported. It is unreasonable to think that the average student, faculty member, or employee can navigate the investigative process on their own. As a former judge, I have seen the value of such victim advocates, and CUNY can set itself apart by hiring top-notch individuals and establishing a robust victim's advocate position within the institution.

4. Coordinate at All Times with Law Enforcement to Protect Everyone at CUNY

CUNY, in conjunction with its Department of Public Safety, has done a good job of keeping its community safe from violence, even in the face of increased antisemitism on campuses. While CUNY has numerous effective rules and processes related to safety, it must still strive to improve. The recent issue of encampments raises new concerns, as well as new opportunities for CUNY to develop best practices. During those encampments, and at various other protests, I heard that many protesters were masked. I understand that many security experts believe that wearing masks during protests creates additional safety concerns. These issues must be dealt with expeditiously and with clarity before they disrupt other students' education and campus life. A policy on freedom of speech and expressive conduct, including a policy related to wearing identity-concealing masks during protests, will help, especially if it contains robust guidance on time, place, and manner restrictions. But in addition, either as part of the policy on freedom of speech and

expressive conduct or separately, there must be clear guidance and prohibitions related to issues of vandalism and destruction of property on CUNY campuses.

5. Provide More Guidance to Those Conducting Investigations Into Antisemitism and Discrimination

As noted throughout this report, CUNY must do more to cure the unevenness that exists in the investigatory process. One way for CUNY to accomplish this would be to move the responsibility for investigating complaints of antisemitism and discrimination away from the chief diversity officers on campuses and create a central investigatory team. I recognize that would involve a major reorganization within CUNY, and that many within CUNY believe there are significant advantages to having the investigatory process housed at the school level. Among those advantages, as I was informed during my review, is that the on-campus chief diversity officer will likely be more familiar with the underlying incidents and persons involved, and thus can make quicker determinations as to whether a complaint has merit or not. For those reasons, I am not recommending that CUNY needs to centralize its investigators, but that it should consider whether that makes sense to do at some point. But for now, if investigations into allegations of antisemitism and discrimination lodged in the Portal are going to be conducted by the chief diversity officer or Title IX coordinator on the campus where the alleged incident took place, those individuals must have more guidance as to how to conduct their investigations.

Determinations of whether alleged conduct violates CUNY's policies and procedures cannot depend solely on the judgment of the individual undertaking the investigation, with no or limited oversight. CUNY's approach needs to be consistent to ensure that all complaints, regardless of the school at which they occur, are investigated properly and that wrongdoing is addressed consistently.

Accordingly, I recommend that CUNY implement a system of mandatory training for chief diversity officers and others who may investigate allegations of antisemitism and discrimination. That baseline training should involve not only training on investigative techniques and dealing with victims, but also on issues of implicit bias, relevant legal requirements, relevant CUNY policies and procedures, and related best practices concerning investigations of this nature. No matter their school, background, or personal views, chief diversity officers and other investigators should follow consistent guidelines to determine whether to substantiate a complaint. In addition, CUNY, either through the aforementioned center or through another vehicle, should implement a system of oversight of the investigative process and individual investigative findings. CUNY should do away with a system that puts the outcome of investigations within the hands of a single individual without guidance or oversight.

6. Increase Consideration of the Relationship Between Israel and the Jewish People When Adjudicating Whether Conduct Constitutes Antisemitism

In Section VI, I explain the vital role that the IHRA definition of antisemitism can play in determining contemporary manifestations of antisemitism, as recognized by the Governor in her 2022 proclamation.²⁸⁹ Today, many of the alleged antisemitic incidents at CUNY implicate attacks on the State of Israel and its citizens—including calls for the annihilation of Israel as a homeland for Jews. When dealing with speech related to the State of Israel, understanding what is protected free speech and what constitutes antisemitism is critical, and IHRA is widely recognized both by the Governor’s Proclamation and Executive Order 13889 as a valuable tool for that challenge. In particular, for many Jewish people, Zionism is part of their Jewish identity. Accordingly,

²⁸⁹ https://www.governor.ny.gov/sites/default/files/2022-06/IHRA_Antisemitism_Definition_Proclamation-2022.pdf

otherwise antisemitic speech or conduct cannot be immunized merely because that speech or conduct is directed at “Zionists” as opposed to Jews. IHRA provides guidance that helps explain that antisemitic speech and conduct masquerading as criticism of Israel or Zionism is still antisemitism. For that reason, and consistent with the Governor’s proclamation, I recommend that CUNY put significant focus on IHRA when it comes to understanding what constitutes antisemitism.²⁹⁰ CUNY should additionally consider whether other definitions of antisemitism also assist in grappling with these complex issues.

