

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 98

INTRODUCER: Senator Siplin

SUBJECT: Education

DATE: October 28, 2011 REVISED: 10/2/11

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Matthews	ED	Fav/1 amendment
2.			JU	
3.			RC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input checked="" type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill provides, on a permissive basis, authority for district school boards to adopt resolutions regarding student delivery of inspirational messages, including prayers, at secondary school level gatherings, such as at commencement.

If adopted, language is required to be included in the resolution, such as that the decision to use a prayer is at the option of student government; only students can deliver prayers; and school personnel is precluded from participating in or influencing students in decisions to use prayers.

This bill creates an undesignated section of law in the Florida Statutes.

II. Present Situation:

On August 27, 2008, the American Civil Liberties Union filed a lawsuit in the United States District Court for the Northern District of Florida against the Santa Rosa County School District, alleging that prayers in school were state-sponsored and violative of the Establishment Clause

and the no-aid provision of the state constitution.¹ On May 6, 2009, both parties entered a consent decree and the court issued an order which provided, in part, for permanent injunction against school officials from:

- Promoting, advancing, endorsing, or causing prayers in conjunction with school events;
- Planning, organizing, promoting, or sponsoring religious services;
- Holding school events at a religious venue when an alternative venue is reasonably suitable that is not a religious venue; and
- Permitting school officials to promote personal religious beliefs.

Subsequent to the issuance of the consent decree, a contempt order was issued by the court against two school officials for violation of the decree, with possible punishment of jail time and fines.² On September 17, 2009, the court found the school officials not guilty.³ Plaintiff teachers and other staff challenged the consent decree in U.S. District Court by plaintiff teachers and other staff, alleging violations of their First Amendment rights.⁴ On March 21, 2011, the court issued an order which granted, in part, a preliminary injunction enjoining the school board from enforcing school policies restricting employee participation in private religious service, including baccalaureate. On July 5, 2011, the school board approved an agreement between the parties, which ended the case, and entered into an amended consent decree, effectively clarifying the original decree.⁵

The 2010 Legislature passed a bill which prohibits district school boards and administrative and instructional personnel from taking affirmative action, including entering into agreements that infringe First Amendment rights of personnel or students, unless waived in writing.⁶

III. Effect of Proposed Changes:

This bill authorizes, but does not require, district school boards to adopt resolutions regarding the delivery of inspirational messages, including prayers of invocation or benediction, at secondary school commencement exercises or other noncompulsory student assemblies.

If adopted, the resolution must include language that provides:

- The use of a prayer of invocation or benediction is at the discretion of the student government;
- Students will deliver all prayers; and
- School personnel may not participate in, or otherwise influence any student in determining whether to use prayers.

¹ *Does v. School Board for Santa Rosa County, Florida* (Case Number 3:08-cv-361/MCR/EMT)

² *Florida School Officials Get Jail Time*, www.cnn.com/2009/CRIME/09/17/florida.school.prayer (September 17, 2009); Last checked March 23, 2011.

³ *Lay, Freeman Not Guilty in School Prayer Case*; <http://www.northescambia.com/?p=10943>; Last checked March 23, 2011.

⁴ *Mary E. Allen v. School Board for Santa Rosa County, Florida* (N.D. U.S.D.C. 2011) (Case Number 3:10-cv-00142-MCR-CJK).

⁵ Settlement Agreement, Waiver and Release, Filed with the Court July 1, 2011.

⁶ ch. 2010-214, L.O.F.; s. 1003.4505, F.S.

This bill identifies as its purpose the provision of the solemnization and memorialization of secondary school events and ceremonies, rather than to advance or endorse any religion or religious belief.

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:

The First Amendment to the Federal Constitution provides, in part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....

This provision is typically referred to as the Establishment Clause.

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....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.

In 1962, the U.S. Supreme Court indicated that evidence of direct government compulsion is not required in an Establishment Clause case (as would generally be the case for Free Exercise claims.) In Engel v. Vitale, the court found impermissible daily prayer in schools, regardless of whether students were specifically and individually required to participate, on the basis that prayer in elementary and secondary schools carries particular risk of indirect coercion.⁷

In 1971, the U.S. Supreme Court established the seminal test to apply to these cases, in Lemon v. Kurtzman, which requires that the following be demonstrated for constitutionality:

⁷ Engel v. Vitale, 370 U.S. 421, 441-442 (1962).

