

February 16, 2024

**Via Email**

Chair Craven and Members of the Board of Elementary and Secondary  
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**Re: January 23, 2024 BESE Meeting**

Dear Chair Craven and Members of the Board:

We write on behalf of the American Civil Liberties Union of Massachusetts (“ACLUM”). We applaud the recognition by the Board of Elementary and Secondary Education (“the Board” or “BESE”) that the Commonwealth has an obligation to address discrimination, including antisemitism, in Massachusetts schools. ACLUM takes no position on the conflict in Israel and Palestine. ACLUM is firmly committed, however, to ensuring that both free expression and anti-discrimination principles are appropriately honored in the Commonwealth’s schools. We write now to express concerns regarding the Board’s January 23, 2024 meeting and its potential support for the International Holocaust Remembrance Alliance’s (“IHRA”) definition of antisemitism.

**Background**

At the Board’s January 23 meeting,<sup>1</sup> Chair Craven announced that she had invited a panel of five individuals to speak about the issue of antisemitism in Massachusetts schools. Neither the panel nor the topic of antisemitism were included on the public meeting agenda, as required by Massachusetts Open Meeting Law. The panelists spoke in favor of adoption of the IHRA working definition of antisemitism, among other things. During public comment, which occurred at the beginning of the meeting,

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<sup>1</sup> Video of the meeting is available at  
<https://livestream.com/madesestreaming/events/11073409/videos/239597676>.

several members of the public discussed the issue of antisemitism and expressed viewpoints that were generally similar to those of the panelists, including urging the adoption of the IHRA definition of antisemitism.

After the panel concluded, Member Moriarty stated that “in street protests, the terms ‘colonialism’ and ‘genocide’ are shouted freely, and resonate not simply as propaganda and accusations, but as ancient, antisemitic blood libel.” He urged that the Department of Elementary and Secondary Education has an obligation to closely examine curricula to ensure that no instruction in any schools prompt any level of antisemitism and suggested that the Department could play a role in “identifying sound curricula” accordingly. Member Stewart noted that the Board has a specific and limited purview and suggested that the Board consider passing a resolution supporting the IHRA definition of antisemitism as a statement of its values. Chair Craven suggested that the Board continue to address the issue of antisemitism in future.

### **Open Meeting Law**

We are concerned that the topic of antisemitism was not included in the public agenda for this meeting.<sup>2</sup> Under the state Open Meeting Law (“OML”), G.L. c. 30, § 20 requires advance notice of public meetings, including a “list of all topics that the chair reasonably anticipates ... will be discussed at the meeting” and requires that the list “be sufficiently specific to reasonably inform the public of the issues to be discussed at the meeting.”<sup>3</sup> The requirement is not a mere technicality, but instead serves to ensure that members of the public are informed of what public officials are discussing, have the opportunity to be heard, and, in turn, that the Board has the opportunity to learn from them.

The January 23 meeting was not conducted consistent with the spirit of these legal standards. As the public comment period demonstrated, some individuals were aware that the Board would be hosting a panel on antisemitism at this meeting, but the general public was not. The Board and the public were not best served by hearing only from individuals who share similar viewpoints. Of course, the members of the public who spoke at the meeting had the right to share their perspectives and inform the Board of their experiences. But the rest of the general public — including those who have strong concerns about the experience of Palestinians, Israel’s conduct of the ongoing war, and the related conduct of the United States — should have been given

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<sup>2</sup> Agenda available at <https://www.doe.mass.edu/bese/docs/fy2024/2024-01/>.

<sup>3</sup> Open Meeting Law Guide and Educational Materials (January 2028), p. 10, available at <https://www.mass.gov/doc/open-meeting-law-guide-and-educational-materials-0/download#:~:text=Meeting%20notices%20must%20be%20posted,be%20discussed%20at%20the%20meeting.>

and should now be given this same opportunity before the Board takes any further steps on these matters.

### **Protecting Free Expression**

We agree with the Board that Massachusetts schools must address antisemitism, just as they must address anti-Palestinian, anti-Arab, and anti-Muslim bias and all other forms of discrimination prohibited under state and federal law. But in so doing, schools may not infringe the fundamental speech rights enshrined in Article 16 of the Massachusetts Declaration of Rights, the First Amendment of the United States Constitution, and state law protecting student speech, G.L. c. 71, § 82.

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,” *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), because public schools are “nurseries of democracy.” *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021). Through learning to formulate and express their own views, students learn to think for themselves and to experience firsthand the fundamental precept that “in our constitutional constellation . . . no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). By being exposed to ideas they may not hear at home and viewpoints with which they may disagree — and even be offended by — students learn the values of being open to new ideas and of tolerating a diverse range of views and are better prepared to participate in a democratic society. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2431 (2022).

Accordingly, both the First Amendment and Article 16 ensure that “[neither] students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Further, G.L. c. 71, § 82 forbids suppression of student speech that is within the bounds of constitutional protection and does not cause actual disruption or disorder, *Pyle v. Sch. Comm. of South Hadley*, 423 Mass. 283 (1996), or qualify as bullying under G.L. c. 71, § 37O, *Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 511-12 (1st Cir. 2021).

