

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 Judiciary Committee

BILL: CS/SB 98

INTRODUCER: Judiciary Committee and Senator Siplin

SUBJECT: Education

DATE: January 13, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Matthews</u>	<u>ED</u>	Fav/1 amendment
2.	<u>O'Connor</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

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

I. Summary:

This bill permits district school boards to adopt resolutions that allow student volunteers to deliver inspirational messages, including but not limited to, prayers of invocation or benediction, at secondary school level gatherings, such as at commencements or other noncompulsory student assemblies.

If adopted, the resolution must provide that:

- The use of an inspirational message is at the discretion of the student government;
- All inspirational messages will be given by student volunteers, and the content of any inspirational message will be at the discretion of the student volunteer; and
- School personnel may not participate in, or otherwise influence any student in determining whether to use a prayer of invocation or benediction, participate in selecting the student volunteer, or influence the content of the inspirational message.

This bill creates an undesignated section of 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, the 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 which 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 the 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, alleging violations of their First Amendment rights.⁴ On March 21, 2011, the court issued an order that granted, in part, a preliminary injunction enjoining the school board from enforcing school policies restricting employee participation in private religious services, including baccalaureate services. 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 that 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 by any individual whose constitutional rights would be impacted.⁶

III. Effect of Proposed Changes:

This bill authorizes, but does not require, district school boards to adopt resolutions that allow student volunteers to deliver inspirational messages, including but not limited to prayers of invocation or benediction, at secondary school commencement exercises or other noncompulsory student assemblies.

If adopted, the resolution must provide that:

¹ *Doe v. School Board for Santa Rosa County, Florida* (N.D. Fla. 2008) (Case Number 3:08-cv-361/MCR/EMT).

² *Florida School Officials Get Jail Time* (Sept. 17, 2009), available at www.cnn.com/2009/CRIME/09/17/florida.school.prayer/index.html (last visited Jan. 3, 2012).

³ *Lay, Freeman Not Guilty In School Prayer Case* (Sept. 17, 2009), available at <http://www.northescambia.com/?p=10943>; (last visited Jan. 3, 2012).

⁴ *Mary E. Allen v. School Board for Santa Rosa County, Florida* (N.D. Fla. 2009) (Case Number 3:10-cv-00142-MCR-CJK).

⁵ Settlement Agreement, Waiver and Release, filed with the court on July 1, 2011.

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

- The use of an inspirational message is at the discretion of the student government;
- All inspirational messages will be given by student volunteers, and the content of any inspirational message will be at the discretion of the student volunteer; and
- School personnel may not participate in, or otherwise influence any student in determining whether to use a prayer of invocation or benediction, participate in selecting the student volunteer, or influence the content of the inspirational message.

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.

The bill provides an effective date of July 1, 2012.

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 United States Constitution provides, in part:

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

This first clause 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 for Establishment Clause cases, in *Lemon v. Kurtzman*, which requires that the following be demonstrated for constitutionality:

- 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 *Lee v. Weisman*, 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 that 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 that is expressly endorsed in the [policy] is an "invocation," a term which primarily describes an appeal for divine assistance.

....

⁷ *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962).

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 YALE L. & POL'Y REV. 503, 510 (2000).

¹⁰ 505 U.S. 577, 587 (1992).

¹¹ *Id.* at 587-88.

¹² 530 U.S. 290 (2000).

¹³ *Id.* at 297-98.

... 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, elected by her class, to give a message unrestricted by the school,¹⁵ which policy specifically stated in part:

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 may be implemented in practice, 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, likely presents the strongest case for constitutionality. At the other end of the continuum, a school district policy that 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. The fact 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.

¹⁴ *Id.* at 306-07, 316.

¹⁵ 250 F. 3d 1330 (11th Cir. 2001).

¹⁶ *Id.* at 1332.

¹⁷ *Id.* at 1333.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill authorizes, but does not require, school boards to adopt 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.)

CS by Judiciary on January 12, 2012

The Committee Substitute:

- Provides that inspirational messages delivered by student volunteers may include, but are not limited to, prayers of invocation or benediction;
- Provides that the subject of the inspirational message will be at the discretion of the student volunteer;
- Removes language that the message must be nonsectarian and nonproselytizing; and
- Clarifies that school personnel may not influence the content of the inspirational message or the selection of the student volunteer.

B. Amendments:

None.