HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 31 Public Education
SPONSOR(S): Policy Council; PreK-12 Policy Committee, Drake and others
TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	PreK-12 Policy Committee	10 Y, 3 N, As CS	Paulson	Ahearn
2)	Civil Justice & Courts Policy Committee	10 Y, 3 N	De La Paz	De La Paz
3)	Policy Council	12 Y, 0 N, As CS	Liepshutz	Ciccone
4)	Education Policy Council	13 Y, 0 N	White	Lowell
5)				

SUMMARY ANALYSIS

The Council Substitute for CS/HB 31 prohibits district school boards, administrative personnel, and instructional personnel from taking affirmative action including, but not limited to, the entry into any agreement, that infringes or waives the rights or freedoms afforded to instructional personnel, school staff, or students by the First Amendment to the United States Constitution, in the absence of the express written consent of any individual whose constitutional rights would be impacted by such infringement or waiver.

The bill does not appear to have a fiscal impact on state or local governments.

The bill takes effect July 1, 2010.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

The Federal Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, requires local educational agencies to certify to the state educational agency that no policy of the local educational agency prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary schools and secondary schools.[1] Florida 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.[2]

Two First Amendment clauses, the Free Exercise Clause and the Establishment Clause, protect religious freedom. Together, they permit neither bias favoring nor bias disfavoring religion.[3] The Free Exercise Clause prohibits federal and state government from placing any restraint on an individual's exercise of religion.[4] The Establishment Clause guarantees that a government may not coerce anyone to support or participate in religion or its exercise.[5]

In *Santa Fe Independent School District v. Doe*, the United States Supreme Court ruled that the school district's policy permitting student-led, student-initiated prayer authorized by student election violated the Establishment Clause. In the case, the Court ruled that the prayers did not amount to private speech and that the school district policy of allowing such prayers was impermissibly coercive.[6]

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[1] 20 U.S.C. § 7904.

[2] Section 1002.205, F.S. These guidelines include, for example, that students may pray in a nondisruptive manner when not engaged in school activities or instruction and that schools may neither organize prayer at graduation nor organize religious baccalaureate ceremonies.

[3] The pertinent clauses of the First Amendment of the United States Constitution read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" Although the First Amendment only restricts legislative action by Congress, these two clauses have been incorporated into the Fourteenth Amendment's guarantee of due process and are therefore applicable to state action. *See School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 215 (1968).

[4] *Id., 222-223.*

[5] *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

[6] The Court ruled that because the speech was authorized by government policy and was delivered on government property at government-sponsored, school-related events, and because the student delivering the speech was elected by a majority of the student body (effectively silencing any minority views), it could not be considered private speech. The Court also ruled that schools could not force students to make the decision between attending these events and avoiding potentially offensive religious rituals. *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 302-304, 311-312 (2000).

However, in *Chandler v. Siegelman*, (*Chandler II)* the United States Court of Appeals for the Eleventh Circuit ruled that students are allowed to take part in group prayers at school functions. The court reviewed a lower court's injunction against the enforcement of an Alabama statute permitting student-initiated prayer at school-related events. Finding that the injunction wrongly assumed that any religious speech in schools is attributable to the State, the appellate court held that the injunction was overbroad and found that as long as the speech was truly student-initiated and not the product of school policy which encourages it, the speech is private and protected.[7]

In *Adler v. Duval County School Board*, the United States Court of Appeals for the Eleventh Circuit upheld a lower court's ruling that the school board's policy of permitting a graduating student, elected by the graduating class, to deliver an unrestricted message at graduation ceremonies did not violate the Establishment Clause on its face. The court ruled that the primary factor in distinguishing state speech from private speech is the element of state control over the content of the message.[8]

In *Holloman ex rel. Holloman v. Harland*, the United States Court of Appeals for the Eleventh Circuit revisited its previous ruling in *Chandler II* after an Alabama public school student brought action against a teacher for soliciting prayer requests and conducting a daily "silent moment of prayer." The court reversed a lower court's decision in favor of the teacher and ruled that simply because the idea initially came from a student, this type of prayer could not be considered "student-initiated" (and therefore constitutionally protected) if the school "encouraged, facilitated, or in any way conducted the prayer."[9]

Effect of Proposed Changes

The Council Substitute for CS/HB 31 prohibits district school boards, administrative personnel,[10] and instructional personnel[11] from taking affirmative action including, but not limited to, the entry into any agreement, that infringes or waives the rights or freedoms afforded to instructional personnel, school staff, or students by the First Amendment to the United States Constitution, in the absence of the express written consent of any individual whose constitutional rights would be impacted by such infringement or waiver.

B. SECTION DIRECTORY:

Section 1: Creates s. 1003.4505, F.S., relating to the delivery of protection of school speech.

Section 2: Provides an effective date of July 1, 2010.