Neither criticism of Israel nor advocacy for the rights of Palestinians is inherently disruptive. While allegations that the actions of the Israeli government are racist, colonialist, or genocidal, or that Israel is an apartheid state, may be controversial and upsetting to some, that fact alone does not render such speech disruptive or a call to harm Jews or Israelis. And, indeed, such political speech is “at the core of what the First Amendment is designed to protect,” *Virginia v. Black*, 538 U.S. 343, 365 (2003), and is speech for which Article 16 provides even greater protection, *see, e.g., Barron v. Kolenda*, 491 Mass. 408, 420-21 (2023).

We therefore strongly urge the Board not to adopt or promote any definition of antisemitism which deems criticisms of Israel or Zionism to be antisemitic and therefore disruptive or otherwise forbidden *per se*. The IHRA definition does just that, including by suggesting the following examples of antisemitism:

- “Denying the Jewish people their right to self-determination; e.g. by claiming that the existence of a State of Israel is a racist endeavor”; and
- “Applying double standards by requiring of [Israel] a behavior not expected or demanded of any other democratic nation.”<sup>4</sup>

Even the main drafter of the IHRA definition, Kenneth Stern, has in recent years urged against its use as a means of suppressing speech due to its frequent deployment as “a blunt instrument to label anyone an antisemite.”<sup>5</sup> Indeed, the IHRA definition has in practice been used to undermine the free expression rights of scholars and pro-Palestinian activists.<sup>6</sup>

While proponents of the IHRA model often present it as a “consensus” definition, it is not; in fact, it has been and continues to be vigorously criticized, including by scholars from a wide range of perspectives.<sup>7</sup> Because the Board only heard from panelists and members of the public who shared similar views with one another, meeting attendees

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<sup>4</sup> International Holocaust Remembrance Alliance, *Working definition of antisemitism*, <https://holocaustremembrance.com/resources/working-definition-antisemitism>.

<sup>5</sup> Human Rights Watch, *Letter to Co-Sponsors of Proposed ABA Resolution 514 on Antisemitism* (Jan. 26, 2023),

<https://www.hrw.org/news/2023/01/26/human-rights-watch-letter-co-sponsors-proposed-aba-resolution-514-antisemitism>. Indeed, in a *Boston Globe* piece published just this week, Kenneth Stern explained that the IHRA definition “was designed primarily for European data collectors ... and to guide the data collection process. There were examples about Israel, not to label anyone an antisemite but because there was a correlation, as opposed to causation, between certain expressions and the climate for antisemitism. But it was never intended to be weaponized to muzzle campus free speech.” Kenneth Stern, *I wrote a definition of antisemitism. It was never meant to chill free speech on campus*, *The Boston Globe* (Feb. 15, 2024), <https://www.bostonglobe.com/2024/02/15/opinion/kenneth-stern-antisemitism-ihra-free-speech/>.

<sup>6</sup> Such “politically motivated instrumentalization of the fight against antisemitism” has led the United Nations Special Rapporteur E. Tendayi Achiume to caution against adoption of the IHRA definition. See Special Rapporteur E. Tendayi Achiume, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance* (October 7, 2022), <https://www.ohchr.org/en/documents/thematic-reports/a77512-combating-glorification-nazism-neo-nazism-and-other-practices>, at 14-16; see also *supra* n.5.

<sup>7</sup> Concern about the misuse of, and/or the plain text of, the IHRA definition among scholars of Jewish Studies and related fields is so acute that it has given rise to two mainstream, independent projects aimed at developing alternative definitions. See *The Jerusalem Declaration on Antisemitism*, <https://jerusalemdeclaration.org/> (with approximately 350 academic signatories); *The Nexus Document*, <https://israelandantisemitism.com/the-nexus-document/> (drafted by a task force affiliated with the University of Southern California and Bard College).

may have come away with the incorrect impression that there is widespread consensus as to the suitability of the IHRA definition or similar approaches to defining antisemitism and using such definitions in our schools.

As members of the Board acknowledged during the meeting, BESE has a limited purview and does not have authority to dictate school districts' curricula or to require them to adopt certain rules or policies. However, as members also acknowledged, BESE has the power to "set the tone" for Massachusetts schools. Accordingly, we urge BESE not to adopt a statement of support for the IHRA definition of antisemitism, including because it is likely to encourage schools to adopt or apply it in ways that will have an unconstitutional chilling effect on protected speech in the schools of the Commonwealth.

### **Conclusion**

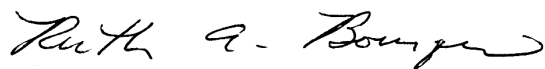
ACLUM supports Massachusetts schools taking steps to address all forms of discrimination, including antisemitism, in Massachusetts schools. If the Board is going to directly engage in this area, we urge it to seek out a broader range of public views and to also address bias against Palestinians, Arabs, and Muslims. And, in considering any measures to address discrimination, we urge the Board to be cognizant of its legal obligations to do so in a manner that protects the speech rights of students, teachers, and staff.

Please do not hesitate to contact the ACLU of Massachusetts if you have any questions or would like to discuss these matters with us.

Sincerely,



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Free Expression Staff Attorney



Ruth A. Bourquin  
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