

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 Committee on Judiciary

BILL: SB 436

INTRODUCER: Senators Baxley and Steube

SUBJECT: Religious Expression in Public Schools

DATE: March 13, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Benvenisty</u>	<u>Graf</u>	<u>ED</u>	Favorable
2.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	Pre-meeting

I. Summary:

SB 436 creates the “Florida Student and School Personnel Religious Liberties Act,” protecting K-12 public school students, their parents, and school personnel from discrimination based on their religious belief and expression.

The bill protects students from discrimination based on their religion in several ways. Regarding coursework, the bill requires that students’ work be graded according to the expected academic standards, without regard for any religious content. Also, if students in a given school setting are permitted to wear clothing, jewelry, or accessories that display a secular message or symbol, then students may also wear items displaying religious messages or symbols. Moreover, the bill authorizes students to express themselves in a religious manner, and to engage in and organize religious activities to the same extent as secular expressions and activities are permitted.

The bill protects school personnel from discrimination in several ways. First, school districts may not discriminate against their employees on religious grounds. Also, school personnel may not be barred from joining in certain types of student-initiated religious activities. This protection includes several caveats, including that the activity must be on school grounds, occur at reasonable times before or after school, be voluntary, and not conflict with the duties of the employee joining the student-initiated activity.

The bill protects religious groups from discrimination by requiring school districts to permit these groups access to the same facilities for assembly that it permits such access to secular groups.

The bill requires school districts to adopt a policy establishing a “limited public forum” for student speakers at certain school events. This policy must include certain elements set forth in the bill. Also, the policy must include or be comprised entirely of the model limited public forum policy that the bill requires the Florida Department of Education to develop and publish.

II. Present Situation:

Federal and State Law Pertaining to Religious Liberty

Provisions in the Constitutions of Florida and the United States

The relationship between religion and government in the United States is governed by the First Amendment to the U.S. Constitution, which prevents the government from establishing religion and protects privately initiated expression and activities from government interference and discrimination.¹

The First Amendment to the U.S. Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Similarly, Article I, section 3 of the Florida Constitution states:

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.

Both the U.S. Constitution and the Florida Constitution contain an Establishment Clause, Free Exercise Clause, and protect individual freedom of speech and expression.²

Establishment of Religion

The Establishment Clause of the First Amendment to the U.S. Constitution requires the government, including public school officials, to maintain neutrality in its treatment of religion.³ Accordingly, teachers and other school personnel, as government officials, may not lead students in prayer, devotional readings from religious texts, or other religious practices.⁴

Free Exercise of Religion

The protections of the Free Exercise Clause direct that no law may discriminate against some or all religious beliefs or regulate or prohibit conduct undertaken for religious reasons.⁵ Florida courts have generally interpreted Florida's Free Exercise Clause as coequal to the federal clause.⁶

¹ U.S. CONST. amend. I.

² U.S. CONST. amend. I; FLA. CONST. art. I, s. 3.

³ U.S. Department of Education, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited March 3, 2017); see also *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

⁴ *Engle v. Vitale*, 370 U.S. 421 (1962) (invalidating state laws directing the use of teacher-led prayer in public schools) and *School District of Abington Township Pennsylvania et al. v. Shempp et al.*, 374 U.S. 203 (1963) (invalidating state laws requiring public schools to begin the school day with Bible readings).

⁵ *Church of the Lukimi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

⁶ *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1030 (citing *Toca v. State*, 834 So. 2d 204, 208 (Fla. 2d DCA 2002)).

