

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 Education

BILL: SB 880

INTRODUCER: Senators Rodriguez and Baxley

SUBJECT: Florida High School Athletic Association

DATE: March 22, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Westmark	Bouck	ED	Pre-meeting
2.			GO	
3.			RC	

I. Summary:

SB 880 requires the Florida High School Athletic Association (FHSAA) to adopt bylaws or policies authorizing a member school to provide 30 seconds of opening remarks over a public-access system before the start of an athletic competition, and prohibiting the FHSAA from controlling the contents of such remarks.

There is no fiscal impact to this bill.

The bill takes effect July 1, 2021.

II. Present Situation:

In December of 2015, Tampa's Cambridge Christian School (Cambridge Christian) advanced to Florida's state championship football game, hosted by the Florida High School Athletic Association (FHSAA), to compete with Jacksonville's University Christian School. The FHSAA denied Cambridge Christian the opportunity to broadcast a pre-game prayer, despite the practice of this tradition by both schools.¹

Federal Law Regarding Opening Remarks at Interscholastic Athletic Events

Free Speech Clause

Speech is protected by the First Amendment of the United States Constitution. The government or a public actor may nevertheless regulate an individual's freedom of speech within

¹ Jesse Panuccio, *A private, religious school has the right to pray before football games*, Tampa Bay Times, Jan. 13, 2020, available at <https://www.tampabay.com/opinion/2020/01/13/a-private-religious-school-has-the-right-to-pray-before-football-games-column/>.

constitutional limits.² The First Amendment’s free speech clause restricts government regulation of private speech but does not regulate government speech.³ To determine whether speech is government speech or private speech, courts consider three 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.⁴

Further, the ability to regulate private speech on government-owned property is determined, in part, by the characterization of the type of public forum created.⁵ There are three types of public forums: traditional public forums, limited public forums, and closed public forums.⁶ 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.⁷ In an open public forum, the government may only impose content-neutral restrictions on the time, place, and manner of expression.⁸ A limited public forum is a venue opened only for certain groups or topics.⁹ 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.¹⁰ 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.¹¹

In 2019, the Eleventh Circuit held that the FHSAA’s application of its Public-Address Protocol prohibiting two schools from using the loudspeaker for a pre-game prayer at the 2A Florida High School State Championship game may have violated constitutional free speech protections.¹² The circuit court agreed with the trial court that the loudspeaker was a nonpublic forum (“closed-public forum”), but accepted the allegation that the FHSAA arbitrarily and haphazardly denied access to the forum in violation of the First Amendment.¹³ The court’s analysis also hinged on whether the speech over the loudspeaker was considered government or private speech. The circuit court agreed with the allegation that speech over the loudspeaker was, at least in part, private.¹⁴ 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 suggested a potential finding of private speech that warranted further deliberation at the district court level.¹⁵

² *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

³ *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009).

⁴ *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).

⁵ *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 678-79.

⁶ *Id.*

⁷ *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 45-46 (1992).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Pleasant Grove City*, 555 U.S. at 470.

¹¹ *Perry*, 460 U.S. at 37.

¹² *Cambridge Christian Sch., Inc. v. Fla. High School Athletics Ass’n*, 942 F.3d 1215 (11th Cir. 2019).

¹³ *Id.* at 1223.

¹⁴ *Id.* at 1232

¹⁵ *Id.* at 1251.

Establishment Clause

The U.S. Constitution prevents the government from establishing religion and protects privately initiated expression and activities from government interference and discrimination.¹⁶ 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.¹⁷

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.¹⁸ 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.¹⁹ 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.²⁰ 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.²¹ *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.²²

Elementary and Secondary Education Act (ESEA)

According to updated guidance from the U.S. Department of Education on constitutionally protected prayer and religious expression in public elementary and secondary schools, student speakers at noncurricular activities such as sporting events may not be selected on a basis that either favors or disfavors religious perspectives. To avoid any mistaken perception that a school endorses student speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech, whether religious or nonreligious, is the speaker's and not the school's speech.²³

¹⁶ See U.S. Const., Amend. 1.

¹⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

¹⁸ See *Santa Fe Independent Sch. District v. Doe*, 530 U.S. 290, 314 (2000).

¹⁹ *Id.* at 317.

²⁰ *Id.* at 302.

²¹ *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).

²² *Santa Fe Independent Sch. District*, 530 U.S. at 302-10.

²³ U.S. Department of Education, *Updated Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools* (Jan. 21, 2020), 85 FR 3257, available at <https://www.federalregister.gov/documents/2020/01/21/2020-00876/updated-guidance-on-constitutionally-protected-prayer-and-religious-expression-in-public-elementary>, at 3268.

