

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1027 Opening Remarks at High School Athletic Contests

SPONSOR(S): Secondary Education & Career Development Subcommittee, Barnaby, Yarborough and others

TIED BILLS: None **IDEN./SIM. BILLS:** SB 880

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Secondary Education & Career Development Subcommittee	13 Y, 4 N, As CS	Bauman	Sanchez
2) Education & Employment Committee	15 Y, 6 N	Bauman	Hassell

SUMMARY ANALYSIS

The bill requires athletic associations, whose memberships include public schools, to adopt bylaws, policies, or procedures that provide schools participating in a high school championship contest or series, under the direction and supervision of the association, an opportunity to make brief opening remarks at the event. If requested by the school, a speaker from the school may give opening remarks, no longer than 2 minutes, using the public address system at the event. Prior to the opening remarks from school speakers, the association must make an announcement that the schools' opening remarks are not endorsed by the association, nor do they reflect the views and opinions of the association.

The bill establishes that athletic associations may not control, monitor, or review the content of schools' opening remarks, nor may the associations control the schools' choice of speaker.

The bill provides that the decision to allow opening remarks before regular season contests is at the discretion of each school.

The bill does not have fiscal impact.

The bill provides an effective of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Federal Law Regarding Opening Remarks at Interscholastic Athletic Events

Establishment Clause

The U.S. Constitution prevents the government from establishing religion and protects privately initiated expression and activities from government interference and discrimination.¹ In order to determine whether a challenged state statute is permissible under the Establishment Clause, courts apply the *Lemon Test*, which requires that the challenged statute have a secular legislative purpose, have a principal or primary effect that neither advances nor inhibits religion, and avoid excessive government entanglement with religion.²

The Supreme Court's analysis in *Santa Fe Independent School District v. Doe* provides insight to how the Court applies the *Lemon Test* when evaluating opening remarks at athletics events on school premises.³ The Court held that the school district's policy permitting student-led, student-initiated prayer over the loudspeaker at high school football games on the school's property violated the Establishment Clause.⁴ The Court concluded that the pre-game invocations at issue were government speech because the invocations were specifically authorized by government policy and took place on government property at government-sponsored, school related events.⁵ However, the Supreme Court cautioned that not all public speech becomes government speech simply because it is made using public facilities at government sponsored events.⁶ Santa Fe school district's policy failed the *Lemon Test* because the Court found the policy did not have secular purpose and advanced certain religion at the expense of other religions given the narrow speaker selection process and criteria; and entangled the government with religion given the school district's specific encouragement of prayer and the history of the policy.⁷

Free Speech Clause

Speech is protected by the First Amendment of the United States Constitution.⁸ The government or a public actor may nevertheless regulate an individual's freedom of speech within constitutional limits.⁹ The First Amendment's free speech clause restricts government regulation of private speech but does not regulate government speech.¹⁰ To determine whether speech is government speech or private speech, courts consider 3 primary factors: the history and tradition of the speech; whether a reasonable observer could conclude that the government endorses the speech; and whether the government exercise direct control over the speech.¹¹

In 2019, the Eleventh Circuit held that the Florida High School Athletic Association's application of its Public-Address Protocol¹² prohibiting two schools from using the loudspeaker for a pre-game prayer at

¹ See U.S. Const., Amend. 1.

² *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

³ See *Santa Fe Independent Sch. District v. Doe*, 530 U.S. 290, 314 (2000).

⁴ *Id.* at 317.

⁵ *Id.* at 302.

⁶ *Id.* See *Rosenberger v. Rector*, 515 U.S.819 (1995) (holding that the University of Virginia must provide financial subsidy to a student religious organization on the same basis as other student publications).

⁷ *Santa Fe Independent Sch. District*, 530 U.S. at 302-10.

⁸ U.S. Const., Amend. 1.

⁹ *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

¹⁰ See *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 467 (2009).

¹¹ See *Pleasant Grove City*, 555 U.S. at 460; *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); *Mech v. Sch. Bd. of Palm Beach Cnty.*, 806 F.3d 1070 (11th Cir. 2015).

