



John Rau

## *Bill Analysis*

*Legislative Service Commission*

### **H.B. 65**

125th General Assembly  
(As Introduced)

**Reps. Faber, Gibbs, Hagan, Cates, DeBose, McGregor, Fessler, Willamowski, Seaver, J. Stewart, Calvert, Flowers, Schaffer**

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#### **BILL SUMMARY**

- Requires school district boards to set aside a period of time each day for the oral recitation of the Pledge of Allegiance to the Flag.

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#### **CONTENT AND OPERATION**

##### **Required time for recitation of the Pledge of Allegiance to the Flag**

(sec. 3313.602)

Current law requires each school district to adopt a policy specifying whether or not the Pledge of Allegiance to the Flag must be recited orally in its schools. If the district mandates the recitation of the Pledge, then it must also establish the time and manner for the recitation. The bill changes the permissive nature of this provision by *requiring* school districts to set aside a period of time each school day for the oral recitation of the Pledge. Each district must designate in its policy the time and manner in which the recitation will occur.

The bill retains recently enacted law (1) prohibiting school districts from requiring any student to say the Pledge and (2) requiring each district's policy to prohibit the intimidation of a student by staff members or other students who seek to coerce the student's participation (added in Sub. H.B. 394 of the 124th General Assembly).

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#### **COMMENT**

Statutes concerning the recitation of the Pledge of Allegiance to the Flag in public schools typically have been upheld by the courts when the recitation is voluntary. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the United States Supreme Court struck down a West Virginia law that required students to recite the Pledge of Allegiance while saluting the flag.

Students who did not participate in the ritual were expelled from school. Although the Court acknowledged that schools could require the recitation of the Pledge of Allegiance, it found that imposing a penalty for nonparticipation was unconstitutional. The Court stated that the refusal of a student to recite the Pledge of Allegiance did not constitute a threat to society serious enough to justify an infringement of the student's First Amendment rights.

Most recent court decisions have adhered to the *Barnette* precedent. For example, in *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7th Cir., 1992), the U.S. Seventh Circuit Court of Appeals upheld an Illinois statute that required elementary students to recite the Pledge of Allegiance. The Court's decision was based on the fact that there was not sufficient evidence to demonstrate that the plaintiff suffered any consequence for remaining silent during the recitation. (The plaintiff claimed that required recitation of the Pledge in a public school violates the Establishment Clause of the U.S. Constitution, which prohibits government entities from establishing, promoting, or inhibiting the free exercise of religion. In 1954, Congress added the words "under God" to the Pledge giving rise to this argument.) Upon appeal, the United States Supreme Court denied certiorari, allowing the lower court's ruling to stand (508 U.S. 950 (1993)).

In contrast, in June 2002, the U.S. Court of Appeals for the 9th Circuit held that a California school district policy permitting teacher-led recitation of the Pledge of Allegiance violates the Establishment Clause (*Newdow v. U.S. Congress*, 292 F.3d 597 (2002); Amended, Reh'g denied, and Reh'g en banc denied, 321 F.3d 772 (2003)). In an amended decision, the Court held that the school district's policy impermissibly coerces students to take part in "a religious act." The Court stated that the policy, even though it does not require students to actually participate in the recitation, "places students in the untenable position of choosing between participating in an exercise with religious content or protesting." The Court further called the "coercive effect of the policy . . . particularly pronounced in the school setting given the impressionability of schoolchildren."<sup>1</sup> (*Newdow v. U.S. Congress*, Reprinted as amended at 328 F.3d 466, 2002 U.S. App. LEXIS 28040.)

The decision of the 9th Circuit Court of Appeals is binding only in federal courts in Montana, Idaho, Nevada, Arizona, California, Oregon, Washington, Alaska, Hawaii, Guam, and the Northern Mariana Islands. It may or may not be

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<sup>1</sup> Originally, the Appeals Court had also held that the Pledge itself with the words "under God" inserted into was a violation of the Establishment Clause. However, in its amended opinion and order, announced on February 28, 2003, the Court invalidated only the school district's policy and restricted its analysis to that policy.

persuasive in other courts in cases presenting similar facts. For instance, in a similar case decided in 2003, the federal district court for the Eastern District of Virginia reportedly reached a different conclusion and upheld the constitutionality of a Virginia statute that requires the daily recitation of the Pledge of Allegiance in the state's schools.<sup>2</sup>

On April 30, 2003, the U.S. Justice Department filed a petition for certiorari in the Supreme Court of the United States in the *Newdow* case. As of the date this analysis was prepared, the Supreme Court had not issued its decision on whether it will hear the case.

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## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	02-18-03	p. 160

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<sup>2</sup> See "Judge Backs Va. Laws Requiring Pledge, Motto" at <http://www.washingtonpost.com/wp-dyn/articles/A60329-2003Mar8.html>. Va. Code Ann. § 22.1-202(C) requires each school board to require the daily recitation of the Pledge of Allegiance in each classroom and that the Flag of the United States be in place in each classroom. No student is to be required to recite the Pledge if the student or the student's parent or legal guardian objects on religious, philosophical, or other grounds, but such student is required "to remain quietly standing or sitting at [the student's desk] while the others recite the Pledge."