Free Speech and Expression

Both the U.S. Constitution and Florida Constitution provide that every person may speak, write, and publish sentiments on all subjects.⁷

However, an individual's freedom of speech or expression may be limited by the government if the speech or expression occurs on government-owned property, such as a public elementary, middle, or high school, or at a public university.⁸ Such limitations are determined by the type of public forum created on government property.⁹ There are three types of public forums:¹⁰

- A “traditional” or “open public forum”¹¹ is a place with a longstanding tradition of freedom of expression, such as a public park or street corner. In an open public forum, the government may only impose content-neutral time, place, and manner restrictions on speech and expression.¹²
- A “designated” or “limited public forum”¹³ is a place with a more limited history of expressive activity, usually only for certain groups or topics. Examples may include a university meeting hall.¹⁴ Such limitations must serve a compelling state interest.¹⁵
- A “closed public forum” is a place that is not traditionally open to public expression, such as a military base.¹⁶

Generally, student speech and religious expression are protected by the First Amendment of the U.S. Constitution.¹⁷ However, such rights may be limited.¹⁸ A student's right to freedom of speech and expression is protected to the extent it does not “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.”¹⁹

Students may pray, read religious texts, or study religious materials in a non-disruptive manner when not engaged in school activities or instruction.²⁰ School authorities are permitted to

⁷ U.S. CONST. amend. 1 (Congress shall make no law abridging the freedom of speech.); Art. I, s. 4, Fla. Const. (Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right.).

⁸ *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

⁹ *Id.* at 678-79.

¹⁰ *Id.*

¹¹ First Amendment Schools, *What is a public forum?* <http://www.firstamendmentschools.org/freedoms/faq.aspx?id=13012>, (last visited March 3, 2017); see *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 45-46 (1992).

¹² *Perry*, 460 U.S. at 45-46.

¹³ First Amendment Schools, *What is a public forum?* <http://www.firstamendmentschools.org/freedoms/faq.aspx?id=13012>, (last visited March 3, 2017); see *Perry*, 460 U.S. at 45-46.

¹⁴ *Perry*, 460 U.S. at 45-46.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 513-514 (1969) (stating “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates.”); see *Mergens*, 496 U.S. at 230, 250 (1990) and *Chandler v. Siegelman*, 230 F.3d 1313, 1316-1317 (11th Cir. 2001) *cert. denied*, 533 U.S. 916 (2001) (religious expression).

¹⁸ *Tinker*, 393 U.S. at 506, 512-13.

¹⁹ *Id.* at 513.

²⁰ U.S. Department of Education, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited March 3, 2017).

regulate such activities, but must do so in a manner that does not discriminate against religious expression.²¹

Florida Statutes

The Religious Freedom Restoration Act

Additionally, the Florida Religious Freedom Restoration Act (RFRA) specifically protects a person's right to the free exercise of religion.²² The RFRA provides that, as a general matter, the government may not substantially burden a person's free exercise of religion.²³ However, the government may substantially burden a person's exercise of religion if the government demonstrates that the burden is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest.²⁴

The Florida Education Code

Florida law authorizes a district school board to adopt a policy allowing an inspirational message by students at a student assembly.²⁵ The policy must provide that students who are responsible for organizing any student-led portion of a student assembly must:²⁶

- Have sole discretion in determining whether an inspirational message is to be delivered; and
- Choose the student volunteers to deliver the message. The student volunteers must be solely responsible for the preparation and content of the inspirational message.

School district personnel are prohibited from participating in, or otherwise influencing, the determination of whether an inspirational message is to be delivered or selecting the student volunteers to deliver the inspirational message.²⁷ Additionally, school district personnel may not monitor or otherwise review the content of a student volunteer's inspirational message.²⁸

The Florida Department of Education is required annually to distribute the federal guidelines on "Religious Expression in Public Schools" published by the U.S. Department of Education to all district school board members, district superintendents, school principals, and teachers for informational purposes.²⁹

Florida law requires each district school board to adopt a code of student conduct for elementary schools and a code of student conduct for middle and high schools, and distribute the appropriate code to teachers, school personnel, students, and parents at the beginning of each school year.³⁰

²¹ *Board of Education of Westside Community Schools, etc. et al. v. Mergens et al.*, 496 U.S. 226 (1990).

²² See ch. 761, F.S.

