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REPORT ON LEGISLATION BY THE CIVIL RIGHTS COMMITTEE AND THE EDUCATION AND THE LAW COMMITTEE

A.8800-A **M. of A. Castro**
S.6087-A **Sen. Golden**

AN ACT to amend the education law, in relation to authorizing religious meetings and worship in school buildings and school sites.

THIS BILL IS OPPOSED

The New York City Bar Association (the "City Bar") is a voluntary membership organization of more than 23,000 attorneys who work in private practice, public and governmental service and academia. The City Bar has a long and distinguished history of supporting and protecting the civil rights and liberties of all New Yorkers. The proposed legislation deals with the scope of appropriate activity of religious organizations in public facilities. Its supporters and opponents agree that it involves fundamental issues of constitutional liberty. As a result, the proposal merits careful and reflective analysis.

SUMMARY OF RELEVANT STATUTORY LAW

Pursuant to Section 414 of the Education Law, school districts may adopt reasonable regulations for the use of school property (i) when it is not in use for school purposes, or (ii) if the property is in use for school purposes, when the proposed use would not disrupt normal school operations. The regulations must provide for the safety and security of the pupils. School districts may, subject to these regulations, permit the use of school property for a variety of purposes, including, for example, arts instruction, civic or social meetings, election polling and athletic events. In the case of social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community, such uses must be non-exclusive and open to the general public. The City of New York is expressly permitted to prohibit any use of schoolhouses and school grounds within its district that would otherwise be permitted under Educ. Law sec. 414.

THE PROPOSED BILL

S.6087-A/A.8800-A (the "Bill") proposes three amendments to Education Law sec. 414: (i) it strips away New York City's existing authority to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under Education Law sec. 414; (ii) it adds "religious" to the types of meetings that school districts may permit in schoolhouses or on

school grounds when they are not in use for school purposes or when such use would not be disruptive of normal school operations, subject to the existing caveat that such uses must be non-exclusive and open to the general public; and (iii) it provides that school districts cannot "adopt or interpret regulations for the use of schoolhouses, grounds or other property . . . that would result in the exclusion or limitation of speech, during non-school hours, even where students may be present, including speech that expresses religious conduct or discusses subjects from a religious viewpoint."

THE CITY BAR OPPOSES THE BILL

The City Bar opposes the Bill because it is overbroad, unnecessary and likely to lead to confusion, litigation and potential Establishment Clause violations.

First, to be clear as to what the Bill does *not* do: current school district policies that permit religious groups to use public schools during non-school hours for activities such as religious instruction, religiously-oriented discussion groups, bible study or prayer groups are unaffected by the Bill.

Rather, at its heart, the bill is intended to prevent the Department of Education (the "DOE") of the City of New York (the "City"), and all other New York State school districts, from enacting or enforcing policies which prohibit the conduct of *worship services* in public schools. Purporting to support "maximum access" to public facilities for religious organizations, the proposal would instead constitute an infringement on the religious liberty of all New Yorkers and would lead school districts into a morass of Establishment Clause problems. Because it would also have the effect of favoring one religion over others and favoring religion over the rights of non-religious individuals, the City Bar believes the proposal represents unsound public policy and should not pass.

BACKGROUND

The current DOE policy barring worship services from the City's public schools was upheld by the United States Federal Court of Appeals for the Second Circuit (the "Second Circuit") in June of 2011 in Bronx Household of Faith v. Bd. of Education, 650 F.3d 30 (2nd Cir. 2011). When the U.S. Supreme Court declined to review that decision last December, the litigation regarding the enforceability of the DOE policy, which had lasted more than fifteen years (during which period the City Bar fully supported the City's position) was finally concluded.

The Second Circuit ruled that DOE and the City acted reasonably and constitutionally in prohibiting worship services. Worship, the Court held, is activity different in character from any other permitted in the public schools. It found that the regular, ongoing domination of a significant number of public schools by evangelical Christian churches' worship services every Sunday raised the real threat of a violation of the provisions of the U.S. Constitution prohibiting the "establishment of religion",[1] thereby clearly making the exclusion of this activity a reasonable exercise of the discretion granted to the City under the New York statute governing activities permitted in public schools. In the view of the City Bar, the policy adopted and enforced by the City was the only option available in these circumstances that complied with sound governance and the Constitution; that policy should not be permitted to be overturned by the proposed legislative enactment.

[1] 650 F.3d at 42.

