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:	SJR 2550
INTRODUCER:	Senator Altman
SUBJECT:	Religious Freedom
DATE:	April 2, 2010
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Matthews	ED	**Favorable**
2.			JU	
3.			RC	
4.				
5.				
6.				

I. Summary:

Senate Joint Resolution 2550 proposes an amendment to the State Constitution to provide that a person cannot be prohibited from participating in a public program because of the person's free choice in using program benefits at a religious provider.

Language is stricken that prohibits public revenue from directly or indirectly supporting sectarian institutions. This provision is commonly known as a Blaine amendment.

This joint resolution amends article 1, section 3, of the Florida Constitution.

II. Present Situation:

Constitutional Amendment Process

Article XI of the Florida Constitution sets forth various methods for proposing amendments to the constitution, along with the methods for approval or rejection of proposals. One method by which constitutional amendments may be proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature.[1] Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the Secretary of State, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing.[2] If the proposed

[1] s. 1, art. XI, Florida Constitution
[2] s. 5(a), art. XI, Florida Constitution

amendment is approved by a vote of at least 60 percent of the electors voting on the measure, it becomes effective as an amendment to the Florida Constitution on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.[3]

III. Effect of Proposed Changes:

Senate Joint Resolution 2550 proposes an amendment to Section 3, Article I, of the State Constitution to provide that a person cannot be prohibited from participating in a public program because of the person's free choice in using program benefits at a religious provider. If approved by the electorate, this amendment would enable public monies to fund religious activities.

The Blaine amendment provision is removed from the state constitution.

The joint resolution is silent regarding an effective date for the constitutional amendment. Therefore, in accordance with section 5, article XI, of the Florida Constitution, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by the electorate.

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 Establishment Clause and the Blaine Amendment

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:

[3] s. 5(e), art. XI, Florida Constitution

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. *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.*

The language emphasized is commonly known as a Blaine amendment, or a "no aid" provision. The history of the Blaine amendment is that it is generally considered to have represented a political response to widespread anti-Catholic and anti-immigrant sentiment in the mid to late 19th century. In response to the rapid spread of Catholic schools in urban cities, such as Chicago, Boston, Philadelphia, and St. Paul, opponents called for political leaders to step in and impose a ban on public dollars going to sectarian institutions, while preserving the ability of teachers to provide Protestant instruction in public schools. At the time, the Fourteenth Amendment had not incorporated the Establishment Clause of the federal constitution so that it did not apply to the states. In 1875, Congressman Blaine, from Maine, introduced legislation which would have placed the restriction on public funding in the federal constitution. Although Congress indicated strong support for the Blaine amendment, it failed to reach the two-thirds super-majority required by four votes.[4]

Proponents of the Blaine amendment took a systematic, state-by-state approach to its introduction into state constitutions. Some territories, in application for statehood, adopted Blaine amendments as a condition to becoming states. By 1890, 29 states had some form of "no aid" provision in their constitutions.[5] Florida adopted its Blaine amendment in 1885, and then readopted it as amended to its current form in 1968.[6]

Not all states adopted Blaine amendments, and today, 37 states have some version or other of the provision in their state constitutions.[7] Commentators differ regarding the existence of the "true" number of Blaine amendments, or the number of provisions with actual enforcement.

Without knowing exactly how this provision may potentially be challenged, it is instrumental to generally assess how the establishment clause applies to education cases. Initially, a provision must comply with facial constitutionality. In analyzing whether a statute is constitutional on its face, the court will not consider a statute's application in

[4] Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HVJLPP 657, 670-672 (1998).
[5] *Id.* at 673.
[6] Nathan A. Adams, *Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education*, 30 NOVALR 1-3 (2005).
[7] Website: www.blaineamendments.org; Last checked April 4, 2010.

practice or through factual findings.[8] The Florida Supreme Court reviewed the First District Court of Appeal's holding that the state's Opportunity Scholarship Program, which provided education vouchers for children to leave failing public schools and attend private schools, violated the "no aid" provision of the state constitution. The Florida Supreme Court, in invalidating the program on other grounds, ruled that it would:

> …neither approve nor disapprove the First District's determination that the OSP violates the "no aid" provision in article I, section 3 of the Florida Constitution, an issue we decline to reach."[9]

Because the court decided the case on uniformity grounds, it also did not reach the question of whether the program violated the federal establishment clause.

