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**Washington, D.C., January 30, 2017:** Yesterday, the Louis D. Brandeis Center for Human Rights Under Law (LDB) ([www.brandeiscenter.com](http://www.brandeiscenter.com)) sent a letter to Stoughton Public Schools District (Stoughton), urging the District to retract the unfair disciplinary measures that its teacher, Hillary Moll, has suffered for standing up against anti-Semitism. In September, LDB previously wrote to Stoughton on behalf of another teacher, Stella Martin, based on unfair discipline against her following her attempt to educate students about anti-Semitism and bigotry, as a response to this same anti-Semitic incident. (LINK: <http://brandeiscenter.com/ldb-urges-stoughton-public-schools-not-to-punish-teachers-for-speaking-out-against-anti-semitism/>) LDB is now writing on behalf of Ms. Moll, as her disciplinary hearing will begin this week. LDB is a national, non-profit civil rights organization committed to combating anti-Semitism.

"Of particular concern is the chilling effect that punishing Ms. Moll will have on teachers and students within the District who wish to stand up to anti-Semitism and bigotry," said LDB attorney Jennifer Gross. "In moments of hate, we must support those who stand up to hate speech," added Gross. "Teaching students that adverse consequences may follow if they dare to call out hateful actions for what they are sends exactly the wrong message about tolerance and inclusivity."

In November 2016, a Stoughton High School senior ("John Doe") posted a swastika made on the school's "Spirit Wall." When another student asked him to remove the swastika, Doe made an offensive and disturbing comment about taking down and burning the swastika, "the way they burned the Jews." Other students reported his actions, and Doe served a six-day suspension.

As will happen in a high school, news of the incident spread. The swastika was displayed in public and observed by other students. The incident was not a secret among the students, nor was Doe's identity, or his punishment.

After learning of the incident, Ms. Moll decided to recant a college letter of recommendation that she wrote on behalf of the offending student. In describing to that university's dean of admissions why she decided to recant the letter, Ms. Moll stated that due to the student's hateful speech, she felt that her assessment of his character in the recommendation letter is no longer accurate. She made no further statements about the student or the incident, and simply followed her pedagogical and ethical obligation to call out the drawing of a swastika for what it is: hate speech.

In its letter, the Brandeis Center argued that the student's actions clearly comprise "hate speech," and that the district's decision to the contrary is based on an erroneous definition of the term.

"Hate speech," as customarily defined, covers a single or multiple actions that, while not per-se illegal, seek to insult or intimate a person based on some immutable characteristic-such as gender, race, religion, or national origin. While publicly referring to the burning of other human beings and evoking the symbols of Nazi Germany is not by itself an illegal act, few would doubt that this appalling behavior would not insult or intimidate other students; such actions clearly constitute "hate speech."

The school district, however, though it nowhere previously defined "hate speech," deviated from this standard definition of the term. For the purposes of investigating this incident it decided ad-hoc to define "hate speech" as "a pattern of behavior and a clear indication to do harm." Because the student's conduct did not recur, the District determined that it did not constitute hate speech. But "hate speech" is universally defined by its content, not the intent of the speaker, nor does "hate speech" require a series of actions-a single action, such as the drawing of a swastika or referring to Jews burning in ovens, suffices.

The Brandeis Center urges Stoughton to reverse its current position, retract Ms. Moll's punishments, issue an apology, and take similar measures to support other Stoughton teachers who have been punished for speaking out against anti-Semitism.

The text of LDB's letter can be found below:

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January 29, 2018

**VIA EMAIL**

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***RE: Hillary Moll; Letter of concern over discipline for responding to anti-Semitic incident at Stoughton High School***

Dear Ms. Rizzi and Members of the Stoughton School Council:

We write on behalf of the Louis D. Brandeis Center for Human Rights Under Law ("the Brandeis Center") in support of Stoughton High School ("Stoughton") teacher Hillary Moll, who was suspended without pay for her statement to an administrator at the Massachusetts Marine Academy regarding an anti-Semitic hate speech incident at Stoughton. The Brandeis Center is a

national public interest advocacy organization dedicated to fighting anti-Semitism in education through legal advocacy, best practices, and policy initiatives. We bring unique expertise to such matters: our President and founder, Kenneth L. Marcus, served as Staff Director at the U.S. Commission on Civil Rights and was delegated the authority of Assistant Secretary of Education for Civil Rights. Mr. Marcus is also a noted expert on anti-Semitism and the author of *The Definition of Anti-Semitism* (Oxford University Press: 2015) and *Jewish Identity and Civil Rights in America* (Cambridge University Press: 2010).

