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February 10, 2011

The Honorable Jeffrey E. Piccola
Majority Chair, Senate Education Committee
Senate Box 203015
Harrisburg, PA 17120-3015

The Honorable Andrew E. Dinniman
Minority Chair, Senate Education Committee
Senate Box 203019
Harrisburg, PA 17120-3019

Dear Senator Piccola and Senator Dinniman,

Thank you for the opportunity to submit written testimony for the Senate Education Committee's hearing on Senate Bill 1, authorizing state-funded vouchers for low-income students to attend non-public schools and public schools outside their home district. Founded in 1920, the American Civil Liberties Union is one of the nation's oldest civil rights organizations. I am submitting these comments on behalf of the 18,000 members of the ACLU of Pennsylvania.

The ACLU of Pennsylvania opposes SB 1, and our opposition is grounded in two key principles. First, SB 1 violates three different provisions of the state constitution related to funding for sectarian schools, sectarian institutions, and schools that are not under the control of the commonwealth. Second, SB 1 funnels state funding to institutions that can and do discriminate against students and parents.

Two provisions of the state constitution bar the commonwealth from funding religious schools. Article III, Section 15 states:

No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.

Under SB 1, state funding that would otherwise go to the public school that a student attends will instead follow the student to a private school. If that school is religiously-based, it is a violation of Article III, Section 15.

There are no cases upholding state appropriations for religious schools. There are two cases in which the state supreme court upheld transporting students to religious schools,¹ but in those cases, the court ruled that providing transportation is a safety measure

¹ See *Rhoades v. Abington Twp. Sch. Dist.*, 424 Pa. 202, 226 A.2d 53 (1967); *Springfield Sch. Dist. v. Dept. of Educ.*, 397 A.2d 1154, 1171 (Pa. 1970).

equivalent to providing firefighting services to a religious school. In *Springfield School District v. Delaware County*, for example, the Court held that the statute requiring school districts to provide bus transportation to private-school students within a certain geographic area did not violate Article III, Section 15 because “no state monies reach the coffers of these church-affiliated schools” and because simply providing bus transportation did not constitute support of sectarian schools.

The authors of SB 1 have suggested that requiring a parent to endorse a check from the state government to a sectarian school satisfies constitutional entanglements. But that check from the state is not sent to the parent until the religious school has provided confirmation of enrollment for the student. It is highly doubtful that simply requiring a parent’s signature makes the constitutional problems disappear.

In addition, unlike money spent by school districts on bus transportation for private-school students, money appropriated to sectarian schools will be used for religious purposes, such as worship services and religious education. This distinction was of central importance to the *Rhoades* majority, which considered “the fact that the transportation of students is ... ‘so separate and indisputably marked off’ from functions in any sense associated with religion” to be “ultimately persuasive” to its holding that requiring school districts to provide bus transportation to private schools did not violate the federal or state constitutions.

It has been noted that state-funded vouchers to religious schools have been upheld by the United States Supreme Court.² However, Article III, Section 15 of the state constitution is far more restrictive than the Establishment Clause of the First Amendment to the federal constitution. Article III, Section 15 states clearly and in plain language that the commonwealth may not fund sectarian schools.

The state constitutional bar on funding sectarian schools is also found in Article III, Section 29 of the Pennsylvania Constitution, which states:

No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denomination and sectarian institution, corporation or association.

With this language, the state constitution again provides a roadblock for SB 1. The Pennsylvania Supreme Court has used Section 29’s predecessor to strike down appropriations for sectarian health organizations,³ assistance to low-income seniors citizens,⁴ and state reimbursement for sectarian hospitals.⁵ Although the state supreme

² See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

³ See *Collins v. Kephart*, 271 Pa. 428, 117 A. 440 (1921)

⁴ See *Busser v. Snyder*, 282 Pa. 440, 128 A. 80 (1925)

court has more recently ruled that payments to religious homes for foster children do not violate Section 29 because they represent a governmental duty rather than a charitable or benevolent purpose,⁶ no such distinction exists with respect to vouchers. Payments to religious schools are clearly for an educational purpose and are thus barred by Section 29. Indeed, even vouchers for non-religious private elementary and secondary schools would violate Section 29 because they constitute payments to individual persons for educational purposes.

