

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 659 Sexual Misconduct with Students by Authority Figures  
**SPONSOR(S):** Education Policy Council; Stargel and others  
**TIED BILLS:** **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	7 Y, 0 N	Kramer	Kramer
2)	Education Policy Council	11 Y, 0 N, As CS	Brock	Cobb
3)	Criminal & Civil Justice Policy Council	(ref. removed)		
4)	Full Appropriations Council on General Government & Health Care		McAuliffe	Leznoff
5)				

### SUMMARY ANALYSIS

The bill creates s. 775.0862, F.S., which requires the reclassification of the felony degree of a sexual offense listed in the sexual predator or sexual offender statutes if the offense is committed by an authority figure of any educational institution against a student of any educational institution. The term "authority figure" is defined to mean "a school officer, teacher or other instructional person, an administrator or other school administrative person, school volunteer, an educational support employee, or an education service provider, who is employed by, under contract with, working at, or providing volunteer services to an educational institution."

The bill requires the reclassification to occur as follows:

1. In the case of a felony of the third degree, the offense is reclassified to a felony of the second degree.
2. In the case of a felony of the second degree, the offense is reclassified to a felony of the first degree.
3. In the case of a felony of the first degree, the offense is reclassified to a life felony.

Reclassifying an offense has the effect of increasing the maximum sentence that can be imposed for an offense. The maximum sentence that can be imposed for a criminal offense is generally based on the degree of misdemeanor or felony. The maximum sentence for a third degree felony is five years imprisonment; for a second degree felony is fifteen years of imprisonment; for a first degree felony is thirty years imprisonment, and for a life felony is life in prison.

The bill does not change the elements of any criminal offense or change the age of consent for sexual activity where the victim is a student.

On February 25, 2009, the Criminal Justice Impact Conference reported that the original House Bill 659 would have an indeterminate prison bed impact on the Department of Corrections. The prison bed impact of this bill is indeterminate because data on the current incarceration rate of educational authority figures imprisoned for a sexual offense cannot be segregated from the general sexual offender population. The committee substitute is more narrowly drawn but would still have an indeterminate fiscal impact.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Currently, it is a crime for a person to engage in sexual activity with a person under the age of 16. A person under the age of 16 cannot legally consent to sexual activity in any circumstance. The offense that the person can be charged with in either the sexual battery or lewd or lascivious statutes depends on the specific act that occurred and the age of the offender and victim as discussed further below.<sup>1</sup>

Section 794.011, F.S., makes it a crime to commit "sexual battery" on any person under the age of twelve. The term "sexual battery" is defined as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object."<sup>2</sup> Sexual activity committed with a child age 12 or over and under the age of 16 is punishable as the offense of lewd or lascivious battery under s. 800.04(4), F.S. The definition of the term "sexual activity" is identical to the definition of the term "sexual battery". Also prohibited in s. 800.04, F.S., are other sexual offenses against children less than 16 including lewd or lascivious molestation, lewd or lascivious conduct and lewd or lascivious molestation. Consent is not a defense to any offense described above.

Section 794.05, F.S. prohibits an offender who is age of 24 or older from engaging in sexual activity with a victim under the age of 18 – consent is not a defense to this offense. Also, s. 794.011(8), F.S., provides that without regard to the willingness or consent of the victim, which is not a defense to prosecution under this provision, a person who is in a "position of familial or custodial authority" to a person less than 18 year of age and commits sexual battery, commits a first degree felony.

The term "position of familial or custodial authority" is not defined in statute. Case law on the topic indicates that a school teacher is not necessarily a person in a position of custodial authority to a student. In *Hallberg v. State*, 649 So.2d 1355 (Fla. 1994), the Florida Supreme Court considered a case in which a junior high school teacher was convicted of sexual battery by a person in a position of familial or custodial authority.<sup>3</sup> The summer after the school year in which the teacher had the victim in his class, the teacher engaged in sexual activity with the victim at the victim's house on several occasions. The offender argued that he did not stand in a position of familial or custodial authority to the victim. The court ruled that the offender should not have been convicted under the section of statute he was charged with and stated that "teachers are not, by reason of their chosen profession, custodians of their students at all times, particularly when school is recessed for the summer."

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<sup>1</sup> See s. 794.011, F.S.; s. 800.04, F.S.

<sup>2</sup> s. 794.011(1)(h), F.S.

<sup>3</sup> The court was interpreting section 794.041, F.S. The provisions of this section have been repealed and transferred to section 794.011(8), F.S. *Clements v. State*, 979 So.2d 256, 258 (Fla. 2<sup>nd</sup> DCA, 2007) (noting that effective October 1, 1993, section 794.041 was repealed and reenacted as subsection (8) of section 794.011.) See ch. 93-156, §§ 3, 4, at 911, § 27 at 933, Laws of Fla.

In sum, a person under the age of 16 cannot legally consent to sexual activity under any circumstances. Further, a person under the age of 18 cannot legally consent to sexual activity with a person in a position of familial or custodial authority or to a person age 24 or older. Because a teacher may not necessarily be considered a person in a position of custodial authority, in the situation in which a teacher is under the age of 24 and a student is age 16 or older (and the teacher therefore could not be charged with a violation of s. 794.05, F.S.), if the student consents to the activity, it may not be punishable as a sexual offense.