We followed the events at Stoughton High School in late 2016 and early 2017, and are concerned about the lack of response to anti-Semitic incidents and the punishment of three teachers – including Ms. Moll – who did their best to appropriately respond to those incidents without the support of the school or the district. In September of 2017, we sent you a letter in support of Stella Martin, another of the three teachers, who was formally reprimanded for engaging her Senior Honors English class in a brief discussion of anti-Semitism and hate speech. Ms. Martin sought to take advantage of a teaching moment and should have been lauded. Indeed, she was lauded by the majority of the community. However, whether to appease the parent of the offending student, in a misguided attempt to control the narrative, or for some other, unexplained reason, Ms. Martin was reprimanded, in violation of best practices and her First Amendment rights.

We understand from our review of the primary documents related to the suspension of Ms. Moll, and conversations with involved parties, that Stoughton purports that this punishment is justified because Ms. Moll described the anti-Semitic incident as *hate speech*, when the school principal and superintendent’s opinion was that the incident should not be described as *hate speech*. We believe it is unfair to punish Ms. Moll for describing the incident – which involved a swastika, and a statement to a Jewish student about “burning it the way they burned the Jews” – as *hate speech*, for two reasons. First, we believe the incident clearly does involve hate speech, and that to treat it otherwise sends exactly the wrong message to the Stoughton students, teachers, and community. Second, we believe the statement by Ms. Moll is protected by the First Amendment of the Constitution.

It is of particular concern to us that Ms. Moll’s suspension will have a chilling effect on other teachers in the Stoughton community, who should not fear punishment for calling out incidents of hate. We are also concerned that, by example, the school is teaching its students that words and symbols of hate directed at Jews (or people of any race, ethnicity, religion, gender, or sexual orientation) are somehow not *hate speech* – and excusable – if the speaker “only” intended it as a joke.

## **I. BACKGROUND**

The underlying facts are as follows.<sup>1</sup> On November 22, 2016, several students were decorating the “Spirit Wall,” part of an annual tradition at Stoughton, when one student (“John Doe”), displayed a swastika made of tape in the room full of students. Another student was upset by the swastika and told him to take it down. John Doe responded that he should *take the swastika down and burn it, the way they burned the Jews*.<sup>2</sup> Another student sought out a teacher to report the incident, the teacher reported the incident to the administration, and John Doe served a six-day suspension.

As will happen in a high school, news of the incident spread. The swastika was displayed in public and was observed by other students, who were free to discuss the incident with each other, and did so. Thus, the incident was not a secret among the students, nor were John Doe’s identity and his punishment.

Ms. Moll had written a letter of recommendation to the Massachusetts Maritime Academy (“MMA”) for John Doe. Upon learning what he had done, Ms. Moll contacted MMA to withdraw the letter of recommendation. Although the *Ryan Investigation Report* makes much of the fact that Ms. Moll contacted MMA directly, rather than withdrawing the letter of recommendation from Navient, a database of letters of recommendation used by many colleges, Ms. Moll never could have withdrawn the letter from Navient. MMA does not use the Navient database, thus Ms. Moll had sent her letter to MMA directly.

When Ms. Moll first contacted MMA to withdraw her letter of recommendation for John Doe, she did not offer any information about her reasons for doing so. Later, the Dean of Admissions placed a call to her to ask if she would explain why she withdrew her letter. According to Ms. Moll’s interview with Investigator Ryan, Ms. Moll explained that she had new concerns about the character of John Doe after a recent incident involving John Doe and anti-Semitic hate speech. *Ryan Investigation Report*, § V(14).

Notably, Ms. Moll used the term *hate speech* – not hate crime. According to Stoughton’s principal, MMA’s report of the conversation is consistent with Ms. Moll’s: “Ms. Moll stated that [John Doe] was involved in an incident that was ‘racially insensitive in nature involving a drawing and a hate speech problem.’” *Ryan Investigation Report*, § V(15).

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<sup>1</sup> Aside from the information reported to us, we reviewed correspondence from the school district, news reports, and other primary and secondary documents, including a document by Regina M. Ryan, Discrimination and Harassment Solutions, LLC, “Investigation of a Complaint by [the mother of John Doe], Findings of Fact, Conclusions and Recommendations” (January 10, 2017), recommending formal reprimand of Ms. Moll (hereinafter, *Ryan Investigation Report*).

