

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Education Pre-K - 12 Committee

BILL: SB 1360
 INTRODUCER: Senator Storms
 SUBJECT: Inspirational Message
 DATE: March 20, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Young	Matthews	ED	Pre-meeting
2.	_____	_____	JU	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill authorizes district school boards to permit the delivery of an inspirational message at a noncompulsory high school event if a majority of the participating students request the message and select a student representative to deliver the message.

This bill creates section 1003.4505 of the Florida Statutes.

II. Present Situation:

Federal

The Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001, requires the U.S. Department of Education to issue guidance on constitutionally protected prayer in public elementary and secondary schools. As a condition of receiving the act's funds, a local educational agency must certify in writing to its state educational agency that it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools.

Florida

Although, Florida's K-20 Education Code (chapters 1000-1013, F.S.) does not specifically address district policies allowing inspirational messages at commencements or school-related non-compulsory student assemblies, it does grant school districts with authority over student management and the use of facilities.

Section 1002.205, F.S., requires the Florida Department of Education to annually distribute the guidelines on Religious Expression in Public Schools published by the U.S. Department of Education to all district school board members, superintendents, school principals, and teachers.

III. Effect of Proposed Changes:

The bill authorizes school districts to allow the delivery of an inspirational message, including a prayer or invocation, at a noncompulsory high school activity, including a student assembly, sports event, or other school-related activity, if a majority of the participating students request the delivery of an inspirational message and select a student representative to deliver the message.

The bill indicates its purpose is to provide for the solemnization and memorialization of noncompulsory high school events and ceremonies. The authority granted under the bill does not prohibit a school or school official from disciplining students in regard to unprotected speech or behavior that is inappropriate or disruptive.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

School districts already have the ability to adopt policies that permit the delivery of an inspirational message at a non-compulsory high school event. By putting this provision into statutory form, this bill may be subject to a facial constitutional challenge under the Establishment Clause. Such a challenge typically occurs without a record as to how the statute had actually been applied.¹ If districts follow the provisions in this bill, the district's resolution may be challenged in court, and a district may need to include other provisions in order to allow its resolution to survive a constitutional challenge.

In *Lemon v. Kurtzman*, the Court articulated three factors to be used when determining if a statute violates the Establishment Clause.² First, the government action must have a

¹ See *Reno v. Flores*, 507 U.S. 292, 301, 113 S.Ct. 1439, 1446, 123 L.Ed.2d 1 (1993)(explaining that a facial challenge is assessed without reference to factual findings or evidence of particular applications and that to prevail on a facial challenge a petitioner must establish that no set of circumstances exists under which the challenged act would be valid).

² *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

secular purpose.³ Second, the government action must have the primary effect of neither advancing nor inhibiting religion.⁴ Third, the government action must not foster an excessive entanglement with religion.⁵

The United States Supreme Court, in *Santa Fe Independent School District v. Doe*, invalidated a Texas school board's policy permitting students to vote upon the delivery of a "statement or invocation," subject to officials' approval, at each home high school football game.⁶ The Court found that the policy violated the Establishment Clause because the message delivered by students would constitute state-sponsored speech rather than private speech.⁷ The court reached this conclusion because the student's speech would be authorized by a government policy that explicitly and implicitly encouraged one particular kind of message, it would take place at a school event, the government had broad power to regulate the content of the student's speech, and the electoral system would yield only a single speaker, which would completely prevent dissenting viewpoints from being heard.⁸ In addition, the Court found that the religious content of the "statement or invocation" permitted by the district's policy was impermissively coercive.⁹

In a similar case, the Eleventh Circuit Court of Appeals decided in *Adler v. Duval County School District* that the district's graduation speaker policy does not on its face violate the Establishment Clause.¹⁰ That policy's provisions do not allow the state to decide whether there will be graduation message, who will speak, or what the speaker may say.¹¹ In addition, the student speakers have complete autonomy over the content of the message, meaning that the message, be it secular or sectarian or both, is not state-sponsored.¹²

The Court in *Adler* focused on two dispositive facts in determining that the policy did not violate the Establishment Clause. First, the policy does not contain any restriction on the identity of the student speaker or the content of the message that might be delivered.¹³ In fact, under the policy, school officials are affirmatively forbidden from reviewing the content of the message, and therefore are denied the opportunity to censor any disfavored views.¹⁴ The Court focused on this part of the district policy because "the ability to regulate the content of speech is a hallmark of state involvement," and that part of the test to determine if the Establishment Clause has been violated is to examine whether a reasonable person could view the message as one imposed by the state.¹⁵ The Court reasoned that since the content of a student message could not be reviewed or censored

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000).