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[7] *Chandler v. Siegelman*, 230 F.3d 1313, 1316-1317 (11th Cir., Ala., 2001); cert. denied 533 U.S. 916 (2001).
[8] *Adler v. Duval County School Board*, 250 F.3d 1330, 1341 (11th Cir., Fla., 2001); cert. denied 534 U.S. 1065 (2001).
[9] *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1287 (11th Cir., Ala., 2004).
[10] s. 1012.01(3), F.S. ("'Administrative personnel' includes K-12 personnel who perform management activities such as developing broad policies for the school district and executing those policies through the direction of personnel at all levels within the district. Administrative personnel are generally high-level, responsible personnel who have been assigned the responsibilities of systemwide or schoolwide functions, such as district school superintendents, assistant superintendents, deputy superintendents, school principals, assistant principals, career center directors, and others who perform management activities. Broad classifications of K-12 administrative personnel are as follows: . . . *[d]istrict-based instructional administrators* . . . *[d]istrict-based noninstructional administrators* . . . [and] *[s]chool administrators* . . . .").
[11] s. 1012.01(2), F.S. ("'Instructional personnel' means any K-12 staff member whose function includes the provision of direct instructional services to students. Instructional personnel also includes K-12 personnel whose functions provide direct support in the learning process of students. Included in the classification of instructional personnel are the following K-12 personnel: . . . *[c]lassroom teachers* . . . *[s]tudent personnel services* . . . *[l]ibrarians/media specialists* . . . *[o]ther instructional staff* . . . [and] *[e]ducation paraprofessionals*. . . .").

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have a fiscal impact on state government revenues.

2. Expenditures:

   The bill does not appear to have a fiscal impact on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

   The bill does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require a city or county to expend funds or take any action requiring the expenditure of funds. The bill does not appear to reduce the authority that municipalities or counties have to raise revenues in the aggregate. The bill does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

According to media reports[12] and testimony received by the Policy Council on April 9, 2010, the impetus for filing this legislation stems from an ongoing controversy that has arisen in the Santa Rosa County public school system. In August 2008, two high school students sued the school board, the school superintendent and principal of Pace High School in the U.S. District Court for the Northern District of

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[12] See, for example: http://floridacapitalnews.com/article/20100319/CAPITOLNEWS/3190323

Florida alleging Establishment Clause violations of their rights.[13] The School Board admitted liability in December 2008, and in May 2009, entered into a jointly proposed consent decree[14] that permanently enjoined school officials from engaging in certain religious activities outlined in the decree. In July 2009, the Christian Educators Association International (CEAI) sought to intervene in the suit claiming that the constitutional rights of its membership -- which includes public and private school teachers, administrators, and paraprofessionals -- were being violated by the consent decree.[15] In February 2010, the Federal District Court denied the CEAI's motion to intervene finding that the association lacked standing because it had not "demonstrated that the consent decree results in an objectively reasonable "chill" on its members' First Amendment rights."[16] The CEAI has appealed the order of the federal district court to the Eleventh Circuit Court of Appeals.[17] On March 24, 2010, the Federal District Court for the Northern District Court of Florida ordered that the "parties to the [original] suit submit memoranda to the court by the close of business on April 7, 2010, advising the court on the status of the plaintiffs' continued interest in this litigation, the continued validity of the injunctive consent decree, and the basis for this court's continued enforcement jurisdiction over the consent decree." [Court's footnote omitted][18]

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 17, 2010, the PreK-12 Policy Committee adopted two amendments to the Proposed Committee Substitute for House Bill 31 (PCS) and reported the bill favorably as a Committee Substitute with two amendments. The differences between the PCS and the Committee Substitute for House Bill 31 (CS) are as follows:

- The PCS included "a prayer or an invocation" as examples of an inspirational message. The CS deletes those references.
- The PCS included a provision requiring students to select a student representative to deliver the message. The CS deletes this provision.

On April 9, 2010, the Policy Council adopted one amendment that deleted s. 1003.4505(1), as created by the bill to prohibit school officials from discouraging or inhibiting the delivery of an inspirational message at noncompulsory high school activities. The bill was reported favorably as a Council Substitute. The analysis reflects the Council Substitute to CS/HB 31.

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[13] *Minor I DOE, through parent I Doe and Minor II Doe, Through parent II DOE v. School Board for Santa Rosa County, Florida, et al.,* Case No. 3:08cv361/MCR/EMT.

[14] *Id.*, document 94.

[15] *Id.,* document 127

[16] *Id.,* 2010 WL 582031 (N.D.Fla.) at 19

[17] *Id.,* appellate case no. 1011188c (documentation received by 11th Cir. on March 17, 2010, according to writer's telephone inquiry of 11th Circuit Court Clerk's Office on 4/12/10).

[18] *Supra.,* fn. 15, document 255 (court's order) at 2. The court also noted in its order that it had come to the "court's attention that the two plaintiffs may have graduated from high school and thus no longer suffer a threat of harm from the School Board's policies and practices." at 1, [court's footnote omitted]. Apparently, the court's concern regarding this issue stems from the "case and controversy" requirement of the U.S. Constitution and the possibility that the case may have become moot at some point during the litigation. See, court's fn. 2 at 2.