HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/SB 98 (First Engrossed) Education
SPONSOR(S): Judiciary, Siplin and others
TIED BILLS: None **IDEN./SIM. BILLS:** HB 317

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Education Committee	9 Y, 6 N	Muller	Klebacha
2) Judiciary Committee	11 Y, 4 N	Thomas	Havlicak

SUMMARY ANALYSIS

The bill authorizes, but does not require, a district school board to adopt a policy allowing an inspirational message to be delivered by students at a student assembly.

The bill requires that if adopted, the policy provide that students who are responsible for organizing any student-led portion of a student assembly must have sole discretion in determining whether an inspirational message is to be delivered. Additionally, those students must choose the student volunteer or volunteers who will deliver the inspirational message. The student volunteer must be solely responsible for the preparation and content of the inspirational message.

If adopted, the policy must provide that school district personnel may not participate in, or otherwise influence, the determination of whether an inspirational message is to be delivered or select the student volunteer who will deliver the message. School district personnel may not monitor or otherwise review the content of a student volunteer's inspirational message.

The bill does not have a fiscal impact.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation:

Florida law currently allows district school boards to provide secular instruction including, but not limited to, an objective study of the Bible and religion.[1] The district school board may also provide a brief period, not to exceed 2 minutes, to be set aside at the start of each school day or each school week for the purpose of silent prayer or meditation.[2]

Additionally, 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.[3]

Florida law also requires the Department of Education to distribute the guidelines on "Religious Expression in Public Schools"[4] to all district school board members, district school superintendents, school principals, and teachers.[5] The guidelines include information regarding student prayer, moments of silence, student speech at student assemblies and extracurricular events, and prayer at graduation.[6]

Florida law does not, however, specifically address affirmative state authorization of student speech at school. Even though the law is silent on this issue, a school district currently has the authority to adopt a policy regarding student speech at student assemblies, provided the policy aligns with constitutional standards.[7]

Some school districts have adopted policies regarding student speech at school assemblies. For example, Duval County School Board adopted such a policy in 2001.[8] The Duval County policy allowed a brief opening and/or closing message at high school graduation exercises, at the discretion of the graduating senior class. The policy also explained that the message was to be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole. Additionally, Duval County's policy required that if the graduating senior class chose to use a message, the content of the message was to be prepared by the student volunteer, and was not to be monitored or otherwise reviewed by Duval County School Board, its officers or employees. The stated purpose of the policy was to allow students to direct their own graduation message without monitoring or review by school officials.[9]

There has also been recent court activity regarding school prayer. 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 violated the Establishment Clause of the U.S. Constitution and the no-aid provision of the state

[1] Section 1003.45(1), F.S.
[2] Section 1003.45(2), F.S.
[3] Chapter 2010-214, L.O.F.; s. 1003.4505, F.S.
[4] Section 1002.205, F.S. The guidelines are published by the United States Department of Education. *See Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, *available at* http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited Feb. 19, 2012).
[5] Section 1002.205, F.S.
[6] United States Department of Education, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, *available at* http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited Feb. 19, 2012).
[7] *See* "Constitutional Issues" section below.
[8] *Adler v. Duval County School Bd.*, 250 F.3d 1330, 1332 (11th Cir. 2001).
[9] *Id*.

constitution.[10] 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 a non-religious venue is available and reasonably suitable;
- Permitting school officials to promote personal religious beliefs.

Subsequent to issuing the consent decree, a contempt order was issued by the court against two school officials for violating the decree, with the possible punishment of jail time and fines.[11] On September 17, 2009, the court found the school officials not guilty.[12] Plaintiff teachers and other staff challenged the consent decree in U.S. District Court, alleging violations of their First Amendment rights.[13] 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, and entered into an amended consent decree, effectively clarifying the original decree.[14]

Effect of Proposed Changes:

The bill authorizes, but does not require, a district school board to adopt a policy allowing an inspirational message to be delivered by students at a student assembly. The stated purpose of the bill is to provide students with the opportunity for formal or ceremonious observance of an occasion or event.