Notably, as the Second Circuit recognized, the City's policy does not prevent churches or other religious groups from using school facilities for the same sort of activities for which they are used by other groups. For all groups petitioning for use of school facilities, the City must follow existing law and determine that activities will not be "disruptive of normal school activities" and qualify as "social, civic, recreational . . . and other uses pertaining to the welfare of the community" which are "non-exclusive and . . . open to the general public," as discussed above. In other words, the schools remain open to churches on the same basis and for the same purposes as any other qualified organization. The sole activity prohibited by the DOE policy is worship services - an activity that, by definition, cannot be conducted by any non-religious organization.

THE BILL IS UNNECESSARY AND OVERBROAD

While the proposed legislation would expressly expand the types of uses the City may permit to include "religious" activities, this change is unnecessary and largely uncontroversial, since religious uses or uses in which a religious viewpoint is expressed, including, for example, singing hymns, holding prayer groups, or providing religious instruction or bible study, are *already permitted* under the current DOE policy. The only thing prohibited under the DOE policy is worship services, and that is precisely what the proposed legislation seeks to overturn. In doing so, however, the Bill eliminates wholesale the City's discretion with respect to *all* speech that must henceforward be permitted in the public schools. Specifically, the Bill provides that local regulations would not be permitted to "*result in the exclusion or limitation of speech, during non school hours, even where students may be present...*". Therefore, while the proposed statutory change may intend to protect worship services from exclusion by explicitly stating that "speech that expresses religious conduct" cannot be restricted or excluded, it in fact would eliminate all restrictions on any speech during non-school hours. Schools would be barred, for example, from restricting a group's request to screen and discuss a sexually explicit film while student after-school clubs are meeting. School districts should not be stripped of all discretion to decide the safest, least disruptive and most manageable uses of school property just because speech is involved.

THE BILL RAISES SERIOUS ESTABLISHMENT CLAUSE CONCERNS

Supporters of the legislation have tended to focus on the second of the two principles relating to religion that are articulated in the First Amendment to the U.S. Constitution. They appeal to the principle which bars government from prohibiting the "free exercise" of one's religious beliefs. Their view is that the City's exclusion of worship services from public schools is precisely such a restriction on the "free exercise" of religion. Of course, as a general matter, religious organizations have every right to engage in expression in public facilities that is equal to the right enjoyed by secular organizations. But once worship services are involved, the matter at issue is not merely "equal access".

Significantly, the First Amendment provides that government must also "make no law respecting an establishment of religion". The Establishment Clause therefore prohibits laws whose purpose is to promote religion, and those whose principal or primary effect is one that advances religion, as the U.S. Supreme Court has held.[2] The prohibition against establishment of religion was

[2] Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

intended to protect citizens' right to practice any religion or not to practice any religion at all; religious freedom and diversity of belief are far more secure when government is prohibited from advancing one religion over others or even favoring religion over atheism or agnosticism. Because the DOE was appropriately concerned about the appearance of government endorsement of religion under the circumstances it was facing, its attendant adoption of its policy prohibiting the use of public schools for religious worship services properly reflected that concern, which is precisely how the Second Circuit saw it.

The "right of equal access" that supporters of the legislation seek to protect therefore cannot be considered absolute. It is no more absolute for religious organizations than for secular organizations. In all instances, including and particularly with respect to the proposed legislation, this right must yield to the government's obligation to avoid an Establishment Clause violation.

BRONX HOUSEHOLD OF FAITH: AN ESTABLISHMENT CLAUSE CAUTIONARY TALE

The record in the Bronx Household of Faith case makes overwhelmingly clear that the government has good reason to be concerned about Establishment Clause violations when religious groups are permitted to use public schools to hold worship services, as opposed to activities that would not constitute worship services. First, the case demonstrates how the Bronx Household of Faith and the school it uses for worship services - P.S. 15 - became intertwined in the minds of the community. It is undisputed that the performance of worship services is the defining event of any organized religion, and a pastor with the Bronx Household of Faith has explained that the Sunday worship service is the "indispensable integration point for our church." The clearly stated purpose of at least this particular church is to treat the schools where the worship services take place as "God's house."[3] As the Second Circuit observed in its ruling:

> When worship services are performed in a place, the nature of the site changes. The site is no longer simply a room in a school being used temporarily for some activity. [Bronx Household of Faith] has made the school the place for the performance of its rites, and might well appear to have *established* itself there. The place has, at least for a time, become a church.[4] [emphasis in original].

Second, the Court observed that during worship services "the schools are dominated by church use."[5] Congregants "use the largest room, or multiple rooms, sometimes for the entire day."[6] In some instances the church is the only outside organization using space in a school. "Accordingly,"

[3] Record on Appeal at 544, Bronx Household of Faith v. Board of Educ. of City of New York, 400 F.Supp.2d 581 (S.D.N.Y. 2005), *vacated and remanded*, 492 F.2d 89 (2d Cir. 2007) ["Record on Appeal".]

