

SUBJECT: Voluntary student expression of religious views in public schools

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 6 ayes — Swinford, Van Arsdale, Christian, B. Cook, Flynn, Parker
0 nays
1 present not voting — Veasey
2 absent — Paxton, Farrar

WITNESSES: For —Ann Hettinger, Concerned Women for America; Allan Parker, Jr., The Justice Foundation; Curt Parsons, Alan Seay-Superintendent of Van Alstyne ISD; Jonathan Saenz, Kelly Shackelford-Chief Counsel of Liberty Legal Institute, Free Market Foundation; Dave Welch, VS Pastor Council; and 14 individuals; (*Registered, but did not testify:* Tama Chunn, Life Advocates, Julie Drenner, Texans for Family Values; and 11 individuals)

Against —Patti Edelman; Will Harrell, ACLU of Texas; Kathy Miller, Texas Freedom Network

On —Dennis Eichelbaum, Texas Association of School Boards

BACKGROUND: Education Code, sec. 25.901 provides that a public school student has an absolute right to individually, voluntarily, and silently pray or meditate in school in a manner that does not disrupt instructional or other school activities. A person may not require, encourage, or coerce a student to engage in or refrain from prayer or meditation during any school activity.

DIGEST: CSHB 3678, which could be cited as the “Religious Viewpoints Antidiscrimination Act” or the “Schoolchildren’s Religious Liberties Act,” would require a school district to treat a student’s voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the district treated a student’s expression of a secular or other viewpoint on a permissible subject.

A school district would have to adopt a policy to establish a limited public forum for student speakers at school events. The policy would require the school district to:

- provide a forum that did not discriminate against a student's voluntary expression of a religious viewpoint on a permissible subject;
- develop a neutral method for selecting students to speak at school events and graduation ceremonies;
- ensure a student speaker did not engage in obscene, vulgar, offensively lewd, or indecent speech; and
- provide a disclaimer, in writing or orally, that the student's speech did not reflect the endorsement, sponsorship, position or expression of the school district.

The disclaimer would be provided at graduation ceremonies and other events for as long as necessary to dispel confusion over the district's non-sponsorship of the student's speech.

Student expression could not be excluded from a limited public forum because the subject was expressed from a religious viewpoint.

Students could express their religious beliefs in their homework, artwork, and other assignments. The assignments would be judged by ordinary academic standards of substance and relevance. Students could not be penalized or rewarded because of the religious content of their work.

Students could organize prayer groups, religious clubs, "see you at the pole" gatherings, and similar activities before, during, and after school in the same manner as students participating in other non-curricular groups, including by using advertising and announcements. Religious groups would have to be given the same access to school facilities as was given to other non-curricular groups. Schools could disclaim sponsorship of student groups and events in a way that neither favored or disfavored students meeting to engage in prayer or practice religious speech.

CSHB 3678 would include a model policy that, if adopted by a school district, would place a school district in compliance with the requirements listed in the bill.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2007.

SUPPORTERS
SAY:

CSHB 3678 is an anti-discrimination bill that would serve to protect a student's voluntary expression of religious viewpoints. The bill would not require or suggest that students express religious viewpoints at any time, but would protect students should they decide voluntarily to express their views, religious or otherwise. Under the bill, school children wishing to express their religious views would have the same privileges afforded to students expressing secular views.

The bill is drafted according to recent Supreme Court opinions. The case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), while considered by some to be the leading case on this issue, has not been widely referenced in recent cases. Arguably, the new test is neutrality. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), for example, pronounced that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." The Supreme Court never has declared that the expression of religious views in a school setting is unconstitutional. While it is true that a school district may not provide, write, or require a prayer, nor endorse prayer as a preferable practice, these restrictions do not prohibit a student from voluntarily initiating a prayer at school events. The bill would support a position of neutrality and prevent speech from being excluded based on its content.

CSHB 3678 would be aligned with the U.S. Department of Education's *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*. The department's guidance on this issue states that students may pray or study religious materials during non-instructional times, such as student recess or the lunch hour. The guidelines also state that students may express their religious beliefs about religion in homework, artwork, or other assignments, which should be evaluated according to ordinary academic standards. While not established law, these guidelines establish permissible activities referenced in the bill.

The bill would prevent religious expression from being treated as second-class speech. Schools are not faith-free zones, and teachers should not be asked to be prayer police. Current policies have been ineffective in both protecting a student's free speech rights and making clear the freedom that

teachers have to allow these student liberties. The bill would lay to rest many myths that have led to the unconstitutional suppression of individual speech in Texas schools.

OPPONENTS
SAY:

CSHB 3678 would interfere with the management of a school campus by adding new state mandates. Principals and teachers are charged with providing students an environment suitable for learning. Schools need order and the discretion to discipline in order to maintain such an environment. The bill could prevent schools from disciplining students on comments and behavior. What is offensive to some may not be to others, and schools must be able to exercise discretion to determine what is considered appropriate for their classrooms and local community.

The bill's constitutionality is questionable. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) established the *Lemon* test, which has been used by courts for more than 30 years to maintain the separation of church and state. It is one of the fundamental principles of the First Amendment's Establishment Clause that the Constitution forbids not only one religion over another, but also those practices that aid all religions and thus endorse or prefer religion over nonreligion. Under the test, the government's action must have a secular legislative purpose; must not have the primary effect of either advancing or inhibiting religions; and must not result in an "excessive entanglement" with religion. The specifics of CSHB 3678, without a secular purpose, could serve to advance the presence of religion in schools. Selecting which students may speak at school events based on the content of their speech could qualify as "excessive entanglement" by the school district. The *Lemon* test still embodies the dominant line of reasoning addressing the separation of church and state. If litigation ensued under the bill, the *Lemon* test still could be used to review a related constitutional challenge.

The bill could serve as a tool to proselytize the majority religious view, Christianity, in Texas schools. The United States is a nation made up of people of many faiths. Children are required to attend school and should be permitted to do so without someone else's religion being imposed on them. An example in Texas schools of majority religious insensitivity was the scheduling of the TAKS exam for the 2006-2007 school year. This year a TAKS exam was scheduled on the first day of Passover, a Jewish holiday. Families who practice the Jewish faith were forced to choose between having their child miss an important exam or miss school to

honor their faith. A school should be a religion-free zone – leaving religion for homes, places of worship, and individual hearts.

**OTHER
OPPONENTS
SAY:**

The bill would cause further confusion on the issue of religion in schools. For fear of litigation, many schools have made efforts to silence religious viewpoints in the classroom and at school events. Because schools have a responsibility to protect religious viewpoints, the bill also should require training on constitutionally supported free religious speech to eliminate uncertainties on what are legal and appropriate expressions of religious views in schools.

NOTES:

HB 3678 as filed included a statement that if any provision of the bill were held invalid, the invalidity would not affect other provisions.

The committee substitute would add Subchapter E to Education Code, ch. 25. The substitute would cite the bill the Religious Viewpoints Antidiscrimination Act or the Schoolchildren's Religious Liberties Act.