The Louis D. Brandeis Center
For Human Rights Under Law

February 3, 2023

ABA House of Delegates

Dear Delegates:

On behalf of the Louis D. Brandeis Center for Human Rights Under Law ("the Brandeis Center"), a legal advocacy group that employs civil rights laws to combat anti-Semitism in higher education, protect the rights of Jewish Americans, and promote justice for all, we commend you for ABA Resolution 514 condemning anti-Semitism and pledging to oppose and eliminate anti-Semitism. This leadership is what we expect of the ABA and is especially important in the face of rising anti-Semitism and crimes against Jews across America.

Unfortunately, we understand that you have received letters promoting specious arguments opposing the IHRA working definition of anti-Semitism ("the IHRA Definition"), which is a critical tool for understanding and recognizing today's anti-Semitism. Half of Americans say they do not understand what anti-Semitism is. If anti-Semitism is not understood, it cannot be seen for what it is and condemned, and anti-discrimination laws and laws prohibiting hate crimes against Jews cannot be enforced. The IHRA Definition helps people understand when Jews are being targeted because they are Jews. Contrary to what some critics assert, it does not call for the punishment or suppression of anti-Semitic speech.

Because the IHRA Definition is uniquely suited to help understand and identify anti-Semitism, it has garnered the support of over 30 countries and at least 1,100 entities worldwide. These include the U.S. government—the Biden administration has declared that it "embraces and champions" it[1]—the U.S. State Department, and governmental and non-governmental groups as diverse as the Organization of American States, the European Parliament, the Global Imams Council, the Argentine Football Association, and Deutsche Bank.[2] The IHRA Definition has also been endorsed, in one form or other, by more than half the states in America.[3]

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[1] Amanda Berman, "Embrace of IHRA's Definition is One of Biden's Early Policy Victories," Jewish Journal, (Feb. 5, 2021), https://jewishjournal.com/commentary/332620/embrace-of-ihras-definition-is-one-of-bidens-early-policy-victories/.
[2] Zvika Klein, "More than 1,000 global entities adopted IHRA definition of antisemitism, The Jerusalem Post, (Jan. 17, 2023), https://www.jpost.com/diaspora/antisemitism/article-728773; *see also* Combat Antisemitism, "IHRA Working Definition of Antisemitism Adoptions & Endorsements Worldwide," https://combatantisemitism.org/ihra-definition/ (last visited Jan. 31, 2023).
[3] Id.

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A small but vocal minority nonetheless opposes the IHRA Definition, claiming that it is "controversial" and charging that it suppresses or even criminalizes speech. The Definition is no more "controversial" than any other civil rights law, and the speech charges are wildly inaccurate.

The detractors are particularly troubled by illustrations of anti-Semitism that include language that delegitimizes and demonizes the Jewish State of Israel. The Definition recognizes up front that "criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic."[4] But it distinguishes such criticism from calls for the destruction of the Jewish State, or comparisons of the State and its people to Nazis, or use of traditional anti-Semitic tropes to demonize the Jewish State and its supporters. Such rhetoric crosses the line into anti-Semitism when directed at Israelis or American Jews—the vast majority of whom identify with the Jewish State as an integral feature of their ancestral and ethnic identity.[5]

Recognizing speech as anti-Semitic does not criminalize that speech. The Definition does not, and cannot under the First Amendment, call for the punishment of persons who engage in hate speech or seek to silence them. The Definition rather allows agencies and legal authorities to identify speech or slogans as anti-Semitic when assessing discriminatory, harassing, or criminal conduct. Consideration of anti-Semitic or other racial epithets in determining whether an assault is a hate crime has no "chilling effect" on speech, as our Supreme Court unanimously held in *Wisconsin v. Mitchell*, 508 U.S. 476, 482 (1993). "[T]he First Amendment does not prohibit the evidentiary use of speech . . . to prove motive or intent." *Id.* at 489.