Florida Law Regarding Opening Remarks at Interscholastic Athletic Events

The scope of the Florida Constitution's protection of free speech is the same as required under the First Amendment,²⁴ and the Florida Constitution closely replicates the First Amendment's protections against the establishment of religion.²⁵

The Florida High School Athletic Association

The FHSAA is designated by law as the governing nonprofit organization of athletics in Florida public schools.²⁶ Any high school, middle school, or combination school,²⁷ including charter schools, virtual schools, private schools, and home education cooperatives,²⁸ may become a member of the FHSAA.²⁹ The FHSAA is required to adopt bylaws regulating student eligibility, recruiting, and member schools' interscholastic competition in accordance with applicable law.³⁰

Florida law establishes that the FHSAA's authority to organize and conduct statewide interscholastic competition includes the potential for state championships, and the FHSAA also has authority to establish terms and conditions for those contests.³¹ The FHSAA is not a state agency, but performs similar functions.³² The FHSAA operates as a representative democracy in which the sovereign authority is within its member schools.³³ The FHSAA also includes a board of directors, who act as a body and in accordance with the FHSAA's bylaws, to, among other activities, act as an administrative board in the interpretation of, and final decision on, all questions and appeals arising from the directing of interscholastic athletics of member schools.³⁴

The bylaws of the FHSAA govern high school athletic programs in its member schools, unless otherwise specifically provided by statute.³⁵

Florida High School State Championship Series

The FHSAA's Florida High School State Championship Series (State Championship Series) determines official state champions among FHSAA member schools in sports sanctioned or

²⁴ 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).

²⁵ 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).

²⁶ Section 1006.20(1), F.S.

²⁷ 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.

²⁸ 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.

²⁹ Section 1006.20(1), F.S.

³⁰ Section 1006.20(2), F.S.

³¹ Section 1006.20(4)(d)6., F.S.

³² *Id.*

³³ Section 1006.20(3)(a), F.S.

³⁴ Section 1006.20(4)(e), F.S.

³⁵ Section 1006.20(1), F.S. See Florida High School Athletic Association, *Bylaws of the Florida High School Athletic Association, Inc.* (2020-21 Ed.), https://fhsaa.com/documents/2020/10/1//2021_handbook_website_1001.pdf?id=292.

recognized by the FHSAA Board of Directors.³⁶ The FHSAA limits participation in the State Championship Series to schools that are full members of the FHSAA.³⁷ The FHSAA Board of Directors determines in which sports³⁸ a State Championship Series will be offered and establishes the terms and conditions for the competition series.³⁹

Public Address Protocol

The FHSAA's Public Address Protocol applies to all State Championship Series. The public address announcer must maintain neutrality. The announcer is required to follow the FHSAA script for promotional announcements, player introductions, and awards ceremonies. The procedure limits other announcements to:⁴⁰

- Those of an emergency nature;
- Those of a "practical" nature, such as 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.

In addition, 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.⁴¹

For regular season events, the FHSAA's Public Address Protocol states that the public address announcer must maintain neutrality.⁴² 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.⁴³

III. Effect of Proposed Changes:

SB 880 requires the Florida High School Athletic Association (FHSAA) to adopt bylaws or policies that:

³⁶ Florida High School Athletic Association, *Bylaws of the Florida High School Athletic Association, Inc.* (2020-21 Ed.), https://fhsaa.com/documents/2020/10/1//2021_handbook_website_1001.pdf?id=292. Bylaw 2.10.

³⁷ *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.

³⁸ 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*, available at https://fhsaa.com/documents/2020/10/9//2021_admin_procedures_1009.pdf?id=319, at 2.

³⁹ Section 1006.20(4)(d)6., F.S.; Bylaw 2.10, FHSAA.

⁴⁰ *Id.* FHSAA, *2020-21 FHSAA Administrative Procedures*, Procedure 3.1.8, available at https://fhsaa.com/documents/2020/10/9//2021_admin_procedures_1009.pdf?id=319, at 13.

⁴¹ *Id.*

⁴² *Id.* at 11.

⁴³ *Id.*

- Authorize a member school to provide 30 seconds of opening remarks over a public-access system before the start of an athletic competition.
- Prohibit the FHSAA from controlling, monitoring, or reviewing the contents of any member school's opening remarks.
- Require that, before any opening remarks, a public address announcer announce that: "The content of the following opening remarks is not endorsed by the FHSAA or reflective of the views or opinions of the FHSAA."

There is no fiscal impact to this bill.

The bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 1006.20 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.