[4] 650 F.3d at 41.

[5] 650 F.3d at 42.

[6] Id.

the Court concluded, "on Sundays some schools effectively become churches."[7] The Second Circuit also noted that the church had held its worship services at the school (and nowhere else) every Sunday for nine continuous years.[8]

This "school as church" confusion highlighted by the Second Circuit may be based, in part, on the inherent nature of the mission of churches such as Bronx Household of Faith, which has indicated that it views its presence in schools as an opportunity to recruit congregants. As demonstrated in the litigation, it is commonplace for members of evangelical churches to distribute flyers, post signs and proselytize outside school buildings.[9] Congregations also advertise worship services at public schools using media advertisements, the Internet, and informal conversations with the public.[10] An official with the church observed that "church is God's method of evangelism, and that's why meeting in the schools is so important."[11] These concerns regarding the state's endorsement of religion become most acute when young students are involved; they may easily mistake the consequence of a facially neutral policy, which permits worship services to be held, for the endorsement of religion.[12]

Concerns about violations of the Establishment Clause are further exacerbated by the appearance that the government is promoting one religion over others. As a factual matter, New York City public schools are not equally available to all faiths. For example, in 2004-2005 more than 800 of the City's 1197 school buildings were reserved on Saturdays for school-sponsored activities – meaning these schools were unavailable for congregations that worship on that day.[13] More than 450 school buildings were reserved for school-sponsored activities on Fridays after school or in the evening – making these schools unavailable for a religious congregation that worships on those days or at those times.[14] Fewer than 300 school buildings, however, were reserved for school-sponsored activities on Sundays.[15] In reality, therefore, schools are far less

[7] Id.

[8] Id. The Court further noted that Bronx Household of Faith excludes from full participation in its activities any persons who are not baptized, those who have been excommunicated, as well as those who practice Islam. 650 F.3d at 43. Thus, its services were not open to the general public as required by the Education Law.

[9] Id.

[10] Record on Appeal at A329; A776; A832; A697-698; A706-708; A713-714; A731-732; 737-739; and A745-749.

[11] Record on Appeal at A557. Bronx Household of Faith and the current roster of other churches using public school facilities are likely to be joined by many others if the City's policy is overturned, only increasing the Establishment Clause concerns. Many evangelical churches seek to grow their congregations by establishing churches in New York City schools. (See Journal of the Southern Baptist Convention, available at http://sbclife.org/Articles/2003/10/Sla4.asp.) Pastor Jack Roberts, a named party in the Bronx Household case, stated the goal quite clearly: ". . . May there be a church . . . in every school in New York City and grow to a large size for the glory of God if that's what he wants." (Deposition transcript in Bronx Household of Faith v. New York City Board of Education, 226 F. Supp. 401 (S.D.N.Y. 2002), aff'd 331 F.3d 342,346 (2d Cir. 2003).)

[12] See Van Orden v. Perry, 545 U.S. 677, 703 (2005) (Breyer, J., concurring).

[13] Record on Appeal at A18; A238.

[14] Id., at A18.

[15] Id.

likely to be available for Jews and Muslims on the days prescribed for their religious services. It is critical that the Legislature be wary of any governmental policy that will, in effect, deny equal access to all religious groups for worship services.

Subsidization of religion also violates the Establishment Clause. Bronx Household of Faith paid neither rent nor utility fees for the use of schools to conduct religious worship services, leading the Second Circuit to conclude that the "City . . . foots a major portion of the costs of the operation of a church."[16] The same conclusion had provided support for DOE's determination that to allow such activity in public schools would involve the government in subsidizing and entangling the government with religion in violation of the Establishment Clause of the Constitution.

CONCLUSION

In a 1995 Supreme Court ruling, Justice Sandra Day O'Connor spoke to the duty and obligation of state officials in matters of church and state when she wrote:

> [The Establishment Clause] imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message. That is, the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions. . . .Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result . . . the Establishment Clause is violated.
>
> <u>This is so . . . because the State's own actions . . . actually convey a message of endorsement.</u>

<u>Capitol Square Review & Advisory Board v. Pinette</u>, 515 U.S. 753, 777 (1995, emphasis added).

By preventing DOE from precluding worship services in public schools, as constitutionally permitted by the Second Circuit, the Legislature is leading the State into a thicket of Establishment Clause problems. In addition to being unnecessary and overbroad, the Bill strips school districts of the ability to take necessary steps to avoid conveying a "message of endorsement" of religion and, for that reason, the New York City Bar Association respectfully opposes its passage.

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[16] 650 F.3d at 41.