If a district school board chooses to adopt a policy allowing a student inspirational message at a student assembly, then the policy must provide that the students who are responsible for organizing any student-led portion of that assembly have sole discretion to determine whether an inspirational message is to be delivered. Additionally, those students must choose the student volunteer or volunteers who will deliver the inspirational message. The student volunteer is solely responsible for the preparation and content of the inspirational message.

If adopted, the policy must also prohibit school district personnel from participating in, or otherwise influencing, the determination of whether an inspirational message is to be delivered or select the student volunteer who will deliver the message. School district personnel may not monitor or otherwise review the content of a student volunteer's inspirational message.

The bill does not restrict the application of these policies to a particular grade level. The bill is also silent regarding the types of assemblies (e.g., commencement exercises, sporting events) at which an inspirational message could be delivered, leaving that determination to each school district.

B. SECTION DIRECTORY:

Section 1. Creates an unnumbered section of law that allows a district school board to adopt a policy allowing a student-led inspirational message at a student assembly, provides policy requirements, and provides the purpose of the bill.

[10] *Doe v. School Board for Santa Rosa County, Florida*, Case Number 3:08-cv-361/MCR/EMT (N.D. Fla. 2008).
[11] *Florida School Officials Get Jail Time* (Sept. 17, 2009), *available at* http://www.cnn.com/2009/CRIME/09/17/florida.school.prayer/index.html (last visited Feb. 19, 2012).
[12] *Lay, Freeman Not Guilty In School Prayer Case* (Sept. 17, 2009), *available at* http://www.northescambia.com/?p=10943 (last visited Feb. 19, 2012).
[13] *Mary E. Allen v. School Board for Santa Rosa County, Florida*, Case Number 3:10-cv-00142-MCR-CJK (N.D. Fla. 2009).
[14] Settlement Agreement, Waiver and Release, filed with the court on July 1, 2011.

Section 2. Provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

The First Amendment

The First Amendment contains separate clauses relating to laws respecting religion and speech:

- The Establishment Clause ("EC") of the First Amendment states: "Congress shall make no law respecting an establishment of religion."[15]
- The Free Speech Clause ("FSC") of the First Amendment states: "Congress shall make no law…abridging the freedom of speech."[16]

Public vs. Private Speech

When considering the constitutional implications of speech in a public school, the court will first look to whether the speech should be considered public or private. If the speech is private, it is protected by FSC. If the speech is not private (i.e., is "state-sponsored"), it may violate EC.[17]

[15] Amendment I, U.S. Const. Similarly, the Florida Constitution provides "[t]here shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof."
[16] Amendment I, U.S. Const.

The Establishment Clause Tests

If the court determines that the speech at issue is not private, two tests are available to determine whether the speech violates EC:

1. The "Lemon Test" or "Entanglement Test" 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.[18]

The last prong remains the critical focus of the test.[19]

2. Under the "Coercion Test," the Court looks for "indicia of whether government actions constituted a pervasive degree of involvement."[20]

Caselaw

U.S. Supreme Court:

In *Santa Fe Independent School District v. Doe*, the U.S. Supreme Court found that a public school district's policy permitting student-led, student-initiated invocations or statements before high school football games violated EC.[21] The Court applied various aspects of both the Lemon and Coercion test.