¹² See *supra* text accompanying notes 33-37.

the 2A Florida High School State Championship game may have violated constitutional free speech protections.¹³ The court’s analysis hinged on whether the speech over the loudspeaker was considered government or private speech. The court determined that inconsistencies in the record and indications that the FHSAA allowed prayer over the loudspeaker at past championships suggested the factors of history and tradition of the speech and the government’s direct control over the speech leaned toward a potential finding of private speech that warranted further deliberation at the district court level.¹⁴

The ability to regulate private speech on government-owned property is determined, in part, by the characterization of the type of public forum created.¹⁵ There are three types of public forums: traditional public forums, limited public forums, and closed public forums.¹⁶ A “traditional” or “open public forum” is a place with a longstanding tradition of freedom of expression, such as a public park, sidewalk, or street corner.¹⁷ In an open public forum, the government may only impose content-neutral restrictions on the time, place, and manner of expression.¹⁸ A limited public forum is a venue opened only for certain groups or topics.¹⁹ A public actor may regulate the subject area content or categories of organizations allowed in limited public forums but may not restrict expression based on a favorable or unfavorable viewpoint of a speaker or organization.²⁰ Finally, a “closed public forum” is a place that is not traditionally open to public expression, such as the teacher’s school mailroom or a military base. Restrictions on speech in a closed public forum may only be reasonable and may not be designed to silence an unfavorable viewpoint.²¹

Florida Law Regarding Opening Remarks at Interscholastic Athletic Events

The Florida Constitution closely replicates the First Amendment’s protections against the establishment of religion.²² The scope of the Florida Constitution’s protection of free speech is the same as required under the First Amendment.²³

Florida law designates the Florida High School Athletic Association (FHSAA) as the governing nonprofit organization for interscholastic competition for grades 6 through 12 in Florida public schools.²⁴ Any high school, middle school, or combination school,²⁵ including charter schools, virtual schools, private schools, and home education cooperatives,²⁶ may become a member of the FHSAA.²⁷ The FHSAA is required to adopt bylaws regulating student eligibility, recruiting, and member schools’ interscholastic competition in accordance with applicable law.²⁸ Florida law establishes that the FHSAA’s authority to organize and

¹³ *Cambridge Christian Sch., Inc. v. Fla. High School Athletics Ass’n*, 942 F.3d 1215 (11th Cir. 2019).

¹⁴ *Id.* at 1231.

¹⁵ *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 678-79.

¹⁶ *Id.*

¹⁷ *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 45-46 (1992).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Pleasant Grove City*, 555 U.S. at 470.

²¹ *Perry*, 460 U.S. at 37.

²² Art. 1, s. 3, Fla. Const. *See Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 119 (Fla. 1st DCA 2010) (explaining that the Florida Constitution’s establishment clause is consistent with the First Amendment and imposes additional restrictions on state actors through the no-aid provision).

²³ Art. 1, s. 4, Fla. Const. *See Cafe Erotica v. Fla. Dep’t of Transp.*, 830 So. 2d 181, 183 (Fla. 1st DCA 2002) (stating that the scope of free speech protections in the Florida Constitution is the same as the First Amendment).

²⁴ Section 1006.20(1), F.S. If the FHSAA fails to meet its obligations and responsibilities, the Commissioner of Education (commissioner) is directed to designate a nonprofit organization to manage interscholastic athletics with the approval of the State Board of Education (SBE). *Id.*

²⁵ A “combination school” is any school that provides instruction to students in high school and the middle school grades; elementary, middle or high school grades combined; or elementary and middle grades combined (e.g. K-12; K-8; 6-12; or 7-12). Bylaw 3.2.2.3, FHSAA.

²⁶ A “home education cooperative” is a parent-directed group of individual home education students that provides opportunities for interscholastic athletic competition to those students and may include students in grades 6-12. Bylaw 3.2.2.4, FHSAA.

²⁷ Section 1006.20(1), F.S.

²⁸ Section 1006.20(2), F.S.

conduct statewide interscholastic competition includes the potential for state championships and the FHSAA also has authority to establish terms and conditions for those contests.²⁹

FHSAA Florida High School State Championship Series

The FHSAA's Florida High School State Championship Series (State Championship Series) determines official state champions, among the Association's member schools, in sports sanctioned or recognized by the FHSAA Board of Directors.³⁰ The FHSAA limits participation in the State Championship Series to schools that are full members of the Association.³¹ The FHSAA Board of Directors determines in which sports³² a State Championship Series will be offered and establishes the terms and conditions for the competition series.³³

The FHSAA's Public Address Protocol applies to all State Championship Series.³⁴ The public address announcer must maintain neutrality.³⁵ The announcer is required to follow the FHSAA script for promotional announcements, player introductions, and awards ceremonies.³⁶ The procedure limits other announcements to:³⁷

- Those of an emergency nature;
- Those of a "practical" nature (e.g. a vehicle with lights on);
- Teams' starting lineups or entire lineups';
- Messages provided by host school management;
- Announcements about the sale of FHSAA souvenir merchandise;
- Players attempting or making a play;
- Penalties as signaled by the referee; and
- Substitutions and timeouts.