<sup>2</sup> These facts are taken from the investigation report, except for the description of the comment, which is left out of this and all documents and correspondence from Stoughton, which simply say that the offending student “made a comment.” *Ryan Investigation Report* at p. 4, § V(9). To say the offending student simply “made a comment” greatly understates the nature of the incident.

John Doe's acceptance to MMA was initially revoked, which was undoubtedly very upsetting to him.<sup>3</sup> At about the same time, according to his mother, John Doe was also upset when he realized the extent to which the swastika incident had become the subject of conversation at Stoughton, and that many students were offended by and condemned his actions.

John Doe's mother ("Ms. Doe") made a formal complaint accusing Ms. Moll (and at least two other teachers) of "bullying" John Doe. She alleged, *inter alia*, that Ms. Moll engaged in bullying when she "called and emailed Mass Maritime Academy but she was never involved in the incident and had no right to release any information regarding my son," and that John Doe was "targeted, bullied, judged, and emotionally affected" by Ms. Moll, who "violated her son's rights."<sup>4</sup>

Despite Ms. Doe's accusations, there are two critical and apparently undisputed facts regarding Ms. Moll's contacts with MMA. ***First, Ms. Moll had every right to withdraw her letter of recommendation.*** She is not, and cannot be, punished for exercising this right. ***Second, Ms. Moll did not violate John Doe's privacy under the FERPA statute.*** Although the Ryan Investigation Report concludes that Ms. Moll did bully John Doe, this finding is not supported by the facts, even as reported in the *Ryan Investigation Report* itself. The elements of the applicable regulation proscribing bullying are clearly not satisfied.

We do not question that John Doe may be embarrassed, regret his actions, or that he is upset that his classmates have criticized his behavior. But his was an act done in public, and likely one that was intended to attract attention. One does not display a swastika in a room full of students decorating a "Spirit Wall" with the intention that no one see it. There is no right to privacy regarding a public act like this one, even if the actor regrets and is embarrassed over his behavior. This is particularly true with respect to the posting of controversial hate speech, such as a swastika.

The disciplinary action against Ms. Moll appears to be a ham-handed attempt to mollify a parent who (understandably) wishes that her son's serious, anti-Semitic acts could remain secret. But John Doe committed these acts in full view of others, and apparently he has discussed it with other students as well. He is responsible for his actions, and any shame or embarrassment he

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<sup>3</sup> We understand that John Doe has since been readmitted to MMA.

<sup>4</sup> *Ryan Investigation Report* at p. 1. Despite the accusation that Ms. Moll emailed MMA, the *Ryan Investigation Report* concludes that Ms. Moll did not, in fact, email MMA. *Ryan Investigative Report*, § V(17). This is one example of numerous concerns we have about potential bias on the part of Ms. Ryan during the investigation. Throughout her *Report*, Ms. Ryan relies on statements by Ms. Doe, without any corroborating support, although (1) Ms. Doe was not present during any of the events at issue, and (2) it is clear that there are untrue statements in Ms. Doe's initial complaint and her interview. At the same time, Ms. Ryan discredits Ms. Moll's statements based on what Ms. Ryan, alone, determined to be untruths in Ms. Moll's interview. Other concerns about Ms. Ryan – including that she is not an independent investigator, but actually a defense lawyer at a firm that defends public entities against employment claims – were mentioned in our previous letter. Since then, it has been reported to us that Ms. Ryan's law firm currently represents the Stoughton School District as defense counsel in another case. We will further address our concerns about Ms. Ryan's independence in a future letter regarding Jaime Regan.

incurs as a consequence. It is not only unfair to punish Ms. Moll; it is also, in our view, a violation of the First Amendment. And, most importantly to the Brandeis Center, the message that this discipline sends to the students and other teachers at Stoughton – that a swastika is not *hate speech* and that it is better not to stand up to discrimination – will likely have long-term, undesirable effects.

## **II. MS. MOLL SHOULD NOT BE DISCIPLINED FOR DESCRIBING THE INCIDENT AS “HATE SPEECH”**

### **A. Swastikas and References to the Burning of Jews in the Holocaust Are Correctly Characterized as Hate Speech.**

Underlying Stoughton’s position, and the investigator’s findings, is the assertion that the incident did not involve “hate speech and hate crimes.”<sup>5</sup> This finding is wrong – the incident clearly does constitute *hate speech*, even if it does not constitute a *hate crime*.

