

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: CS/SB 626
INTRODUCER: Education Committee and Senator Bullard
SUBJECT: Bullying in the Public School System
DATE: March 12, 2013 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hand	Klebacha	ED	Fav/CS
2.	_____	_____	JU	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

CS/SB 626 applies the context of current case law to define and prohibit cyberbullying, and update current law prohibiting bullying and harassment.

The bill defines and prohibits cyberbullying, and specifies the circumstances under which bullying, cyberbullying and harassment of any student or employee of a public K-12 educational institution is prohibited.

The bill requires the Department of Education, by October 1, 2013, to incorporate into its model policy on bullying and harassment, a prohibition on cyberbullying. The bill requires school districts, by December 1, 2013, to incorporate into their model policies on bullying and harassment, a prohibition on cyberbullying.

The effective date of the bill is July 1, 2013.

This bill substantially amends section 1006.147 of the Florida Statutes.

II. Present Situation:

The legal framework in which a school district's prohibition on bullying, cyberbullying, and harassment is generally challenged in the context of a First Amendment free speech claim.

School Districts Regulating Student Speech

The First Amendment, through the Fourteenth Amendment, prohibits States from “abridging the freedom of speech.”¹ While students retain significant First Amendment rights in the school context, their rights are not coextensive with those of adults.² Because of the “special characteristics³ of the school environment,” school administrators have latitude in regulating student speech.⁴ The seminal case concerning school district regulation of student speech is *Tinker v. Des Moines Independent Community School District*.⁵

In *Tinker*, a group of high-school students decided to wear black armbands to school to protest the Vietnam War.⁶ The principals became aware of the plan and adopted a policy that any student wearing an armband to school would first be asked to remove it, and if refused, suspended until the student returned without the armband.⁷ Subsequently, the students that wore armbands were suspended pursuant to school policy, and a complaint against the school district was subsequently filed.⁸ The case progressed its way to the U.S. Supreme Court. The *Tinker* Court ultimately held that:

[C]onduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.⁹

Claims have been made by some that federal courts have issued too broad a range of decisions on the subject of student off-campus speech.¹⁰ While there have been a variety of federal court

¹ U.S. Const. art. I.; *Gitlow v. New York*, 268 U.S. 652 (1925).

² See, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513-514 (1969).

³ The special characteristics of schools that allow school officials to restrict certain speech are: (1) their educational mission; and (2) the importance of protecting student safety. *Kolwalski v. Berkely County Sch.*, 652 F.3d 565, 567 (4th Cir. 2011).

⁴ See, *Tinker, Kowalski*

⁵ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513-514 (1969).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 512-513. The Court also held that in order for “school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.* at 509. The Court also stated that “[t]he principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is the personal intercommunication among the students. This is not only an inevitable part of the process of attending schools; it is also an important part of the educational process. *Id.* at 512.

¹⁰ Maryclaire Dale, *Online Student Speech Appeals Rejected by Supreme Court*, Huffington Post, January 17, 2012, http://www.huffingtonpost.com/2012/01/17/court-rejects-appeals-in-0_n_1210399.html

decisions involving school discipline for student off-campus speech, with a few exceptions, the decisions are not as disparate as critics suggest.¹¹ For example:

- *Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012). The location from which the student spoke may be less important than the posts being directed at the school, because the posts could be reasonably expected to impact the school environment.
- *Kowalski v. Berkley Cnty. Schs.*, 652F.3d 565 (4th Cir. 2011). The school district was authorized by *Tinker* to discipline the student, regardless of where her speech originated, because the speech was materially and substantially disruptive in that it interfered with the school's work and collided with the rights of other students to be secure and to be let alone.
- *Doniger v. Niehoff*, 642 F.3d 334 (2nd Cir. 2011). The student may be disciplined for expressive conduct, even when occurring off school grounds, when this conduct would foreseeably create a risk of substantial disruption within the school environment.
- *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3rd Cir. 2011) (en banc). Student's creation of a MySpace profile for principle was so juvenile and nonsensical that no reasonable person could take its content seriously. Thus, there was no substantial disruption.
- *Barbaras v. Florida State University College of Medicine*, 2011 WL 7139411 (N.D. Fla. 2011). Student off-campus conduct (felony battery charges and multiple complaints from other students about physical and emotional abuse) could be subject to *Tinker* if the speech raises on-campus concerns.
- *Evans v. Bayer*, 684 F.Supp.2d 1365 (S.D. Fla. 2010). Complaint about a student posting made from home computer criticizing teacher that was quickly removed, did not indicate a well founded expectation of a disruption.

Thus, numerous federal courts have recently utilized the *Tinker* test to balance a student's rights to free speech against a school's interest in maintaining an appropriate learning environment and protecting the rights of other students.¹²

Bullying and Harassment

The 2008 Florida Legislature enacted s. 1006.147, F.S., which prohibits bullying and harassment in the school environment.¹³

Bullying means systemically and chronically inflicting physical hurt or psychological distress on one or more students and may involve:

- Teasing;
- Social exclusion;
- Threat;
- Intimidation;
- Stalking;
- Physical violence;

¹¹ Nancy Willard, *Student Online Off-Campus Speech: Assessing "Substantial Disruption,"* 22 Alb. L.J. Sci. & Tech. 611, 612 (2012).

