

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 659

Sexual Misconduct with Students by Authority Figures

SPONSOR(S): Stargel

TIED BILLS:

IDEN./SIM. BILLS: SB 1892

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	7 Y, 0 N	Kramer	Kramer
2)	Education Policy Council			
3)	Criminal & Civil Justice Policy Council			
4)	Full Appropriations Council on General Government & Health Care			
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 or the offender is acting in such a manner as to lead the victim to reasonably believe that the offender is such an authority figure and the victim is a student. The term "authority figure" is defined to mean a person who is in a position of control or authority as an agent or employee of 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 bill would have an indeterminate prison bed impact on the Department of Corrections.

## 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 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 section 800.04(4). The definition of the term "sexual activity" is identical to the definition of the term "sexual battery". Also prohibited in section 800.04 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 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

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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

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.”

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 or the offender is acting in such a manner as to lead the victim to reasonably believe that the offender is such an authority figure and the victim is a student.

The term “authority figure” is defined to mean “a person who is in a position of control or authority as an agent or employee of an educational institution.”

The term “educational institution” is defined to mean an institution that is a part of the state system of public education or any other institution:

1. In which participants, trainees, or students are offered an organized course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitude, or abilities from, by, or under the guidance of an instructor or teacher; and
2. That is approved, licensed, or issued a permit to operate as a school by the Department of Education or any other governmental agency that is authorized within the state to approve, license, or issue a permit for the operation of a school

The term “student” is defined to mean “any child or adult who is enrolled in any instructional program or activity conducted under the authority and direction of 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.<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.

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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.

**B. SECTION DIRECTORY:**

Section 1. Creates s. 775.0862, F.S.; relating to sexual battery offenses against students by authority figures; reclassification.

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 the bill would have an indeterminate prison bed impact on the Department of Corrections.

**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:**

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The definition of the term “authority figure” in the bill means that the person is “in a position of control or authority as an agent or employee of an educational institution.” It is not clear whether this requires proof that the person was an in a position of control or authority *in relation to the student*. The phrase “a person who is in a position of familial or custodial authority” discussed in the *Hallberg* case, above, is similar to the phrase “a person who is in a position of control or authority”. For example, it is not clear whether this will apply to the following scenarios:

- When a person in a position of control at one school commits a sexual offense against a student of another school.
- When a teacher who does not have a student in their class engages in sexual activity with a student.

The bill reclassifies the felony degree of any offense *for which a conviction would require registration as a sexual predator* under s. 775.21, F.S., or for which a conviction would require registration as a sexual offender under s. 943.0435, F.S. if the offense is committed by an authority figure and the victim is a student. As written, the bill would require proof that the offense is one for which the person *would be required to register as a sexual predator or sexual offender*. It may be clearer to amend this provision to indicate that it applies to any of the offenses listed in those sections of statute rather than tying it to the actual requirement to register.

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