

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Judiciary Committee

BILL: CS/SB 1420

SPONSOR: Education Committee and Senator Wise

SUBJECT: School Events/Inspirational Message

DATE: April 25, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hermanson</u>	<u>O'Farrell</u>	<u>ED</u>	<u>Fav/CS</u>
2.	<u>Matthews</u>	<u>Maclure</u>	<u>JU</u>	<u>Favorable</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This committee substitute authorizes a school board to adopt a resolution allowing the use of an inspirational message at a secondary school commencement exercise or secondary school-related noncompulsory student assembly. The resolution must provide that the decision of whether to use an inspirational message is up to the discretion of the students. If the students decide to use an inspirational message, the message:

- Must be given by a student volunteer;
- Must be nonsectarian and nonproselytizing in nature; and
- The school board may not participate in nor influence the students' determination of whether to use an inspirational message.

This committee substitute creates unnumbered sections of the Florida Statutes.

II. Present Situation:

The Education Code (chapters 1000-1013, F.S.) does not specifically address district policies allowing inspirational messages at commencements or school-related noncompulsory student assemblies. However, districts currently have the ability to adopt such resolutions.

Section 3, Article I of the State Constitution provides:

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury

directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Except for the no-aid provision contained in the last sentence, Article I, section 3 of the Florida Constitution is synonymous with the Establishment Clause of the First Amendment.¹ The Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The Establishment Clause prohibits any government body from acting in such a way as to establish a religion.²

Section 9524 of the Elementary and Secondary Education Act (ESEA) of 1965, as amended by the No Child Left Behind Act of 2001, requires the United States Department of Education to issue guidance on constitutionally protected prayer in public elementary and secondary schools. In addition, section 9524 requires that as a condition of receiving ESEA 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. Section 1002.205, F.S., requires the Department of Education to annually distribute the guidelines on "Religious Expression in Public Schools" published by the United States Department of Education to all district school board members, district school superintendents, school principals, and teachers.

III. Effect of Proposed Changes:

This committee substitute authorizes a district school board to adopt a resolution allowing the use of an inspirational message at a secondary school commencement exercise or secondary school-related noncompulsory student assembly. District school boards currently have the authority to adopt resolutions authorizing certain messages at school-related events.

The committee substitute provides that if a school district chooses to adopt a resolution, the resolution must provide that the use of an inspirational message is at the discretion of the students. If the students decide to use an inspirational message, it must be given by a student volunteer and must be nonsectarian and nonproselytizing in nature. Additionally, if a school district adopts a resolution, the resolution must require that school personnel may not participate in or otherwise influence the students' decision of whether to use an inspirational message.

The committee substitute states that its purpose is to provide for the solemnization and memorialization of secondary school events and ceremonies, and that it is not intended to advance or endorse any religion or religious belief.

There is also a severance clause, which provides for severability if certain provisions are found to be unconstitutional.

The committee substitute takes effect July 1, 2005.

¹ *Bush v. Holmes*, 886 So. 2d 340, 344 (1st DCA, 2004).

² See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8, 67 S.Ct. 504, 508, 91 L.Ed. 711 (1947).

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:

While the term “inspirational message” may be religious or nonreligious, if it is interpreted to be religious in nature, there may be a constitutional challenge to this committee substitute. School districts already have the ability to adopt the type of resolutions addressed in this committee substitute, and by putting this provision into statutory form, this committee substitute 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.³ If districts follow the provisions in this committee substitute, 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.⁴ First, the government action must have a secular purpose.⁵ Second, the government action must have the primary effect of neither advancing nor inhibiting religion.⁶ Third, the government action must not foster an excessive entanglement with religion.⁷

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.⁸ 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.⁹ The court reached this conclusion because the student’s speech

³ 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).

⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000).

⁹ *Id.* 530 U.S. at 302, 120 S.Ct. at 2275.

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.¹⁰ In addition, the Court found that the religious content of the "statement or invocation" permitted by the district's policy was impermissively coercive.¹¹

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.¹² 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.¹³ 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.¹⁴

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.¹⁵ 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.¹⁶ 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.¹⁷ The Court reasoned that since the content of a student message could not be reviewed or censored by the state, no reasonable person attending a graduation could view that wholly unregulated message as one imposed by the state.¹⁸ Finally, the Court opined that the district policy did not by its terms invite and encourage religious messages.¹⁹ 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.²⁰

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.²¹ Therefore, if the committee substitute or a district resolution is challenged, the Court will examine whether the bill or resolution is neutral

¹⁰ *Id.* 530 at 302-307, 120 S.Ct. at 2275-2278.

¹¹ *Id.* 530 at 310, 120 S.Ct. at 2275.

¹² *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001).

¹³ *Id.* at 1336.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1336-37.

¹⁷ *Id.* at 1337.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Santa Fe*, 530 U.S. at 307, 120 S.Ct. at 2278.

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. This committee substitute provides that districts may adopt resolutions regarding the use of inspirational messages, and therefore there is an absence of “code words such as ‘invocation,’” which “unequivocally connot[es] religion.”²²

However, this committee substitute 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*.²³ 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. Additionally, in *Adler*, the court noted other “critical” facts, which are not in this committee substitute, including the policy’s outright prohibition on state content review of non-or-anti-religious messages” and the lack of evidence that students must vote up-or-down on the message.²⁴

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 nonproselytizing speech can be prohibited because it is inherently coercive.²⁵

Additionally, *Adler* only dealt with speech at graduations, while this committee substitute provides for both commencement exercises or “secondary-school related noncompulsory student assemblies.” In *Santa Fe*, the Court struck down a policy governing a school invocation at football games.²⁶ However, the Eleventh Circuit Court of Appeals upheld a state statute which permitted non-proselytizing student-initiated religious speech at school-related events.²⁷ 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.²⁸

²² *Adler*, 250 F.3d at 1342.

²³ *Id.*

²⁴ *Id.*

²⁵ *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).

²⁶ *But see Chandler*, 180 F.3d 1254.

²⁷ *Chandler v. Siegelman*, 230 F.3d 1313.

²⁸ *Id.* at 1317.

Therefore, the committee substitute may be facially challenged, and districts should examine current case law interpreting the First Amendment before adopting any resolution.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

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