¹² Nancy Willard, *Student Online Off-Campus Speech: Assessing "Substantial Disruption,"* 22 Alb. L.J. Sci. & Tech. 611 (2012).

¹³ ch. 2008-123, L.O.F., provides the Jeffrey Johnston Stand Up for All Students Act.

- Theft;
- Sexual, religious, or racial harassment;
- Public humiliation; or
- Destruction of property.¹⁴

Harassment means any threatening, insulting, or dehumanizing gesture, use of data or computer software, or written, verbal or physical conduct directed against a student or school employee that:

- Places a student or school employee in reasonable fear of harm to his or her person or damage to his or her property;
- Has the effect of substantially interfering with a student's educational performance, opportunities, or benefits; or
- Has the effect of substantially disrupting the orderly operation of a school.¹⁵

Bullying and harassment includes:

- Retaliation against a student or school employee by another student or school employee for asserting or alleging an act of bullying or harassment; and
- Perpetuation of bullying or harassment by an individual or group with intent to demean, dehumanize, embarrass, or cause physical harm to a student or school employee by incitement or coercion, accessing or knowingly causing or providing access to data or computer software through a computer, computer system, or computer network within the scope of the district school system, or acting in a manner that has an effect substantially similar to the effect of bullying or harassment.

Bullying or harassment of any student or employee of a public K-12 educational institution is specifically prohibited:

- During education programs and activities;
- During school-related and school-sponsored activities, including on a school bus; and
- Through the use of data or computer software that is accessed through a computer, computer system, or computer network of a public K-12 institution.¹⁶

School districts are required to have a policy which prohibits bullying and harassment of students and employees of public K-12 educational institutions, and which must be integrated with a school's curriculum, discipline policies and other violence prevention efforts.¹⁷

Cyberbullying

Section 1006.147, F.S., does not define or specifically prohibit cyberbullying, except to:

- Prohibit bullying or harassment of any student or employee of a public K-12 educational institution through the use of data or computer software that is accessed through a computer, computer system, or computer network of a public K-12 educational institution;¹⁸ and

¹⁴ s. 1006.147(3)(a), F.S.

¹⁵ s. 1006.147(3)(b), F.S.

¹⁶ s. 1006.147(2), F.S.

¹⁷ s. 1006.147(4), F.S.

¹⁸ s. 1006.147(2)(c), F.S.

- Include as bullying the perpetuation of specific behaviors that includes teasing, social exclusion, and threats by an individual or group with intent to demean, dehumanize, embarrass, or cause physical harm to a student or school employee by accessing or knowingly causing or providing access to data or computer software through a computer, computer system, or computer network within the scope of the district school system.¹⁹

In a 2010 random sample of 4,400 students of ages 11 through 18:

- Approximately 20 percent responded that they had been a victim of cyberbullying;
- Approximately 20 percent responded that they had committed cyberbullying; and
- About 10 percent indicated that they had been both victim and offender.²⁰

Subsequently, in a 2012 random sample of 4,441 students in grades 9-12, students who reported that many of their friends had bullied others (at school, using a computer, and using a cell phone) were significantly more likely to have also reported that they too had cyberbullied others.²¹

Research also revealed a link between cyberbullying and low self-esteem, family problems, academic problems, school violence and delinquent behavior.²² Forty-nine states have adopted anti-bullying legislation, with 16 of these states specifically including anti-cyberbullying legislation.²³

III. Effect of Proposed Changes:

CS/SB 626 applies the context of current case law to define and prohibit cyberbullying, and update current law prohibiting bullying and harassment.

The bill defines cyberbullying as:

Bullying or harassment that is related to computers, as described in s. 815.03, or that otherwise occurs through the use of technology or any electronic communications, including, but not limited to, any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic system, photoelectronic system, or photooptical system, or other transmission or medium such as electronic mail, text messaging, instant messaging, social media, Internet communications, or facsimile communications.

¹⁹ s. 1006.147(3)(d)2.b., F.S.

²⁰ Sameer Hinduja, PhD and Justin W. Patchin, PhD, *Cyberbullying: Identification, Prevention, and Response* (2010). See online at <http://www.cyberbullying.us/>. Last checked March 6, 2013.

²¹ Sameer Hinduja, PhD and Justin W. Patchin, PhD, *Cyberbullying Research Summary: The Influence of Parent, Educators, and Peers* (January 2013).

²² Sameer Hinduja, PhD and Justin W. Patchin, PhD, *Cyberbullying: Identification, Prevention, and Response* (2010). See online at <http://www.cyberbullying.us/>. Last checked March 6, 2013.

²³ Sameer Hinduja, PhD and Justin W. Patchin, PhD, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies* (January 2013).

Additionally, cyberbullying may involve, but is not limited to:

- Harassment and cyberstalking, as defined in s. 784.048, F.S.;
- Creating a webpage, weblog in which the creator assumes the identity of another person, or knowingly impersonates another person, while posting content or sending messages; and
- Electronically sharing or distributing material and communications to more than one person or posting material on one or more electronic media that may be accessed by one or more persons.