7. Ensure That All Those at CUNY, Including Chief Diversity Officers, Follow The Law With Reference to How Antisemitism is Legally Defined

Section VI of this report contains a detailed analysis of the issues surrounding the definition of antisemitism. In that Section, I explain why I am not recommending that CUNY adopt a specific definition of antisemitism, though of course I am not suggesting that CUNY is prohibited from doing so. As I point out in the report, I do not believe CUNY must adopt a definition of antisemitism, nor do I believe it would be appropriate for me to recommend to CUNY which definition to adopt. In fact, I have found that debate over definitions of antisemitism and other forms of hate risk diverting attention from devising effective means to address conduct occurring on CUNY campuses that satisfy any definition of hateful conduct.

What CUNY must do, however, is follow the law. Senior leadership at CUNY, including presidents, deans, and chief diversity officers, must be trained on the requirements of the law and

²⁹⁰ I recognize that CUNY’s Chancellor has already taken a positive step in this direction by reaffirming Governor Hochul’s proclamation and identifying the IHRA definition of antisemitism as a vital resource.

<https://www.cuny.edu/about/administration/offices/transformation/diversity-equity-and-inclusion-hub/combating-antisemitism/>

cannot gauge the propriety of conduct based on their personal views of what constitutes antisemitism. They must be guided by what the law applicable to CUNY dictates—even if that involves application or interpretations of a definition of antisemitism with which they disagree. To that end, as set forth in detail in Section V of this Report, Executive Order 13889 declares that in enforcing Title VI and identifying evidence of discrimination based on race, color, or national origin, agencies must consider the IHRA definition of antisemitism. Given that the Executive Order remains in effect, those examining whether conduct at CUNY constitutes prohibited discrimination must likewise consider IHRA during their investigations.

8. Update CUNY’s Existing Policies and Procedures and Remove Ambiguities

In Section VII, I examine CUNY’s existing policies and procedures and highlight many of the ways that they are outdated, unclear, inconsistent or otherwise deficient. I recommend that CUNY focus on the issues I identify in that Section, and undertake an extensive effort to modernize its policies and procedures to make sure they reflect the current legal frameworks and provide the CUNY community with clear guidance. Members of the CUNY community cannot be left with confusion over how to report incidents of antisemitism, or how such incidents will be addressed. In addition, because some of CUNY’s policies have not been revised in almost a decade, even where they do not diverge from existing law, they are not as effective as possible when it comes to dealing with today’s problems. This is particularly the case for CUNY’s policies that deal with social media issues. As part of updating its policies and procedures, CUNY also should establish a process for reviewing its policies and procedures on a regular basis to ensure they do not ever become stale again.

9. Hold Faculty and Others Accountable for Violative Conduct

While most at CUNY do not engage in antisemitism, discrimination or other forms of hate, there must be accountability for those who do, or who otherwise violate CUNY's policies and procedures. This includes both students and the faculty who should be role models for such students. As I note throughout, students and faculty must be permitted to exercise their First Amendment rights fully and without restriction, and faculty must be free to challenge students—even if that means exposing them to uncomfortable concepts. However, when students or faculty, including tenured faculty, violate CUNY's policies and procedures, or otherwise engage in antisemitic conduct or conduct that creates an unsafe environment at CUNY, they must be held accountable.

Accordingly, I recommend that CUNY institute protocols to address, discipline, and remediate student or faculty conduct and speech (as well as conduct and speech by all members of the CUNY community) that violates CUNY's policies and procedures. As part of those efforts, faculty in particular should be trained on CUNY's policies and procedures and relevant law with respect to antisemitism and the First Amendment. As I note in Section V, during my review, I observed that many within CUNY did not have an accurate understanding of the law—and hence could be misguided in their daily activities. Additionally, given that CUNY faculty necessarily interact with and supervise students with diverse viewpoints, CUNY would be well served to train its faculty on implicit bias. To repeat a critical point, the overwhelming majority of students and faculty are behaving appropriately at CUNY, and are a credit to the institution. But even those who do not run afoul of CUNY's policies and procedures and/or applicable law benefit from training and clear guidance on expectations.