The Court found that the speech at issue was not private speech, in part because "[the] invocations are authorized by a government policy and take place on government property at government-sponsored school-related events."[22] The Court further reasoned that the speech did not take place in a public forum because the school did not "evince either by policy or by practice any intent to open the [pregame ceremony] to indiscriminate use by the student body generally."[23]

Efforts by the school to divorce itself from the speech were also insufficient. First, the policy itself "invite[d] and encourage[d] religious messages" by its stated purpose of "solemnizing an event." The Court found that "[a] religious message is the most obvious method of solemnizing an event."[24] Second, although the election of the speaker was conducted by students, the District authorized the election.[25]

The Court then found that the state-sponsored speech failed the Coercion Test.[26] The student election mechanism itself, which was authorized by the District, "encourages divisiveness along religious lines in a public school setting, a result at odds with [EC]."[27] Furthermore, the Court rejected the argument that the policy was not coercive because students were not required to attend the pre-football game commencement ceremonies to which it applied. The Court found that although football games are not technically mandatory, the "[l]aw reaches past formalism," and the Constitution did not permit the

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[17] *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." (quoting *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens*, 496 U.S. 226, 250 (1990)). This issue is discussed in further detail under the "Caselaw" section below.

[18] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

[19] 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).

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

[21] *Santa Fe*, 530 U.S. at 301.

[22] *Id*.

[23] *Id.* at 303 (internal quotations and punctuation omitted, emphasis added).

[24] *Id.* at 306.

[25] *Id.* ("The elections take place at all only because the school board has chosen to permit students to deliver a brief invocation and/or message." (internal quotations omitted)).

[26] As established in *Lee v. Weisman*, 505 U.S. 577, 587 (1992). *See* explanation above.

[27] *Santa Fe*, 530 U.S. at 311.

District to "require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."[28]

Additionally, the Court expressed concerns with the majoritarian elections themselves, finding that "[the] election mechanism established by the District undermines the [Establishment Clause's] essential protection of minority viewpoints."[29]

In reaching its decision, the Court emphasized that it looked beyond the text of the statute.[30] The Court considered the historical context,[31] objective understanding of the students,[32] "realities of the situation,"[33] and general social realities[34] surrounding the statute, stating that it "refuse[d] to turn a blind eye to the context in which [the] policy arose."[35]

Eleventh Circuit Court of Appeals:

In 2001, the Eleventh Circuit Court of Appeals reviewed a Duval County school district policy in light of the U.S. Supreme Court's holding in *Sana Fe*.[36] The court held the policy facially constitutional.[37]

The policy 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[38]

The court found that unlike *Santa Fe*, the policy was not state-sponsored speech.[39] The court distinguished the case by recognizing that unlike the policy in *Santa Fe*, under the Duval policy "school officials are affirmatively *forbidden* from reviewing the content of the message, and are expressly denied the opportunity to censor any non-religious or otherwise disfavored views."[40] Furthermore, the court noted that unlike *Santa Fe*, the policy did not include religious terms such as "solemnizing" or "invocation," but was "neutral regarding whether *a message* is to be given, and if a message is to be given, the content of that message."[41]

Based on these facts, the court also found that the Duval policy was not coercive.[42]

The bill contains similar language to the Duval policy upheld in *Adler*. *Adler* has not been appealed.

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[28] *Id.* at 311-12.
[29] *Id.* at 317.
[30] *Id.* at 315. (finding that although the statute was unconstitutional on its face, "[o]ur examination, however, need not stop at an analysis of the text of the policy").
[31] *Id.* at 308, 311, 317.
[32] *Id.* at 308 ("In cases involving state participation in a religious activity, one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." (internal quotations and citation omitted).
[33] *Id.* at 305.
[34] *Id.* at 315. ("Whether a government activity violates [EC] is in large part a legal question to be answered on the basis of judicial interpretation of social facts… Every government practice must be judged in its unique circumstances…" (internal quotations and citations omitted)).
[35] *Id.*
[36] *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330, 1331-32 (11th Cir. 2001).
[37] *Id.* at 1332.
[38] *Id.*
[39] *Id.* at 1336.
[40] *Id.* at 1336-37.
[41] *Id.* at 1337 (emphasis added).
[42] *Id.* at 1338 ("These key facts also help illustrate why the speech permitted by Duval County cannot reasonably be described as state coercion of religion." (internal quotations omitted)).

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.