The bill adds school employees to the definition of those who may be bullied, and adds to the list of activities that may constitute bullying:

- “Emotional pain or discomfort;” and
- “Humiliation.”

The bill adds to the definition of harassment specified conduct that:

- As provided in s. 784.048(1)(a), F.S., serves no legitimate purpose and causes substantial emotional distress to a student or school employee; and
- Materially and substantially disrupts or interferes with the orderly operation of a school or the ability of a student to be safe and secure at a school or a school-sponsored event.

The bill expands the circumstances under which bullying, cyberbullying, or harassment of any student or employee of a public K-12 educational institution is prohibited by:

- Adding to the existing prohibition of bullying or harassment through the use of data or computer software that is accessed through a computer, computer system, or computer network, which is physically located on the property of the educational institution, at the site of any school-related or school sponsored program or activity conducted by the educational institution, or on a school bus of a public K-12 educational institution; and
- Creating a new prohibition when the bullying, cyberbullying, or harassment, creates, or if it is reasonably foreseeable that it could create, material and substantial interference with or disruption of:
 - The operation of a school, an education program or activity conducted by a public K-12 educational institution, or a school-related or school-sponsored program or activity, including, but not limited to, field trips, extracurricular activities, or transit on a school bus of a public K-12 educational institution for any of the actions under this subparagraph; or
 - A student’s ability to be safe and secure during school, an education program or activity conducted by a public K-12 educational institution, or a school-related or school-sponsored program or activity, including, but not limited to, field trips, extracurricular activities, or transit on a school bus of a public K-12 educational institution for any of the actions under this subparagraph.

The bill clarifies the definitions of bullying and harassment, and adds to the definition of cyberbullying:

- Retaliation:
 - Against a public school student or employee who makes an allegation of bullying, cyberbullying or harassment; or
 - By making a bad-faith allegation of bullying, cyberbullying or harassment; or

- Perpetuation of bullying, cyberbullying, and harassment by an individual or group of individuals with intent to demean, dehumanize, embarrass, or cause physical harm to a student or school employee by accessing or knowingly causing or providing access to data or computer software through computer-related means described in s. 815.03, F.S.

The bill requires the Department of Education to incorporate into its existing model policy for bullying and harassment, a model policy prohibiting cyberbullying, no later than October 1, 2013. The model policy must include factors that school officials must consider when responding to an incident of bullying, cyberbullying or harassment that occurs off school grounds or outside a school-sponsored activity or event. The model policy must be included in the code of student conduct and provide clear notice to a student and parent that the district will discipline a person who violates the provisions of this section.

The bill requires school districts, by December 1, 2013, to incorporate into their policies prohibiting bullying and harassment, a prohibition on cyberbullying of any student or employee of a public K-12 educational institution. The bill requires the policy to:

- Require computers on which web-filtering software is not installed, or disabled, to be used when complaints of cyberbullying are investigated; and
- Provide instruction to students, parents, teachers, school administrators, counseling staff, and school volunteers on identifying, preventing, and responding to behaviors that lead to bullying, cyberbullying, and harassment.

The bill requires that distribution of safe school funds to a school district provided in the 2014-2015 General Appropriation Act is contingent upon and payable to the school district upon the Department of Education's approval of the school district bullying, cyberbullying, and harassment policy. The Department's approval of each school district's bullying, cyberbullying, and harassment policy shall be granted upon certification by the department that the school district's policy has been submitted to the department and is in substantial conformity with the department's model bullying, cyberbullying, and harassment policy.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

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. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Committee on Education on March 12, 2013:

The committee substitute differs from SB 626 in that the committee substitute:

- Names the act the “Imagine Sheterrria Elliot Act;”
- Establishes cyberbullying as a stand-alone prohibited action;
- Prohibits bullying, cyberbullying, and harassment through the use of data or computer software that is accessed through a computer, computer system, or computer network which is on a public school bus;
- Codifies recent court decisions use of the *Tinker* test in the context of prohibiting bullying, cyberbullying, and harassment off school property;
- Clarifies the definition of bullying by including school employees;
- Clarifies the definition of cyberbullying by specifically including text messages and social media, and incorporating the definitions of harassment and cyberstalking in s . 784.048, F.S.;
- Clarifies the definition of harassment by incorporating the definition of harassment in s. 784.048(1)(a), F.S., and by incorporating the *Tinker* test;
- Requires the Department of Education to incorporate cyberbullying into its model policy on bullying and harassment. The model policy must include factors a school district must consider when responding to an incident of bullying, cyberbullying, or harassment which occurs off school grounds, and must provide clear notice to a student and parent that the district will discipline a person who violates this section;

- Requires a school district to incorporate cyberbullying into its policy on bullying and harassment; and
- Makes distribution of safe school funds to a school district provided in the 2014-2015 General Appropriations Act contingent and payable to the school district upon the Department of Education's approval of the school district's bullying, cyberbullying, and harassment policy.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