Stoughton repeatedly referred to *hate speech* and *hate crimes* together, as though they are the same. But *hate speech* and *hate crimes* are entirely different. Under the First Amendment, pure speech, no matter how hateful, cannot be outlawed. That fact does not make it any less hateful, or any less appropriately characterized as *hate speech*. At the same time, *hate crimes* generally consist of illegal forms of conduct – usually crimes against the person, such as assault, battery, or crimes against property, such as graffiti and other forms of property damage – where the victim was selected based on race, ethnicity, religion, gender, sexual preference, or another characteristic. Thus, *hate speech* is rarely deemed criminal, and *hate crimes* are rarely, if ever, based on speech alone.<sup>6</sup>

Here, Stoughton went to great lengths to inform the community that the actions of John Doe were not *hate speech*, but in doing so, clearly conflate (or confuse) *hate speech* with *hate crime*. For example, a letter from Superintendent Rizzi to all members of the school community regarding the incident stated:

There has been a lot of discussion regarding incidents at our high school which have been ***incorrectly described as hate speech and hate crimes***. I want to assure that this is an inaccurate portrayal of the matters. . . . it was determined that ***this was not a hate crime or hate speech***.

(Letter from M. Rizzi to Stoughton community (Jan. 27, 2017).) The assertion that a swastika is not hate speech is contrary to all common usage and understanding. For example, the Anti-Defamation League’s (ADL) database of hate symbols includes the swastika, with the following description, in part:

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<sup>5</sup> Letter from M. Rizzi to Stoughton community (Jan. 27, 2017).

<sup>6</sup> A potential exception to the rule that hate speech, as speech, cannot be outlawed is the case of harassment.

Since 1945, the swastika has served as the most significant and notorious of hate symbols, anti-Semitism and white supremacy for most of the world outside of Asia. Its display is prohibited in Germany and some other countries, leading some right-wing extremists to devise variants or alternatives to the swastika that would evoke a similar effect. In the United States, the swastika is overwhelmingly viewed as a hate symbol. [See <https://www.adl.org/education/references/hate-symbols/swastika>.]

The failure to characterize a swastika and a reference to the burning of Jews in ovens during the Holocaust as hate speech teaches students exactly the wrong lesson about hate speech, civility, and discrimination, and, quite frankly, hate itself. Speech is no less hateful just because it doesn't constitute a crime. Indeed, if only illegal speech were deemed hate speech, there would be no hate speech in this country at all.

The same letter also offers an odd definition of hate speech – one we have never seen before, that is inconsistent with the definitions routinely used, and that is nowhere in Stoughton's Employee Handbook, Code of Conduct, or any other resource available to us. The letter states, "Hate speech is indicated by a pattern of behavior and a clear indication to do harm." (Letter from M. Rizzi dated Jan. 27, 2017.) Based on this "definition," the letter concludes that the incident does not constitute hate speech because this particular incident, alone, does not constitute a pattern, and was intended as "*an attempt to be funny.*" *Id.*

It is as though this "definition" was drafted on the fly, with the intent of excusing the behavior as a joke that just didn't go over well.<sup>7</sup> Ms. Rizzi's letter is exactly contrary to best practices. [See, e.g., Anti-Defamation League, "Zero Indifference: A Guide to Stop Name Calling and Bullying," <https://www.adl.org/sites/default/files/documents/assets/pdf/education-outreach/Zero-Indifference-A-Guide-to-Stop-Name-Calling-Bullying-color.pdf>, "Refuse to sanction behavior as joking").]

Regardless, hate speech is universally identified by its content, and not the intent of the speaker. This is how the term is commonly used, by lay people, by experts and advocates who work in the field of discrimination and harassment, and by internet-based companies that enforce rules prohibiting hate speech on social media, where hate speech is a top priority of late.<sup>8</sup> It is impossible to imagine how we would employ a standard where the intent of the speaker determines whether or not speech is hateful – how would we judge the speakers' intent? What message are we sending to students and all members of our community that are the subject of such hate speech? That your fellow students' statements are just fine, because those words he or

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<sup>7</sup> Alternatively, perhaps there is confusion with the crime of harassment, which can be a hate crime.

<sup>8</sup> Google, for example, defines hate speech by content, not intent: "content that promotes hatred or violence towards groups of people based on race or ethnic origin, religion, disability, gender, age, veteran status, or sexual orientation/gender identity." *Terms and Policies: User Content and Conduct Policy*. Google Inc., available at: <https://www.google.com/intl/en/%2B/policy/content.html>.

she used to describe your race, religion, ethnicity, gender identification, disability, or sexual preference are funny?

Also contrary to the definition that Rizzi set forth, hate speech can occur as a singular incident or randomly. No particular number or pattern of incidents is relevant. A single swastika can constitute hate speech.

