

Via U.S Mail and E-mail

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Hoover City Board of Education

2810 Metropolitan Way

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## **Re: Prayer at Hoover School Board Meetings**

Dear Board Members:

We have received a complaint regarding the Board of Education's proposal to reintroduce prayer at its meetings. We understand that, on the advice of the school district's attorney Donald Sweeney, the Board had discontinued the presentation of pre-meeting prayers, replacing them with a moment of silence. Tiffany Ray, *Hoover School Board President Donna Frazier says she wants to reinstate prayer at school board meetings*, The Birmingham News, Apr. 15, 2010, available at [http://blog.al.com/spotnews/2010/04/hoover\\_school\\_board\\_president.html](http://blog.al.com/spotnews/2010/04/hoover_school_board_president.html). We further understand, however, that the Board is now considering reinstatement of the prayer, which would be delivered by invited outside clergy. We write to request that you retain your current practice of opening meetings with a moment of silence.

The U.S. Supreme Court has repeatedly held that school authorities cannot include prayers at public-school events. See *Lee v. Weisman*, 505 U.S. 577, 599 (1992); *Sch. Dist. v. Schempp*, 374 U.S. 203, 211 (1963); *Engel v. Vitale*, 370 U.S. 421, 430-33 (1962); see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000). The Court has been particularly vigilant about enforcing this requirement because there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure" when children are involved. *Lee*, 505 U.S. at 592.

Although the Supreme Court upheld prayer at the opening of sessions of a state legislature in *Marsh v Chambers*, 463 U.S. 783 (1983), numerous courts - including the U.S. Court of Appeals for the Eleventh Circuit (which has jurisdiction over Alabama) - have refused to extend *Marsh* beyond its unique context. See *Pelphrey v. Cobb County*, 547 F.3d 1263, 1275 (11th Cir. 2008) (holding that prayer at meetings of county commission were constitutional under *Marsh*, but explicitly refusing to "adopt[] a broad interpretation of *Marsh* that would authorize prayer at virtually every government meeting.") (quotations omitted); *Glassroth v. Moore*, 335 F.3d 1282, 1298 (11th Cir. 2003) (holding *Marsh* inapplicable to display of Ten Commandments in state judicial building, and noting that "a broad reading of *Marsh* 'would gut the core of the Establishment Clause'" (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 604 (1989))); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 828-29 (11th Cir. 1989) (stating that "[b]ecause *Marsh* was based on more than 200 years of the 'unique history' of legislative invocations, it has no application to [prayer before high-school football games]"); see also *Mellen v. Bunting*, 327 F.3d 355, 369 (4th Cir. 2003) (holding that "*Marsh* is applicable only in

narrow circumstances” and does not extend to the context of public education); *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1148 (4th Cir. 1991) (holding that *Marsh* was “predicated on the particular historical circumstances presented in that case” and thus is inapplicable to courtroom prayer, which is unconstitutional).

Accordingly, in *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 380-83 (6th Cir. 1999), the U.S. Court of Appeals for the Sixth Circuit held that prayers at meetings of public school boards fall outside the *Marsh* exception, and unequivocally concluded that school-board prayer in any form is unconstitutional. *Id.* at 380-86. Explaining that: “*Marsh* [did not] create a presumption of validity for government-sponsored prayer at *all* deliberative bodies” *id.* at 380-81 (emphasis added), the court held that because school boards are charged with directing school-related matters - setting policies and standards for the education of children - and because their “constituency” comprises minor students who cannot vote, they are subject to the strict rule against school-sponsored prayer. *Id.* at 381-82.[1] <#\_ftn1>

Any prayers, even nonsectarian ones, send the message to adherents of minority faiths that the Board does not represent their interests or welcome their participation in debates over matters of concern to the public. That message is particularly damaging when students are in the audience as they are here. “Mixing religious activity with a government institution designed to foster and educate youth in the values of a democratic, pluralistic society is troubling because of the special nature of public schools as the symbol of our democracy and most pervasive means for promoting our common destiny.” *Id.* at 378 (internal quotations and citations omitted).

To comply with the Constitution and to respect the rights of its students and their parents, we ask that the Board retain its current practice of engaging in a moment of silence to open its meetings. Please do not hesitate to contact Ian Smith at (202) 466-3234 or [ismith@au.org](mailto:ismith@au.org) if you have any questions or would like to discuss this matter.

Sincerely,

Ayesha N. Khan, Legal Director  
Richard Katskee, Asst. Legal Director

Ian Smith, Staff Attorney

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[1] <#\_ftnref1> A district court recently upheld the presentation of prayers at school board meetings. *See Doe v. Indian River Sch. Dist.*, No. 05\_120\_JJF, 2010 U.S. Dist. LEXIS 15505, at \*36-\*43 (D. Del. Feb. 21, 2010), *appeal docketed*, No. 10-1819 (3d Cir. Mar. 22, 2010). That decision is now on appeal, however, and we believe it will be reversed because the Court of Appeals for the Third Circuit has, like other federal Courts of Appeals, held *Marsh* to be inapplicable in the context of public schools. *See ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1480 (3d Cir. 1996) (distinguishing between the public schools and contexts where prayer has been upheld under *Marsh*); *Brody v. Spang*, 957 F.2d 1108, 1121 n.6

(3d Cir. 1992) (recognizing that “[t]he Supreme Court, however, has never extended the *Marsh* test . . . and other courts have also refused to do so.”). Even if it were an open question whether prayers were permissible at school board meetings, the safer course of action would be to prohibit them. Such a prohibition would not expose the school board to legal liability (*cf. Turner v. City Council of City of Fredricksburg*, 534 F.3d 352 (4th Cir. 2008) (holding that city council was not liable under Free Exercise clause for restricting councilmember’s offering of prayer)), while allowing them surely would (*see Coles*, 171 F.3d at 380-83).