In upholding an Ohio school voucher program, the U.S. Supreme Court ruled that it did not violate the federal Establishment clause, as the program took a neutral approach towards religion and individuals had the option to exercise their own free choice regarding private providers.[10] Rather than focusing on the volume of available religious providers, which in this case represented a full 82 percent of participating schools, the court deemed critical the extent to which the program had the effect of advancing or inhibiting religion.[11] In the absence of demonstrated governmental preference for religious support, the mere incidental advancement of religion, the court opined, is not constitutionally deficient.[12]

The United States Court of Appeals for the District of Columbia circuit reiterated this principle in American Jewish Congress v. Corporation for National and Community Service.[13] Here, the court upheld the AmeriCorps Education Awards Program, a nationwide community service program that provided placement of participants in schools, and granted an award to those who completed qualifying service hours. The program did not exclude providers on the basis of religious affiliation or instruction. Some participants were placed in sectarian schools, and some taught religious instruction as part of their coursework. While the program did not expressly restrict instruction to non-secular subjects, instructors received no incentive for teaching religious courses, and these hours did not count towards qualifying service hours.[14] As program challengers

[8] *Bowen v. Kendrick*, 487 U.S. 589, 600-01 (1988). See, also, *Reno v. Flores*, 507 U.S. 292, 301, 113 S.Ct. 1439, 1446, 123 L.Ed.2d 1 (1993), which provides that a facial challenge is assessed without reference to factual findings or evidence of particular applications. To prevail on a facial challenge a petitioner must establish that no set of circumstances exists under which the challenged act would be valid.

[9] *Bush v. Holmes*, 919 So.2d 392, 413 (Fla. 2006); here, the court struck down the program on the basis that it violated s. 1(a), art. IX, of the Florida Constitution, as it jeopardized the requirement that the state provide for a uniform system of free public schools: "The OSP contravenes this…provision because it allows some children to receive a publicly funded education through an alternative system of private schools…not subject to the uniformity requirements of the public school system. The diversion of money not only reduces public funds for a public education but also uses public funds to provide an alternative education in private schools…not subject to the "uniformity" requirement for public schools." *Id.* at 412.

[10] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

[11] *Id.* at 640.

[12] *Id.*

[13] 365 U.S.App.D.C. 112 (2005).

[14] *Id.* at 118.

failed to demonstrate favoritism towards religious institutions or teachings, the court held, there was no imprimatur of government endorsement.[15]

The Ninth Circuit Court of Appeals did find such an imprimatur, however, in a challenge to a state program establishing a privately funded student tuition organization (STO), where those contributing to the program received a dollar-for-dollar credit on taxes.[16] Although the statute at issue did not directly specify that funding would be provided to religious institutions, in practice, the overwhelming presence of sectarian STOs in the program, and the unrestricted grant of money to these STOs (which then distributed the money solely to religious schools), combined to leave parents with little choice in the selection of providers. Therefore, although the stated purpose of the program was individual choice in education, an on-its-face neutral purpose, its impact was to further religion through education. In support of its invalidation of the STO program, the court cited the U.S. Supreme Court in McCreary County, Kentucky v. ACLU of Kentucky: "…although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."[17]

This joint resolution provides both for the removal of the Blaine amendment from the state constitution, and the introduction of new language upholding independent choice. Not all state constitutions contain a Blaine amendment now so its deletion here is, in all likelihood, permissible. Without the benefit of having a program in place to review, it is difficult to analyze the new language in this joint resolution for constitutional impact. However, this provision would likely survive a challenge on its face.

Joint Resolutions

In order for the Legislature to submit SJR 2550 to the voters for approval, the joint resolution must be agreed to by three-fifths of the membership of each house.[18] If SJR 2550 is agreed to by the Legislature, it will be submitted to the voters at the next general election held more than 90 days after the amendment is filed with the Department of State.[19] As such, SJR 2550 would be submitted to the voters at the 2010 General Election. In order for SJR 2550 to take effect, it must be approved by at least 60 percent of the voters voting on the measure.[20]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[15] *Id.* at 117.
[16] *Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002 (2009).
[17] 545 U.S. 844, 864 (2005).
[18] s. 1, art. XI, Florida Constitution
[19] s. 5(a), art. XI, Florida Constitution
[20] s. 5(e), art. XI, Florida Constitution

B. Private Sector Impact:

Private religious institutions could benefit from receiving public funds.

C. Government Sector Impact:

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election.[21] Costs for advertising vary depending upon the length of the amendment. According to the Department of State, the average cost of publishing a constitutional amendment with the ballot summary is $102,053. The cost varies depending on the length of the full text. The average cost per word is $94.68.

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:

None.

[21] s. 5(d), art. XI, Florida Constitution