²³ This burden might be a law, rule, or regulation—e.g., a statute that prohibited students from praying in the company of their classmates.

²⁴ Section 761.03, F.S.

²⁵ Section 1001.432(1), F.S.

²⁶ *Id.* at (1)(a).

²⁷ *Id.* at (1)(b)1.

²⁸ *Id.* at (1)(b)2.

²⁹ Section 1002.205, F.S.; see also U.S. Department of Education, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited March 3, 2017).

³⁰ Section 1006.07(2), F.S.

The code of student conduct must include, but is not limited to, an explanation of the responsibilities of each student with regard to appropriate dress and must prohibit clothing that exposes underwear or body parts in an indecent or vulgar manner, or that disrupts the orderly learning environment.³¹

Additionally, each district school board is authorized to adopt policies requiring students to wear uniforms or impose other dress-related requirements, if a district school board finds that the policies are necessary for the safety and welfare of the student body or school personnel.³²

In 2016, the Legislature enacted the Students Attired for Education (SAFE) Act to create an incentive payment for school districts and charter schools that implement a standard student attire policy for all students in kindergarten through grade 8.³³ The standard attire policy must:³⁴

- Apply to all students in kindergarten through grade 8 in the school district or charter school, regardless of individual school grade configurations;
- Prohibit certain types or styles of clothing and require solid-colored clothing and fabrics for pants, skirts, shorts, or similar clothing and require short-or-long sleeved shirts with collars; and
- Allow reasonable accommodations based on student's religion, disability, or medical condition.

A district school board or charter school governing board that implements a districtwide or schoolwide standard attire policy, respectively, is immune from civil liability resulting from adoption of the policy in accordance with Florida law.³⁵

Federal Statutes

The Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination based on race, color, religion, sex, and national origin.³⁶ As such, a school district may not discriminate against an employee on the basis of his or her religion. For purposes of the Civil Rights Act, the term "religion" includes all aspects of religious observance, practice, or belief.³⁷

The Equal Access Act

The Equal Access Act³⁸ makes it unlawful for any public secondary school that receives federal financial assistance and maintains a limited open forum³⁹ to deny equal access or fair opportunity

³¹ *Id.* at (2)(d)1.

³² Section 1001.43(1)(b), F.S.

³³ Section 1011.78, F.S.

³⁴ *Id.* at (3).

³⁵ *Id.* at (5).

³⁶ 42 U.S.C. s. 2000e.; U.S. Equal Employment Opportunity Commission, *Title VII of the Civil Rights Act of 1964*, <https://www.eeoc.gov/laws/statutes/titlevii.cfm> (last visited March 3, 2017).

³⁷ 42 U.S.C. s. 2000e(j).

³⁸ 20 U.S.C. s. 4071.

³⁹ A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurricular related student groups to meet on school premises during instructional time. 20 U.S.C. s. 4071(b). This is

to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of speech at such meetings.⁴⁰

A public secondary school is deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that:⁴¹

- The meeting is voluntary and student-initiated;
- There is no sponsorship of the meeting by the school, the government, or its agents or employees;
- Employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
- The meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
- Nonschool persons do not direct, conduct, control, or regularly attend such activities of student groups.

The U.S. Supreme Court has held that the Equal Access Act does not violate the Establishment Clause of the First Amendment to the U.S. Constitution.⁴² The Equal Access Act applies to public secondary schools⁴³ and does not address the applicability of the Act to elementary or middle schools.⁴⁴

Federal Funding Conditioned on School Districts Not Restricting Prayer in School

A school district is responsible for the operation, control, and supervision of all public schools within the school district.⁴⁵ As a condition of receiving federal funds, a school district must certify in writing to the Florida Department of Education that the school district has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools.⁴⁶

a different standard from the “limited public forum” specified in SB 436. *See East High Gay Straight Alliance v. Board of Education of Salt Lake City School District*, 81 F. Supp. 2d 1199, 1200 n.1 (D. Utah 1999) (citing *Mergens*, 496 U.S. at 242).

