



Bill Analysis

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Legislative Service Commission

Sub. H.B. 394*

124th General Assembly
(As Reported by H. Education)

Reps. Damschroder, Barrett, Calvert, Carey, Collier, Flowers, Hoops, Jolivette, Key, Latell, Latta, Lendrum, Metzger, Niehaus, Otterman, Patton, Roman, Schmidt, Seaver, Seitz, Setzer, Webster, White, Young

BILL SUMMARY

- Requires school districts to provide for a daily minute of silence with participation of all students for prayer, reflection, or meditation on a moral, philosophical, or patriotic theme.
- Prohibits school boards from adopting any policy promoting or restricting the exercising of religious beliefs in primary or secondary schools during the minute of silence.
- Requires school districts to set aside a time for the daily oral recitation of the Pledge of Allegiance to the Flag.
- Prohibits a student from being required to participate in the recitation of the Pledge of Allegiance to the Flag.
- Requires a district's policy to prohibit the intimidation of a student by other students or staff members aimed at coercing the student into reciting the Pledge of Allegiance to the Flag.

CONTENT AND OPERATION

Daily minute of silence and religious expression

Under current law, a school district board cannot prohibit a classroom teacher from providing in the classroom reasonable periods of time for "programs

** This analysis was prepared before the report of the House Education Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

or meditation upon a moral, philosophical, or patriotic theme." Current law also prohibits a pupil from being "required to participate in [these teacher-initiated] programs or meditations if they are contrary to the religious convictions of the pupil or [the pupil's] parents or guardians." (Sec. 3313.601.) The bill revises this current law by replacing the phrase "programs or meditation" with the word "activities."

In addition to this revision to current law, the bill requires a city, local, exempted village, or joint vocational school district board to "provide for a minute of silence each school day with participation of all students for prayer, reflection, or meditation upon a moral, philosophical, or patriotic theme." (See **COMMENT 1**.) Also, the bill specifically prohibits any district board of education from adopting any policy or rule respecting or promoting an establishment of religion or prohibiting any student from the free, individual, and voluntary exercise or expression of the student's religious beliefs during the required minute of silence.

Recitation of Pledge of Allegiance to the Flag

Current law requires each city, local, exempted village, and joint vocational 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. (Sec. 3313.602.)

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. Under the bill, school districts cannot require any student to say the Pledge. To protect those students who choose not to participate, each district's policy also must prohibit the intimidation of a student by staff members or other students who seek to coerce the student's participation. (See **COMMENT 2**.)

COMMENT

1. Many states have laws establishing a moment of silence. Such legislation has been challenged as violating the First Amendment to the United States Constitution, prohibiting laws respecting an establishment of religion. Although the constitutionality of any specific laws can be determined only on a case-by-case basis, the primary test of any such legislation is a three-prong test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the *Lemon* test, the statute must have a secular legislative purpose, its principal or primary effect

must be one that neither advances nor inhibits religion, and the statute must not foster an excessive entanglement with religion.

For example, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Supreme Court struck down an Alabama statute which authorized a one-minute silent period at the start of each school day which was to be used "for meditation or voluntary prayer." The *Wallace* majority concluded that the legislature's sole purpose in enacting the statute, as evidenced by statements from the prime sponsor of the legislation and the Governor of Alabama, was to return prayer to the Alabama schools, thereby endorsing religion in violation of the first prong of the *Lemon* test. After applying the *Lemon* test and distinguishing the *Wallace* case, a "moment of quiet reflection" recently was upheld by the Eleventh Circuit Court of Appeals in *Bown v. Gwinnett County School District*, 112 F.3d 1464 (11th Cir., 1997). The Court found that any possible religious motives for supporting the statute were not relevant given the clear secular purpose expressed in language of the statute and the history of the legislation.

Also, on October 29, 2001, the United States Supreme Court declined to hear a challenge to a Virginia statute that requires each school board of education to "establish a daily observance of one minute silence in each classroom" (*Brown v. Gilmore*, 2001 U.S. LEXIS 10022). That statute provides that each student is to remain "seated and silent" so that any student "may in the exercise of [the student's] individual choice meditate, pray, or engage in other silent activity" that does not interfere with other students' exercise of their individual choice. (Va. Code Ann. 22.1-203.) Earlier the U.S. Court of Appeals for the Fourth Circuit upheld the constitutionality of the Virginia statute (258 F.3d 265). The appeals court stated that the statute has "at least two purposes, one of which is clearly secular [to meditate] and one of which may be secular even though it addresses religion [to pray]. In analyzing this second purpose, the court characterized the statute as a "nonintrusive accommodation of religion that does not establish religion." (258 F.3d at 276-278.) The effect the Supreme Court's action is to let stand the ruling of the appeals court. Although decisions of the Fourth Circuit Court of Appeals are not controlling in Ohio, they may be persuasive in courts that do rule on Ohio statutes.

2. 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 argued 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.

Recent cases 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, who objected to reciting the Pledge of Allegiance on religious grounds, suffered any consequence for remaining silent during the recitation. Upon appeal, the United States Supreme Court denied certiorari, allowing the lower court's ruling to stand (508 U.S. 950 (1993)).

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	10-04-01	p. 878
Reported, H. Education	---	---

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