In the higher education realm in which the Brandeis Center regularly works, the IHRA Definition assists universities in complying with their obligations under Title VI of the Civil Rights Act of 1964 (Title VI). Title VI requires them, *inter alia*, to protect Jewish students from anti-Semitic harassment and discrimination. When it occurs, the Education Department's Office for Civil Rights (OCR) has directed schools to "take prompt and effective steps … to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring."[6]

But schools cannot protect their Jewish students unless they are able to recognize anti-Semitism. For this reason, Executive Order 13899 on Combatting Antisemitism ("the EO"), issued in 2019, requires executive departments and agencies charged with enforcing Title VI to consider the IHRA Definition and its contemporary examples when assessing evidence of discriminatory intent.[7] In

[4] INT'L HOLOCAUST REMEMBRANCE ALLIANCE, *Working Definition of Antisemitism*, https://www.holocaustremembrance.com/working-definition-antisemitism.
[5] *See* https://www.ajc.org/news/survey2021, https://www.ajc.org/Jewish-Millennial-Survey-2022/American-Jewish-Millennials.
[6] Assistant Secretary for Civil Rights Russlynn H. Ali, "Dear Colleague Letter" (Oct. 26, 2010), pp. 2-3, available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html.
[7] Exec. Order No. 13899 §1, 3 C.F.R. 68779-68780 (2019).

2021, OCR, incorporated the EO into its policy guidance.[8] And as recently as January 4, 2023, the head of OCR affirmed the agency's commitment to complying with the EO, which directs agencies like OCR to refer to the IHRA Definition and its guiding examples when investigating allegations of anti-Semitic discrimination.[9]

The Brandeis Center sees firsthand how anti-Semitism masked as anti-Zionism morphs into harmful conduct. Take, for example, the recent case of our clients, Cassie Blotner and Ofek Preis, two Jewish students at the State University of New York at New Paltz (SUNY New Paltz), whose story was featured on a CNN broadcast. Cassie and Ofek, both sexual assault survivors, were thrown out of the sexual assault survivor support group that Cassie helped establish when other students discovered the women had posted an infographic in support of Israel on their personal Instagram accounts. What did Cassie and Ofek post? A statement explaining that Israel is not a colonial enterprise because Jews are an ethnic group that come from the land of Israel. For this, Cassie and Ofek were castigated as enemies in the fight against oppression, who could not be allowed to remain within the group Cassie had formed.

The ugly insults that Cassie and Ofek received were indeed free speech, but exclusion from the sexual survivor group on the basis of their Jewish identity was discriminatory conduct—conduct the university was bound to address, as we explain in our Title VI complaint. This is no isolated incident—Jewish students at schools across the country are increasingly finding themselves excluded and shunned from student groups and other educational opportunities simply because they are Jewish.

We regularly ask schools like SUNY New Paltz not to punish hate speech but to speak out against it. When they remain silent, harassment and exclusion often follow. But schools cannot speak out if they do not recognize anti-Semitism.

Once again, we commend your resolution against anti-Semitism. We urge you to consider endorsement of the IHRA Definition, which uniquely helps universities and agencies to uphold the civil rights of students like Cassie and Ofek.

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[8] *See Questions and Answers on Executive Order 13899 (Combatting Anti-Semitism and OCR's Enforcement of Title VI of the Civil Rights Act of 1964*, U.S. DEP'T EDUC.–OFFICE FOR C.R. (Jan. 19, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-anti-semitism-20210119.pdf.

[9] "Statement from U.S. Assistant Secretary for Civil Rights on Title VI protection from discrimination based on shared ancestry or ethnic characteristics," (Jan. 4, 2023), https://brandeiscenter.com/statement-from-u-s-assistant-secretary-for-civil-rights-on-title-vi-protection-from-discrimination-based-on-shared-ancestry-or-ethnic-characteristics/.

Other steps can also be taken. The ABA and other legal organizations should ensure that their DEI programs address Jewish identity and anti-Semitism. Organizations that have employees resource groups should form such groups for Jews. Organizations that observe ethnic heritage months should observe Jewish American Heritage Month. We also recommend training on anti-Semitism for ABA members, government lawyers, and lawyers in private practice. This training, which could be for CLE credit, should include discussion of the IHRA definition.

Sincerely,

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