Public address announcers may not provide play-by-play commentary as if announcing a radio or television broadcast, make comments that offer an unfair advantage to one team, make comments critical of contest participants, schools, or officials.³⁸

For regular season events, the FHSAA's Public Address Protocol states that the public address announcer must maintain neutrality.³⁹ The FHSAA encourages schools to abide by the additional requirements of the Public Address Protocol for the State Championship Series but does not require compliance for regular season events.⁴⁰

Other Athletic Associations in Florida

Although FHSAA is the largest school athletic association in Florida, other associations are in operation and oversee their respective member schools' athletics and interscholastic competitions.⁴¹ These

²⁹ Section 1006.20(4)(d)6., F.S.

³⁰ Bylaw 2.10, FHSAA.

³¹ *Id.* The FHSAA must allow private schools the option of maintaining full membership in the Association or membership by sport. The FHSAA may allow public schools the option of applying for consideration to join another athletic association. Section 1006.20(1), F.S.

³² The FHSAA currently conducts State Championship Series in the following sports: baseball, basketball, bowling, competitive cheerleading, cross country, flag football, football, golf, lacrosse, soccer, softball, swimming and diving, tennis, track and field, volleyball, water polo, weightlifting, and wrestling. FHSAA, *2020-21 FHSAA Administrative Procedures*, at 2, available at https://fhsaa.com/documents/2020/10/9//2021_admin_procedures_1009.pdf?id=319.

³³ Section 1006.20(4)(d)6., F.S.; Bylaw 2.10, FHSAA.

³⁴ FHSAA, *2020-21 FHSAA Administrative Procedures*, Procedure 3.1.8, at 13, available at https://fhsaa.com/documents/2020/10/9//2021_admin_procedures_1009.pdf?id=319.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ FHSAA, *2020-21 FHSAA Administrative Procedures*, Procedure 2.2.1, at 11, available at https://fhsaa.com/documents/2020/10/9//2021_admin_procedures_1009.pdf?id=319.

⁴⁰ *Id.*

⁴¹ See Sunshine State Athletic Conference, *Our Members*, <https://www.sunshinestateathletics.com/page/show/5114535-our-members> (last visited March 2, 2021); Florida Independent Christian Athletic Association, *Regions & Members*, <https://ficaa.org/members> (last

associations primarily serve private schools but some of the associations' memberships are growing to include more public schools.⁴² These associations operate state championship contests for their member schools according to the associations' respective policies and procedures.⁴³

Effects of Proposed Changes

The bill requires athletic associations, whose memberships include public schools, to adopt bylaws, policies, or procedures that provide schools participating in a high school championship contest or series, under the direction and supervision of the association, an opportunity to make brief opening remarks at the event. If requested by the school, a speaker from the school may give remarks, no longer than 2 minutes, using the public address system at the event. Prior to the opening remarks from school speakers, the association must make an announcement that the school's opening remarks are not endorsed by the association nor do they reflect the views and opinions of the association.

The bill establishes that athletic associations may not control, monitor, or review the content of schools' opening remarks, nor may the associations control the schools' choice of speaker.

The bill provides that the decision to allow opening remarks before regular season contests is at the discretion of each school.

B. SECTION DIRECTORY:

Section 1. Creates s. 1006.185, F.S., requiring certain athletic associations to create bylaws, policies, or procedures allowing opening remarks at specified events; providing requirements for such remarks; requiring certain announcements before such opening remarks; providing that opening remarks at specified events are at the discretion of each school.

Section 2. Provides an effective date of July 1, 2021.

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:

visited March 2, 2021); Florida Independent High School Athletic Association, *School Links*, <https://fihsaa.org/schools/> (last visited March 2, 2021); Sunshine Independent Athletic Association, <https://www.siaa1.com/> (last visited March 2, 2021) (click "Member Schools" in menu).

⁴² See Sunshine State Athletic Conference, *About Us*, <https://www.sunshinestateathletics.com/page/show/5084878-about-us> (last visited Feb. 22, 2021).

⁴³ See Sunshine State Athletic Conference, *Girls Beach Volleyball*, <https://www.sunshinestateathletics.com/page/show/5114586-girls-beach-volleyball> (last visited March 11, 2021); Florida Independent High School Athletic Association, *Manual*, at 18-19, available at <https://fihsaa.files.wordpress.com/2020/03/fihsaa2.pdf> (last visited March 11, 2021).

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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:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 17, 2021, the Secondary Education and Career Development Subcommittee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS differs from the bill as originally filed by:

- Requiring any athletic association whose memberships include public schools, rather than just the FHSAA, to provide schools participating in a high school championship contest or series, under the direction and supervision of the association, an opportunity to make brief opening remarks at the event.
- Establishing that the athletic association may not control, monitor, or review the content of the opening remarks or control the school's choice of speaker; the original bill applied this provision just to the FHSAA.
- Requiring the athletic association, rather than just the FHSAA, to announce that the school remarks are not endorsed by and do not reflect the views and opinions of the association.

The analysis is drafted to the committee substitute as approved by the Secondary Education and Career Development Subcommittee.