Finally, Article III, Section 30 of the Pennsylvania Constitution says:

No appropriation shall be made to any charitable or educational institution not under the absolute control of the Commonwealth, other than normal schools established by law for the professional training of teachers for the public schools of the State, except by a vote of two-thirds of all the members elected to each House.

In 1995, the Pennsylvania Supreme Court invalidated line-item appropriations in the General Appropriation Act, holding that the appropriations violated Section 30 because they were earmarked for specific charitable institutions and did not constitute reimbursement for services rendered by the entity for performing a governmental duty.⁷ Although the legislature technically appropriated the funds to an executive branch agency, the Court held that the funds were in fact intended for specific charitable recipients and the agency was merely a pass-through because of the numerous restrictions that the legislature placed on the agency's discretion in deciding how to disburse the funds.⁸

Given the significant restrictions that SB 1 places on the Education Opportunity Board's discretion in distributing the funds appropriated to the voucher program, a court would likely find that the funds are appropriated to the schools that ultimately receive them, rather than the Board. In addition, private schools are by definition not under the absolute control of the Commonwealth. Accordingly, it is likely that a court would hold SB 1 to violate Article III, Section 30 unless it is passed by two-thirds of both houses.

Along with the constitutional concerns, the ACLU of Pennsylvania also opposes SB 1 because it provides state funding for private schools that can and do discriminate against kids and families for a wide variety of reasons, including disability, ethnicity (specifically, language skills), religion, gender, sexual orientation, gender identity or expression, marital status and familial status. There is no language in SB 1 banning such discrimination against students.

⁵ See *Collins v. Martin*, 290 Pa. 388, 139 A. 122 (1927)

⁶ *Schade v. Allegheny County Institution Dist.*, 386 Pa. 507, 126 A.2d 911 (1967).

⁷ *Common Cause of Pa. v. Pennsylvania*, 668 A.2d 190, 204 (Pa. Cmwlth 1995).

⁸ *Id.* at 204-206.

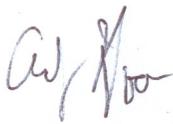
In the 1980s, litigation was filed against the archdiocese of Philadelphia accusing the archdiocese of racial discrimination.⁹ The Pennsylvania Commonwealth Court ruled that parochial schools are not “public accommodations” and thus do not fall under the jurisdiction of the Pennsylvania Human Relations Act, the state’s non-discrimination law. With the exception of denying admission based on race,¹⁰ religious schools are free to discriminate.

In addition, state law does not protect people from discrimination on the bases of sexual orientation, gender identity or expression, familial status, or marital status. Lesbian, gay, bisexual, and transgender (LGBT) parents and students from non-traditional families are susceptible to discrimination when applying to or attending private schools. In recent sessions, there have been bills introduced to add these protected classes to the PHRA, but they have failed to pass. SB 1, meanwhile, contradicts the spirit of those bills by providing state funds to private schools that discriminate.

The ACLU of Pennsylvania agrees with the sponsors of SB 1 that access to a quality education is a civil rights issue. Most students who are getting an inadequate education are low-income and many are racial and ethnic minorities. But SB 1 presents civil rights problems of its own, particularly for kids with disabilities, LGBT kids and parents, kids of minority religions, and non-English speakers.

The ACLU of Pennsylvania applauds the authors of SB 1 for exploring new methods for increasing the quality of education for students who aren’t currently receiving the education they deserve. But SB 1 is not the answer. This legislation is plagued with constitutional and civil rights problems. On behalf of the 18,000 members of the ACLU of Pennsylvania, I urge the committee members to oppose SB 1.

Sincerely,



Andy Hoover
Legislative Director

⁹ See *Roman Catholic Archdiocese of Philadelphia and St. Stephen’s Parish v. the Pennsylvania Human Relations Commission*, 119 Pa. Commw. 445, 548 A. 2d 328 (1988).

¹⁰ 24 Pa. Cons. Stat. § 15-1521.