*Effect of bill:*

The bill creates s. 775.0862, F.S., which requires the reclassification of the felony degree of a sexual offense listed in the sexual predator or sexual offender statutes<sup>4</sup> if the offense is committed by an authority figure of any educational institution against a student of any educational institution.

The term “authority figure” is defined to mean “a school officer, teacher or other instructional person, an administrator or other school administrative person, school volunteer, an educational support employee, or an education service provider, who is employed by, under contract with, working at, or providing volunteer services to an educational institution.”

The term “educational institution” is defined to mean “an entity providing instructional programs of study by means of regular classes, activities, or courses, including virtual courses, to students in early learning programs or in prekindergarten through grade 12.”

The term “student” is defined to mean “any early learning or prekindergarten through grade 12 child who is enrolled in an educational institution.” This would include students who are dually enrolled in high school and at a community college, state college or state university.

The bill requires the reclassification to occur as follows:

1. In the case of a felony of the third degree, the offense is reclassified to a felony of the second degree.
2. In the case of a felony of the second degree, the offense is reclassified to a felony of the first degree.
3. In the case of a felony of the first degree, the offense is reclassified to a life felony.

Reclassifying an offense has the effect of increasing the maximum sentence that can be imposed for an offense. The maximum sentence that can be imposed for a criminal offense is generally based on the degree of misdemeanor or felony. The maximum sentence for a third degree felony is five years imprisonment; for a second degree felony is fifteen years of imprisonment; for a first degree felony is thirty years imprisonment, and for a life felony is life in prison.<sup>5</sup>

The bill does not change the elements of any criminal offense and does not make any activities illegal which are currently legal.

**B. SECTION DIRECTORY:**

**Section 1:** Creates s. 775.0862, F.S.; relating to sexual battery offenses against prekindergarten through grade 12 students by authority figures; providing for reclassification of specified sexual offenses; and providing for severity ranking of offenses.

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<sup>4</sup> The offenses listed in s. 943.0435, F.S, the sexual offender statute includes sections 787.01 (kidnapping); s. 787.02 (false imprisonment); s. 787.025 (luring or enticing a child); s. 794.011 (sexual battery); s. 794.05 (unlawful sexual activity with certain minors); s. 796.03 (procuring a person under the age of 18 for prostitution); s. 796.035, (selling or buying of a minor into sex trafficking or prostitution); 800.04 (lewd or lascivious offenses); 825.1025(2)(b) (lewd or lascivious battery on an elderly person); s. 827.071 (promoting sexual performance by a child); s. 847.0133 (selling or showing obscenity to a minor); 847.0135 (traveling to meet a minor for the purpose of engaging in illegal sexual activity); s. 847.0137; (transmitting child pornography); s. 847.0138 (transmitting material harmful to minors); s. 847.0145 (selling or buying of a minor); or s. 985.701 (sexual misconduct by a Department of Juvenile Justice employee).

<sup>5</sup> Section 775.082, F.S.

**Section 2:** Amends s. 921.0022, F.S.; relating to Criminal Punishment Code; offense severity ranking chart.

**Section 3:** Provides effective date of October 1, 2009.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

On February 25, 2009, the Criminal Justice Impact Conference reported that House Bill 659 would have an indeterminate prison bed impact on the Department of Corrections. The prison bed impact of this bill is indeterminate because data on the current incarceration rate of educational authority figures imprisoned for a sexual offense cannot be segregated from the general sexual offender population. The committee substitute is more narrowly drawn but would still have an indeterminate fiscal impact.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

None.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On April 1, 2009, the Education Policy Council adopted an amendment and reported the bill favorably as a committee substitute (CS). The differences between the Committee Substitute (CS) and House Bill 659 are as follows:

- The CS, like the bill, reclassifies certain felony offenses committed against a student by an authority figure at an educational institution. Reclassification means increasing the severity or degree of the felony. The CS and the bill reclassify a first degree felony to a life felony; a second degree felony to a first degree felony; and a third degree felony to a second degree felony.
- The bill defines an “authority figure” as a person in authority or an agent or employee of an educational institution. The CS more narrowly defines an “authority figure.” The new definition specifies teachers and other instructional personnel, school administrative personnel, volunteers, support employees, and education services providers.
- The bill defines “educational institution,” in part, to include *any* institution that provides courses of study or training. The CS more narrowly defines “educational institution” as an entity providing instructional programs of study to students in early learning programs or in prekindergarten through grade 12.
- The bill’s definition of “student” included students in postsecondary institutions. The CS more narrowly defines “student” to mean early learning or prekindergarten through grade 12 children who are enrolled in an educational institution.
- The bill adds language regarding registration as a sexual predator or offender; the point was not whether the offender had properly registered or not, rather, the point was that the bill would identify the felonies that would require reclassification, and the felonies needed to be identified with greater specificity. To that end, the CS eliminated unnecessary language and added pinpoint citations in the cross-references to the included felonies; i.e., from references to ss. 775.21 and 943.0435, F.S., to ss. 775.21(4)(a)1. and 943.0435(1)(a)1.a., F.S.

This bill analysis is drafted to the CS.