- The statute must contain a secular purpose;
- The statute's principal or primary effect is one that neither advances nor inhibits religion; and
- The statute must not foster excessive government entanglement with religion.⁸

The last prong remains the critical focus of the test.⁹

In 1992, however, the Supreme Court did not apply the Lemon test to a case involving endorsement of nonsectarian prayer and emphasized, instead, indicia of whether government actions constituted a pervasive degree of involvement, commonly referred to as the Coercion Test.¹⁰ Here, that school officials decided themselves to have prayer at commencement, selected clergy, and influenced speech content by providing a pamphlet to the clergy with guidelines for nonsectarian prayer, the court determined, rose to the level of impermissible pervasive activity.¹¹ Although asserted that attendance was voluntary, the very monumental nature of a graduation made student participation mandatory.

In Santa Fe Independent School District v. Doe, the U.S. Supreme Court ruled that school district policy which authorized student-led, student-initiated invocations at football games did not constitute private speech.¹² In this case, the policy authorized student elections to determine whether invocations should be provided at games, and if so, who should deliver the invocation.¹³ The District Court limited the policy to nonsectarian, nonproselytizing prayer. In finding the lower court's modified policy unconstitutional, the Supreme Court applied a hybrid Lemon/Lee test and determined that a policy that expressly authorizes prayer at all promotes religion, constitutes unlawful coercion, and is therefore facially unconstitutional:

Indeed, the only type of message expressly endorsed in the policy is an "invocation," a term which primarily describes an appeal for divine assistance....Through its election scheme, the District has established a government mechanism that turns the school into a forum for religious debate....It further empowers the student body majority....to subject students of minority views to constitutionally improper messages.¹⁴

In 2001, in Adler v. State, the Eleventh Circuit Court of Appeals reviewed a Duval County school district policy that permitted a graduating student,

⁸ 403 U.S. 602, 612-13 (1971).

⁹ John P. Cronan, *A Political Process Argument for the Constitutionality of Student-led, Student-initiated Prayer*, 18 YLLPR 503, 510 (2000).

¹⁰ *Lee v. Weisman*, 505 U.S. 577, 578 (1992).

¹¹ *Id.* at 578, 587.

¹² 530 U.S. 290 (2000).

¹³ *Id.* at 297.

¹⁴ *Id.* at 291, 316.

elected by her class, to give a message unrestricted by the school,¹⁵ which specifically provided:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;
2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and...not be monitored or...reviewed by Duval County School Board, its officers or employees;

The purpose of these guidelines is to allow students to direct their own graduation message without monitoring or review by school officials.¹⁶

Here, the court held that as this policy was neutral on-its-face and did not involve any degree of state control, it was facially constitutional.¹⁷

Although it is difficult to gauge how this bill would be implemented in practice, it can be said that a Duval County-type policy, which authorizes a student message to be delivered at graduation but does not mention prayer, and prohibits school review of content, presents the strongest case for constitutionality. At the other end of the continuum, a school district policy which allows students to decide if they want a student-led prayer to be delivered at a school event similar to Santa Fe may be constitutionally suspect. Less certain outcomes exist for other factual combinations. That this bill references only the secondary, rather than the K-12 setting, is likely inconsequential.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

¹⁵ 250 F.3d 1330 (11th Cir. 2001).

¹⁶ *Id.* at 1332.

¹⁷ *Id.* at 1333.

C. Government Sector Impact:

This bill authorizes, but does not require school boards to draft policies addressing inspirational messages. Therefore, any fiscal impact related to policy drafting and adoption is expected to be insignificant.

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:

Barcode 138252 by the Committee on Pre-K – 12 on November 2, 2011:

Removes unnecessary language that required that the message be nonsectarian and nonproselytizing as this is already provided in language specifying the bill's purpose.