⁴⁰ 20 U.S.C. s. 4071(a).

⁴¹ *Id.* at (c).

⁴² *Mergens*, 496 U.S. at 253.

⁴³ A “secondary school” means a public school which provides secondary education as determined by state law. 20 U.S.C. 4072(1). A secondary school in Florida is described as a high school. Section 1003.01(2), F.S.

⁴⁴ The U.S. Supreme Court has noted that no meaning can be derived from the decision by Congress not to address elementary schools in the Equal Access Act. *Good News Club v. Milford Central School*, 533 U.S. 98, 118 n.8 (2001).

⁴⁵ FLA. CONST. art. IX, s. 4(b).

⁴⁶ 20 U.S.C. s. 7904(b); *see also* Florida Department of Education, *Guidelines in Annual Certification Regarding Constitutionally Protected Prayer in all Public Elementary and Secondary Schools* (Oct. 28, 2016), Memorandum DPS:2016-168; U.S. Department of Education, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited March 3, 2017); s. 1002.205, F.S.

III. Effect of Proposed Changes:

Discrimination Against Students, Parents, and School Personnel for Religion Prohibited

The bill prohibits a school district from discriminating against a student, parent, or school personnel on the basis of a religious viewpoint or religious expression.

Non-discrimination Regarding Student Religious Expression

Under the bill, a school district must treat a student's voluntary expression of a religious viewpoint on an otherwise permissible subject in the same way that it would treat the expression of a secular viewpoint.

Student Religious Expression in Coursework and Attire

The bill requires public schools to evaluate each student's work on expected academic criteria relating to the course curriculum and requirements, at least as to assignments that require a student to express his or her viewpoint.⁴⁷

Similarly, the bill prohibits discrimination against religious clothing, accessories, and jewelry. Specifically, a school district must permit the wearing of clothing, accessories, and jewelry that display a religious message just as the school district would if these items were secular.⁴⁸

Student Prayer and Religious Activities

The bill also authorizes a student to pray or engage in and organize religious activities before, during, and after the school day to the same extent that students may engage in secular activities, expression, or groups. Further, the bill authorizes a group that meets for prayer or religious speech to advertise or announce its meetings to the same extent that a secular group may advertise or announce its meetings. This right appears to be consistent with the federal Equal Access Act, which applies to public secondary schools.⁴⁹ Also, students at these schools may organize during non-instructional time.⁵⁰ The bill appears to guarantee this right for students in public elementary and middle schools as well.

The bill authorizes a student to express his or her religious beliefs via homework, artwork, and other written and oral assignments free from discrimination based on their religious content of the student's work. This authority appears to be consistent with federal guidance on "Religious

⁴⁷ The second and third sentences of paragraph (3)(a) seem to express the same basic idea, except where the third sentence limits the prohibition on discrimination against religious viewpoints in coursework to those assignments that *require* a student to express his or her viewpoint.

⁴⁸ Examples of clothing, accessories, and jewelry that display a religious message or symbol may include a rosary necklace (see *Chalifoux v. New Caney Independent School District*, 976 F. Supp. 659 (S.D. Tex. 1997), a yarmulke (see *Menora v. Illinois High School Association*, 683 F.2d 1030 (7th Cir. 1982)), long, braided hair of particular religious significance (see *A.A. ex rel. Betenbaugh v. Needville Independent School District*, 611 F.3d 248 (5th Cir. 2010)), and a hijab (United States' Memorandum of Law in Support of Its Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, *Hearn et al. v. Muskogee Public School District*, C.A. No.: CIV 03-598-S (E.D. Okla. May 6, 2004)).

⁴⁹ 20 U.S.C. s. 4071.

⁵⁰ "A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." *Id.* at (b).

