

February 11, 2016

Chairman Timothy Derickson
Vice-Chair Timothy Ginter
Ranking Member Stephanie Howse
Members of the Community and Family Advancement Committee
Ohio House of Representatives
77 S. High St.
Columbus, Ohio 43215

Re: Support for HB 425

Dear Chairman Derickson, Vice-Chair Ginter, Ranking Member Howse, and Members of the Committee:

The Center for Law & Religious Freedom is the legal advocacy arm of the Christian Legal Society, a nondenominational association of Christian attorneys, law students, and law professors with attorney chapters nationwide, including in Ohio, and student chapters at 90 law schools, including at the Ohio State University Moritz College of Law and the University of Toledo College of Law. For four decades, the Center has worked to protect students' right to be free from discriminatory treatment of their religious expression while at school. For example, the Center was instrumental in the passage of the Equal Access Act, 20 U.S.C. §§ 4071-4074, passed by Congress in 1984 to protect the right of students to meet for religious speech on public secondary school campuses. *See* 128 Cong. Rec. 11784-85 (1982) (statement of Sen Hatfield). The Center was a primary drafter, along with the American Jewish Congress, of *Religion in the Public Schools: A Joint Statement of Current Law* (Attachment C).¹ That statement became the basis for the Clinton Administration's Department of Education's guidance letters regarding *Religious Expression in Public Schools*, issued to school administrators in 1995, 1998, and 1999 (Attachment A)², and the corresponding Bush Administration's Department of Education's *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools* (Attachment B)³, published at 68 Fed. Reg. 9645 (Feb. 28, 2003).

Completely consistent with the guidance offered by both the Clinton and Bush Administrations, HB 425 merits bipartisan support as an important effort to ensure that students' religious expression is protected in Ohio's public schools. HB 425 is consonant with the entire First Amendment: it protects public school students' right to express their religious beliefs as protected by the Free Speech and Free Exercise Clauses, while respecting the boundary set by

¹ The Joint Statement (Attachment C) is available at <http://files.eric.ed.gov/fulltext/ED387390.pdf> (last accessed February 11, 2016).

² The Clinton DOE guidance letter (Attachment A) is available at <http://files.eric.ed.gov/fulltext/ED416591.pdf> (letter dated May 30, 1999) (last accessed February 11, 2016).

³ The Bush DOE guidance (Attachment B) is available at <https://www.gpo.gov/fdsys/pkg/FR-2003-02-28/pdf/03-4693.pdf> (last accessed February 11, 2016).

the Establishment Clause that requires the government to be neutral in its treatment of students' religious expression. As the United States Supreme Court has explained, in the public schools, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (upholding the Equal Access Act's requirement that public secondary schools allow students to meet for prayer, Bible study, and religious discussions) (emphases in original). See also, *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (Free Speech Clause of First Amendment requires elementary schools to allow religious community groups to meet in elementary schools immediately after school, and Establishment Clause is not violated).

Specifically, in § 3320.01, HB 425 protects several types of students' religious expression, including prayer. As the Supreme Court has explained, "religious worship and discussion . . . are forms of speech and association protected by the First Amendment." *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

By explicitly protecting students' prayer groups, religious clubs, "see you at the pole" gatherings, and other religious gatherings, HB 425 tracks the Bush Administration's Department of Education's *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003) ("Students may organize prayer groups, religious clubs, and 'see you at the pole' gatherings") (Attachment B). HB 425 similarly tracks the Clinton Department of Education's guidance letter (Attachment A), which stated:

"Student prayer and religious discussion: The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. . . . Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

"Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. . . .

"Students may also participate in before or after school events with religious content, such as "see you at the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event."

HB 425, in § 3320.01, also protects students' distribution of written materials or literature of a religious nature. Again, HB 425 parallels the Clinton DOE guidance letter, which stated:

“Religious literature: Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on non-school literature generally, but they may not single out religious literature for special regulation.”

When HB 425, in § 3320.01, protects students’ wearing of symbolic clothing or the expression of a religious viewpoint, it draws upon the Clinton DOE guidance letter, which stated:

“Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.”

HB 425, in § 3320.02(A), further protects students’ religious expression before, during, and after school hours to the same extent as a student is permitted to engage in secular activities and expression. This echoes the Clinton DOE guidance letter in the section already quoted above, as well as the Bush DOE guidance. 68 Fed. Reg. 9635, 9647 (Feb. 28, 2003).

In § 3320.02(B), HB 425 protects students’ access to school facilities for meetings for the purpose of engaging in religious expression on the same basis as other student groups have access to school facilities. This protection is required by the federal Equal Access Act, 20 U.S.C. §§ 4071-4074, which was upheld by the Supreme Court in *Board of Education v. Mergens*, 496 U.S. 226 (1990). Again, the Clinton DOE guidance letter affirmed that “[t]he Equal Access Act is designed to ensure that, consistent with the First Amendment, student religious activities are accorded the same access to public school facilities as are student secular activities.” The Bush DOE guidance likewise protects religious student groups. 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003).

HB 425, in § 3320.03, protects students’ right to engage in religious expression in their homework, artwork, or other written or oral assignments and protects students from being penalized or rewarded based on the religious content of their schoolwork. Again, HB 425 is reinforced by the Clinton DOE guidance letter, which stated:

“Student assignments: Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.”

The Bush DOE guidance contains this same language. 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003).

HB 425 also authorizes a school district to provide for a moment of silence during the school day for prayer, reflection, or meditation upon a moral, philosophical, or patriotic theme.

HB 425 prohibits mandatory participation in the moment of silence. Moment of silence laws have been upheld by the Fourth, Fifth, Seventh, and Eleventh Circuits. See *Bown v. Gwinnett County School District*, 112 F.3d 1464 (11th Cir. 1997); *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001); *Croft v. Governor of Texas*, 562 F.3d 735 (5th Cir. 2009); *Sherman v. Koch*, 623 F.3d 501 (7th Cir. 2010).

HB 425 is win-win legislation. Not only will it protect students' religious expression, but it also will help school districts and school administrators avoid costly legal mistakes and, therefore, will save taxpayer money. Too often, problems involving religious expression in the public schools arise when school administrators mistakenly think that they must censor students' religious expression in order to avoid a violation of the Establishment Clause. School administrators' mistakes then lead to unnecessary litigation that wastes taxpayer money. By clarifying that students' religious expression is protected in Ohio schools, HB 425 helps school districts avoid unnecessary and costly mistakes.

But most importantly, it ensures that Ohio's public schools teach students the invaluable lesson that freedom of speech and free exercise of religion are inalienable rights. Government officials, including public school administrators, may not censor personal religious expression. As the Sixth Circuit noted in a case about religious expression in Ohio public schools, "[s]chools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the . . . schools can teach anything at all. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons." *Rusk v. Crestview School District*, 379 F.3d 418, 422 (6th Cir. 2004) (quotation marks and citation omitted).

For the foregoing reasons, HB 425 merits bipartisan support. If I can be of further assistance to the Committee, please contact me at (703) 894-1087 or kcolby@clsnet.org.

Yours truly,

/s/ Kimberlee Wood Colby

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