10. Draft and Adopt a Comprehensive Policy on Freedom of Speech and Expressive Conduct

As I note in Section VII, in 2016 CUNY considered, but did not ultimately adopt, a policy on freedom of expression and expressive conduct. Though that policy as drafted was far from perfect—which is perhaps why it was never adopted—to the extent the policy sought to provide schools with central guidance on free speech rights, the implementation of the Henderson Rules and appropriate time, place, and manner restrictions, it was a good idea. Accordingly, I recommend that CUNY put together a diverse working group with the goal of drafting a fair policy that provides members of the CUNY community with clear and straightforward guidance on acceptable speech and conduct, and appropriate behavior on campus.

11. Encourage Leadership to Speak Out Forcefully Against Hate

In the wake of the October 7 terrorist attacks, CUNY's Chancellor and many CUNY presidents and deans issued strong statements condemning Hamas's horrific actions. Subsequently, as the war unfolded, many of those same leaders issued statements acknowledging the humanitarian crisis in Gaza and loss of life from the ongoing war. And, in the past, CUNY's Chancellor has also issued statements rejecting calls for CUNY to divest from companies that aid Israel. These statements reflect the reality that the protections of the First Amendment do not require CUNY leadership to stay silent on important issues that affect the CUNY community. In the face of speech that, while not violative of applicable law, is inconsistent with CUNY's values, CUNY leadership can and, in my opinion, must speak up forcefully. Leadership should recognize that their speech can shape the culture of the institution and fill in gaps where the law permits speech and conduct that conflicts with the values and culture of inclusiveness that CUNY hopes to foster. Of course, whether leaders decide to speak on any particular issue is their own decision, and often is not an easy one to make. But, in fighting antisemitism and discrimination on campus,

CUNY leaders must recognize that they are aided, and not limited, by the protections afforded through the First Amendment.

12. Recruit and Hire to Foster Inclusiveness

CUNY is one of the most diverse academic institutions in the United States. The CUNY Law School, widely regarded as one of the most ethnically diverse law schools in the country, is a prime example. But when it comes to openness to differing views and tolerance, campus environments do not appear to always foster inclusive dialogue. If CUNY is going to create an environment of tolerance and respect, it must examine its faculty recruitment and hiring processes and ensure that it recruits and hires those who will encourage and promote inclusivity, constructive dialogue and tolerance.

13. Encourage More Dialogue Aimed at Bringing People Together

Today at CUNY, speech appears to be driving people apart. But constructive dialogue can bring members of the community together. While lectures and debates among faculty and campus leaders with divergent backgrounds and viewpoints on today's issues has not always proven successful, during our review we heard enough examples of positive results from such efforts that I believe CUNY should look for more opportunities to advance such programs. Certainly, the aforementioned center can review what has worked best on individual campuses and facilitate such programming throughout CUNY.

At the same time, programming at the University aimed at fostering a shared understanding of the rich history of CUNY may help minimize incidents of hate. CUNY is intertwined with the fabric of this City. A CUNY education has helped millions of New Yorkers of all races, ethnicities, and religious backgrounds better themselves and their lots in life. Students across all demographics share the aspirations of growth and success that a CUNY education can help deliver.

Infusing in CUNY students and faculty an understanding of the rich history of CUNY can only help to create an environment where peaceful and civil debates replace dangerous and violent protests and where everyone is treated with respect irrespective of their viewpoints on the issues of the day.

X. CONCLUSION

In completing this review of antisemitism and discrimination at the City University of New York, I would like to acknowledge Governor Hochul’s leadership in this critical undertaking. Antisemitism and hate in all its forms cannot be ignored or minimized, or allowed to interfere with the education of the next generation of New Yorkers and the value system that has guided CUNY since its inception. I, along with my colleagues, have been privileged to have had the opportunity to contribute to making a reality of Governor Hochul’s admonition that “we cannot allow hate and intimidation to become normalized” at CUNY.²⁹¹

As CUNY moves forward, in this school year and beyond, I ask the members of the community that make up this wonderful and unique institution that has helped lift the lives of millions over the past 150 years, to reject hatred of any kind and treat each other fairly, and with respect. Ultimately, it is only by doing so that CUNY as an institution will continue to be what it has been historically: a place where all New Yorkers, regardless of religion, identity, income, socioeconomic status, and beliefs, can be welcomed as they seek to learn and better themselves and future generations.

²⁹¹ <https://www.governor.ny.gov/news/following-surge-hate-and-bias-crimes-governor-hochul-deploys-all-available-state-resources>