⁷ *Id.* 530 U.S. at 302, 120 S.Ct. at 2275.

⁸ *Id.* 530 at 302-307, 120 S.Ct. at 2275-2278.

⁹ *Id.* 530 at 310, 120 S.Ct. at 2275.

¹⁰ *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001).

¹¹ *Id.* at 1336.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 1336-37.

¹⁵ *Id.* at 1337.

by the state, no reasonable person attending a graduation could view that wholly unregulated message as one imposed by the state.¹⁶ Finally, the Court opined that the district policy did not by its terms invite and encourage religious messages.¹⁷ The policy was neutral regarding whether a message was to be given, and if one was to be given, the policy was also neutral on the content of the message.¹⁸

In *Santa Fe*, the Court found that the prayer or religious speech delivered pursuant to that policy would be viewed as state-sponsored, in part because the policy expressed a clear preference for religious messages.¹⁹ Therefore, if the committee substitute or a district resolution is challenged, the Court will examine whether the bill or resolution is neutral toward the content and whether the bill or resolution expresses a clear preference for religious messages.

Here, the guidelines for a district resolution on the use of inspirational messages are similar to the type of guidelines in the Duval County School District policy, and it may be determined that any resulting speech arising under the policy is not state-sponsored. However, while the bill provides that districts may adopt resolutions regarding the use of inspirational messages, it also specifically references that the inspirational message can be a prayer or invocation, terms which “unequivocally connot[e] religion.”²⁰

Moreover, the bill does not lay out identical criteria to the policy reviewed in *Adler*. For example, it does not require the district resolution to prohibit school personnel from censoring or regulating the content of an inspirational message, something the Court noted was a “critical” fact in *Adler*.²¹ The restriction that is placed upon school personnel is that they cannot participate in or otherwise influence the exercise of discretion of the students in the determination of whether to use an invocation or a benediction.

Although school personnel generally cannot censor or regulate the content of a student message, in *Chandler v. James*, the Eleventh Circuit Court of Appeals opined that proselytizing speech can be prohibited because it is inherently coercive.²²

Additionally, *Adler* only dealt with speech at graduations, while this bill provides for any noncompulsory high school activity, including a student assembly, a sports event, or other school-related activity. In *Santa Fe*, the Court struck down a policy governing a school invocation at football games.²³ However, the Eleventh Circuit Court of Appeals

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Santa Fe*, 530 U.S. at 307, 120 S.Ct. at 2278.

²⁰ *Adler*, 250 F.3d at 1342.

²¹ *Id.*

²² *Chandler v. James*, 180 F.3d 1254, 1265 (11th Cir. 1999), *vacated by Chandler v. Siegelman*, 530 U.S. 1256, 120 S.Ct. 2714, 147 L.Ed.2d 979 (2000), *reinstated by Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000), *cert denied*, 533 U.S. 916 (2001). (“[a] student’s right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his audience. The Constitution requires that schools permit religious expression not religious proselytizing. Proselytizing speech is inherently coercive, and the Constitution prohibits it from the government’s pulpit.” (citations omitted).

²³ *But see Chandler*, 180 F.3d 1254.

upheld a state statute which permitted non-proselytizing student-initiated religious speech at school-related events.²⁴ The Court held that the school district's act of permitting genuinely student-initiated religious speech in schools and school-related events did not violate the Establishment Clause but was in fact required under the free speech and freedom of expression clauses of the U.S. Constitution.²⁵

Therefore, the bill may be facially challenged, and districts should examine current case law interpreting the First Amendment before adopting any inspirational message policy.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²⁴ *Chandler v. Siegelman*, 230 F.3d 1313.

²⁵ *Id.* at 1317.