AMERICANS UNITED
FOR SEPARATION OF CHURCH AND STATE

Amrita Singh
State Legislative Counsel

(202) 466-3234 x
(202) 898-0955 (fax)
americansunited@au.org

1901 L Street, NW
Suite 400
Washington, DC 20036

February 2, 2016

Senator Joan Carter Conway
Chair, Senate Education, Health &
Environmental Affairs Committee
Miller Senate Bldg #2 West
Annapolis, MD 21401

Senator Paul G. Pinsky
Vice-Chair, Senate Education
Health & Environmental Affairs Committee
11 Bladen St
Annapolis, MD 21401

Re: SB 267 – An Unconstitutional Bill Allowing School Prayer at All Events in Public Schools

Dear Chair Conway and Vice-Chair Pinsky:

On behalf of its Maryland members, Americans United for Separation of Church and State urges you to oppose SB 267. This bill would *require* all Maryland public schools to allow student prayers at *all* mandatory and voluntary school-sponsored events. The bill has many flaws, including that violates the United States Constitution by serving a religious purpose, it requires schools to hold prayers even where prohibited by the United States Constitution, and creates an administrative nightmare for schools and school districts. Furthermore, it opens schools up lawsuits when they are forced to choose between violating state law or violating the Constitution.

Public-school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[1] this right is not without limit. They already have the right to express their religious beliefs and engage in genuinely student-initiated, student-led and voluntary prayer. But this bill fails to set out the proper limitations of that right. As the Supreme Court held in *Santa Fe Independent School District v. Doe*,[2] presentation of prayers by students at school-sponsored events unconstitutionally coerces other students to participate in that religious activity.

<u>This Bill Violates the Constitution by Solely Serving a Religious Purpose</u>

The Establishment Clause of the United States requires that the state have a secular legislative purpose.[3] This bill, in contrast, serves a solely religious purpose. Indeed, the only goal of this bill is to require that schools allow prayer at school-sponsored events. In *Wallace v. Jaffree*,[4] the Supreme Court struck down a law that amended the state's moment of silence law to include that the moment of silence could be used for "voluntary prayer." The Supreme Court explained that "the addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice."[5]

[1] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).
[2] 530 U.S. 290, 305 (2000).
[3] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
[4] 472 U.S. 38, 59 (1985).
[5] *Id.*

The message here is the same—that prayer is preferred over all other speech, and therefore, religion, is preferred over non-religion. In addition, the bill creates a mechanism for allowing prayer, but not any other type of speech. The bill, therefore, is unconstitutional.

This Bill Violates the Constitution by Coercing Students into Participating in Prayer

It is beyond dispute that, at a minimum, the Establishment Clause of the U.S. Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[6] Even though this bill labels prayers at school-sponsored events "voluntary" does not make them so. Indeed, the United States Supreme Court has ruled otherwise, striking down student-led prayers at football games because the prayers coerced all students in attendance to participate.[7]

Similarly, the bill attempts to skirt the Constitution by claiming that the prayers "may not be construed as an action of" a school to "support, approve, or sanction" or endorsement of the prayer. But such an assertion is meaningless when constitutional jurisprudence says otherwise. The United States Supreme Court has ruled that "the actual or perceived endorsement" of the prayers "is established by factors beyond just the text of the policy."[8] Indeed, in *Santa Fe Independent School District v. Doe,* the Court held that the voluntary, student-initiated invocations in question violated the Establishment Clause, in part, because they were "authorized by a government policy and [took] place on government property at government-sponsored school-related events."[9] Prayers at school-sponsored events, even if led by students, "bear 'the imprint of the state'" and thus, are considered action by the state in the context of the Establishment Clause. This bill cannot escape that result.

This Bill Violates the Religious Freedom of Students

Public schools are open to all and all students should be made to be feel welcome, regardless of their faith. SB 267, however, would allow students of the majority religion to saturate all school events with their prayer, violating the religious freedom of other students, particularly those of minority faiths. When prayers take place at mandatory school events, the students who are required to attend are a captive audience and thus are coerced to participate in religious exercise, which could violate their own faith or make them feel like outsiders in their own school. Holding prayers at voluntary events could limit the ability of students to participate in extracurricular activities. The Maryland legislature would better serve students by adhering to the United States Constitution.

This Bill Would Create Logistical Nightmares for Schools

SB 267 would allow for prayers at all school sponsored events. This would include all assemblies, athletic events, and graduation ceremonies. Because the language of the bill fails to define "event" it could also even include *all* other school sponsored events such as cheerleading, swim, and wrestling practice; Spanish and math club, debate team, and honor society meetings; and 4-H club meetings, just to name just a few. Some schools can have close to 100 school sponsored clubs and more than a dozen athletic teams. At each of these school sponsored events, time would have to be allotted for any and all students to give their prayers if they desire. If schools want to limit the number of students who could provide prayers at school sponsored

[6] *Lee v. Weisman*, 505 U.S. 577, 587 (1992).
[7] *Santa Fe*, 530 U.S. at 305. *See also Ingebretsen v. Jackson Pub. Sch. Dist.,* 88 F.3d 274, 281 (5th Cir. 1996) (invalidating state statute allowing student-initiated, nonsectarian prayer at school sporting and other events);
[8] *Id.* at 307.
[9] *Id.* at 302.

events, they would be responsible for many new tasks, including setting up mechanisms to ensure that prayers are allowed when requested, for choosing students to speak, assigning students speaking dates and assignments, ensuring students show up to speak. School administrators do not need to add additional logistical and legal responsibilities to their busy workload.

Of course, if a school does choose to adhere to the state law, it will also open itself up to costly and time consuming litigation, as adherence would run afoul of the Establishment Clause.

Conclusion

Americans United supports the right of students to voluntarily profess their religious beliefs, where that expression falls within the confines of constitutionally-protected speech. This bill, however, does not accurately distinguish between speech permitted and prohibited by the Establishment Clause of the U.S. Constitution. As noted in *Santa Fe*, "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear . . . to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."[10] If the state would like to ensure religious freedom in its public schools, SB 267 is not the way to achieve this goal as it will create more confusion than clarity and invite costly lawsuits.

For the reasons enumerated above, we strongly urge to you **SB 267.**

Sincerely,

Amrita Singh
State Legislative Counsel

[10] *Santa Fe*, 530 U.S. 290, 312 (2000) (quoting *Lee*, 505 U.S. 577, 592).