



(202) 466-3234  
(202) 466-3353 (fax)  
www.au.org

1310 L Street, NW  
Suite 200  
Washington, DC 20005

August 28, 2020

Jeffrey Riel  
jriel@ocde.us  
General Counsel  
Orange County Board of Education  
200 Kalmus Drive  
Costa Mesa, CA 92626

*Re: Unconstitutional Board invocation policy*

Dear Mr. Riel:

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization committed to preserving the constitutional principles of religious freedom and the separation of religion and government. It has come to our attention that the Orange County Board of Education will soon vote on proposed amendments to the Board's invocation policy. Like the existing policy, the proposed amended version is unconstitutional. We write to explain why the Board should not only reject the proposed amendments but also repeal its existing policy and end altogether the practice of presenting prayers at its meetings.

As you are no doubt aware, the U.S. Court of Appeals for the Ninth Circuit recently held, in *Freedom From Religion Foundation v. Chino Valley Unified School District Board of Education*, 896 F.3d 1132, 1151 (9th Cir. 2018), that the Establishment Clause of the First Amendment to the U.S. Constitution forbids the inclusion of prayer in public-school-board meetings. Perhaps in recognition of the fact that the Board's existing invocation policy openly violates this ruling, the Board has proposed changes to the policy that encourage excluding children and conscientious objectors from the portions of Board meetings that involve prayer. That is no solution.

“[P]rayer at school-board meetings cannot be understood as part of the historical tradition” of opening prayers at meetings of governmental bodies, because there is no long-standing tradition of prayer at school-board meetings, and because schools boards are heavily involved with and focused on children and their interests. *Id.* at 1145–48. School-board prayer is thus unconstitutional, violating Establishment Clause prohibitions on governmental promotion of religion and coercion of people to take part in religion. *See id.* at 1145–49.

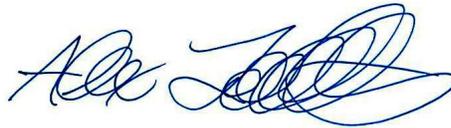
Attempting to limit student attendance at Board meetings to avoid the coercive effects of prayers would only complicate the constitutional problems. First, to say that students will be excluded to “every extent possible” falls short of a guarantee that no student will be forced to listen to government-sponsored prayer in violation of the Establishment Clause. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 598 (1992). And if some students are permitted to opt in while others wait outside during the prayers, abstaining children will face the untenable choice of either grudging participation or open protest. *See id.* at 593–94. Second, to ban students from attending portions of public government meetings meant to address *their* interests and achievements so that adults can engage in prayer subordinates the community’s secular educational interests to some community members’ religious preferences.

Moreover, *Chino Valley* identified multiple constitutional deficiencies in school-board prayer unrelated to students’ presence during prayers—deficiencies that the Board’s proposed amendments cannot cure. Among these, the Ninth Circuit faulted the “explicit linkage[ ] of the work of the Board, teachers, and the school community” to religion; the inherently religious purpose of prayer; and the promotion of prayer by government officials. *See Chino Valley*, 896 F.3d at 1140, 1149–51. The Orange County Board’s proposed policy doubles down here, reaffirming the Board’s belief in the vital importance of intertwining its public functions with religious practices.

In addition to violating the federal Establishment Clause, the Board’s insistence on injecting prayer into its meetings runs afoul of three provisions of the California Constitution. Article I, section 4 contains both the state’s establishment clause and its no-preference clause. The former is typically interpreted to provide the same protections as the federal analog (*see, e.g., E. Bay Asian Local Dev. Corp. v. California*, 13 P.3d 1122, 1138 (Cal. 2000)), so it prohibits the Board’s prayer policy at least to the same extent as federal law (*cf. Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 820 (Cal. 1991) (legislative-prayer tradition “has no application to religion in the public schools”). The latter forbids governmental conduct that has the effect of a religious preference “even when there is no discrimination.” *Fox v. City of Los Angeles*, 587 P.2d 663, 665 (Cal. 1978). And article XVI, section 5, which provides that California governmental bodies must not give any aid to sectarian purposes, has been construed by the California Supreme Court to ban “any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes.” *E. Bay*, 13 P.3d at 1140 (quoting *Cal. Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 521 n.12 (Cal. 1974)). A government policy calling for prayer, giving that prayer a platform at official meetings, and forcing students to structure their involvement in school governance around that prayer violates all three provisions—which together provide even greater protections for religious freedom than does the federal Establishment Clause.

The Board's proposed amendments to its invocation policy do not cure the policy's blatant constitutional defects. We urge the Board instead to cease including prayers at its public meetings, out of respect for the rights of all of its constituents to be free from governmental pressure in matters of religious belief, as well as in recognition of the considerable cost to taxpayers of any litigation in federal or state court that could result from continuing the prayers.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Alex J. Luchenitser". The signature is stylized and cursive.

Richard B. Katskee, Legal Director  
Alex J. Luchenitser, Associate Legal Director  
Patrick Grubel, Madison Legal Fellow