Expression and Prayer in Class Assignments.”⁵¹ Such assignments must be evaluated based on relevant academic standards, and neither penalized nor rewarded on account of religious content.⁵²

Religious Liberty for School Personnel

Under the bill, a school district may not prohibit its personnel from attending religious activities that are:

- On school property;
- Student-initiated;
- Voluntary;
- At reasonable times before or after school; and
- Not in conflict with the responsibilities or assignments of the attending personnel.

Also, the bill expressly requires school districts to comply with Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating against an employee on the basis of religion.

Non-discrimination Regarding Access for Religious Groups

The bill requires school districts to permit religious groups to assemble in the same facilities in which they permit a secular group to assemble. Therefore, for example, if a school grants afterschool access to its gymnasium for an environmentalist group’s event, it must permit a Jewish group to meet in the school’s gymnasium as well.

School Districts Required to Create “Limited Public Forum” Policies

In addition, the bill provides that a school district may not prevent school personnel from participating in religious activities on school grounds if the activities are initiated by students at reasonable times before or after the school day if the activities are voluntary and do not conflict with the responsibilities or assignments of these personnel.⁵³

The bill also requires a school district to adopt a policy that establishes a limited public forum for student speakers at any school event at which a student is to speak publicly. The policy must require the school district to:

⁵¹ U.S. Department of Education, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited March 3, 2017). As an example, if a teacher’s assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer should be judged on the basis of academic standards, such as literary quality. *Id.*

⁵² *Id.*

⁵³ Presently, pursuant to the Establishment Clause of the First Amendment to the U.S. Constitution, teachers, school administrators, or other school employees generally may not actively participate in prayer or similar religious activities with students on school grounds, unless the overall context makes clear such employees are not participating in their official capacity. U.S. Department of Education, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited March 3, 2017). For example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversations or nonreligious activities. Similarly, teachers may participate in their personal capacities in privately sponsored baccalaureate ceremonies. *Id.*

- Provide the forum in a manner that does not discriminate against a student’s voluntary expression of a religious viewpoint on an otherwise permissible subject;
- Provide a method based on neutral criteria for the selection of student speakers at school events, activities, and graduation ceremonies;
- Ensure that a student speaker does not engage in obscene, vulgar, offensively lewd, or indecent speech; and
- State in written or oral form that the student’s speech does not reflect the endorsement, sponsorship, position, or expression of the school district. The school district must deliver this disclaimer at all graduation events and any other event at which a student speaks publicly.

Additionally, the bill provides that a limited public forum may not exclude student expression of a religious viewpoint on an otherwise permissible subject. Currently, district school boards have the discretion to decide whether to establish a limited public forum.⁵⁴ Consequently, a district school board that has not yet adopted a policy may need to adopt a policy establishing a limited public forum for student speakers to meet the requirements of this bill.

Responsibility of the Department of Education

The bill requires the Florida Department of Education to develop and publish on its website a model “limited public forum” policy, which each district school board must adopt and implement, regarding a limited public forum and the voluntary expression of religious viewpoints by students and school personnel in public schools. The model policy may assist the school districts in adopting a uniform policy regarding religious expression in public schools, which may facilitate consistency in implementation of the policy.

The bill takes effect on July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the State Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁵⁴ See *Perry*, 460 U.S. at 45-46. A limited public forum is a place with a more limited history of expressive activity, usually only for certain groups or topics. Examples may include a university meeting hall. Such limitations must serve a compelling state interest. First Amendment Schools, *What is a public forum?* <http://www.firstamendmentschools.org/freedoms/faq.aspx?id=13012>, (last visited March 3, 2017).

D. Other Constitutional Issues:

The provisions of the bill appear to be substantially consistent with provisions of federal law, state law, and court opinions interpreting the right to religious freedom under the state and federal constitutions. These laws and court opinions are discussed in the present situation.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill requires the Florida Department of Education to develop and model limited public forum policy, which school districts are required to adopt. School districts may be permitted to supplement the model policy. Creating and adopting these policies may involve some amount of cost to the Department of Education and each school district.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates an unnumbered section of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.