[See, e.g., *Responding to Hate: Information and Resources*. Anti-Defamation League, at 6 (2016), available at <https://www.adl.org/sites/default/files/documents/adl-responding-to-hate-info-resources-2016.pdf> (a hate incident includes “the display [of] a flag with a Nazi Swastika,” or “writing a [single] derogatory post about women”).]

We note that other local school districts, including the districts in Sharon, Natick, Milton, and Newton, saw similar incidents. But the officials in those districts did not seek to publicly excuse hate speech, including display of the swastika, as poorly-received attempts at humor, or on any other basis. That Stoughton seeks to do so is of great concern to us, not because we believe John Doe was inadequately punished – we take no position on that – but because of the danger of teaching John Doe and the other students at Stoughton that a swastika and a “joking” reference to the burning of Jews in ovens during the Holocaust is anything but hate speech, or that hate speech is simply excused if the speaker intended to get a laugh from fellow classmates.

#### **B. Punishment of Ms. Moll for Using the Term *Hate Speech* Violates Her First Amendment Rights.**

Stoughton is not punishing Ms. Moll for withdrawing her letter of recommendation, but for what she said when asked by MMA *why* she was withdrawing her recommendation of John Doe. The content of that conversation is, of course, speech. Ms. Moll was found to be responsible for bullying John Doe – essentially, bullying the bully – and the basis for that finding was her use of the term *hate speech* in the telephone conversation with MMA’s Dean of Admissions.

Ms. Moll’s telephone conversation with MMA is covered by the First Amendment, and her statement that the incident involved hate speech – her viewpoint – cannot be punished. Indeed, it is black-letter law that the government (including public school districts) may not regulate speech based on viewpoint. Thus, Ms. Moll is entitled to withdraw her letter of recommendation, and she is entitled to explain her reasons for doing so. Unless Stoughton disputes these facts – and it has not done so thus far – it cannot regulate the content of that conversation.

Moreover, a school district can never restrict a teacher’s speech unless the speech violates a specific rule, and the teacher has notice of that rule. As we explained in our previous letter, the First Amendment prohibits a school district from punishing a teacher *even for speech in the classroom*, unless the teacher has notice that the speech is prohibited. This was not speech in the classroom, of course, and Stoughton would have to meet a very high standard to justify any rule regulating this speech. But Stoughton has no written definition of hate speech. Nor does



Stoughton offer any written rule that clearly indicates that Ms. Moll's statements were prohibited. Thus, Ms. Moll could not possibly have known that describing this incident as hate speech was punishable.

Stoughton has raised FERPA in previous correspondence. FERPA is an example of a rule that does place restrictions on speech, as it prohibits sharing educational records. Of course, the teachers have notice of FERPA, and FERPA does not ban speech by viewpoint, thus proper enforcement of FERPA does not, on its face, violate teachers' constitutional rights. But *there is no FERPA issue here. Ms. Moll is not even accused of violating FERPA.* Thus, FERPA does not provide any cover for Stoughton's violation of the First Amendment here.

Essentially, Stoughton is punishing Ms. Moll for expressing her opinion that posting a swastika and a comment to a Jewish student referencing "the way they burned the Jews" constitutes hate speech. Punishing her for expressing that opinion is clearly unconstitutional.

### **III. CONCLUSION**

The Brandeis Center reiterates our support for Ms. Moll and urges Stoughton to retract her punishment. We are particularly concerned about the message that Stoughton sends, both by pursuing this case against Ms. Moll (and Ms. Martin and Ms. Regan), and by Superintendent Rizzi's January 2017 letter attempting to mollify the concerns of parents by denying that hate speech was involved. Quite frankly, we find Stoughton's denial that this incident involves hate speech to be irresponsible at best.

In our view, it is inappropriate and unfair to suspend a teacher, without pay, for describing a public posting of a swastika and a hateful, crude comment about "the way they burned the Jews" as hate speech. In our view, such language clearly is hate speech. To punish Ms. Moll for describing it as such is tantamount to denying that it is hate speech, and, in this context, essentially teaches the student body that the symbolism of the Holocaust is acceptable, and not hateful, and that comparisons to the burning of Jews is also not hate speech, so long as the speaker thinks that the reference is funny.

We remain interested in working cooperatively to implement best practices for addressing and preventing anti-Semitism in the Stoughton Public Schools District. If you would like more information or to discuss these matters further, we are available via phone at (202) 559-9296 or at the email addresses listed below.

Sincerely,



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