



bullying or harassment through the use of computers, technology, or electronic communication. The definition of “harassment” is expanded to include conduct that has no legitimate purpose and which causes substantial emotional distress to a student or school employee.

By October 1, 2013, the Department of Education (DOE) is required to incorporate cyberbullying into its existing anti-bullying model policy.

The bill requires school districts to incorporate the DOE’s provisions on cyberbullying from its model policy into the district’s anti-bullying policy by December 1, 2013. Distribution of safe school funds provided in the 2014-2015 General Appropriations Act is contingent upon DOE approval of a district’s bullying, cyberbullying, and harassment policy.

This bill substantially amends section 1006.147, Florida Statutes.

## II. Present Situation:

### School Districts Regulating Student Speech

Courts have long established the axiom that students do not leave their constitutional rights to freedom of speech and expression at the schoolhouse gate.<sup>1</sup> Still, First Amendment rights of students are not coextensive to that of adults. The watershed case in this area, *Tinker v. Des Moines Independent Community School District*, involved a group of students who intended to protest the Vietnam War by wearing black armbands to class. Hearing of the plan, school administrators quickly adopted a policy to prevent the students from wearing the armbands on school grounds.<sup>2</sup> Subsequently, students who wore armbands were suspended pursuant to school policy, and affected students and parent filed legal action against the school district.<sup>3</sup> The case ultimately ended up in the U.S. Supreme Court. Pointing out that the wearing of the armbands constituted silent, passive expression; the Court noted that “this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.”<sup>4</sup>

[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.<sup>5</sup>

In upholding the right of the students to wear the armbands to school, the Court established the threshold test of constitutionality in expression cases in the school

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<sup>1</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).

<sup>2</sup> *Id.* at 504. The policy provided for teachers or administrators to ask a student wearing a black armband to remove it. If the student refused, he or she would be suspended.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 508.

<sup>5</sup> *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.

environment. For a school to infringe the First Amendment rights of students, the student's activities must "materially and substantially disrupt the work and discipline of the school."<sup>6</sup>

Subsequent courts have handily applied the *Tinker* standard to cases involving First Amendment rights of students to the school ground context. Less certain, however, is the extent to which laws and courts can sanction the behavior of a student off campus, when the impact of the behavior spreads into the school or the classroom. Still, some courts have relied on *Tinker* as precedent in First Amendment challenges in cyberbullying cases.

By way of example, in 2008 the Third Circuit Court of Appeal reviewed a case in which a student created a fake webpage of a school principal on the popular social networking site MySpace.<sup>7</sup> The website made various disparaging attacks on the principal. The principal suspended the student for 10 days, placed him in alternative education for the remainder of the school year, and prohibited the student from participating in extracurricular activities and the school graduation ceremony.<sup>8</sup> In applying *Tinker*, the Court upheld the district court's finding that the school district failed to establish a sufficient nexus between the student's speech and a substantial disruption of the school environment.<sup>9</sup>

Other courts have ruled differently on the application of *Tinker* and the greater question of whether First Amendment rights apply to online student speech.<sup>10</sup> The Second Circuit Court of Appeals reviewed a challenge involving a sanction against a student for posting a blog off-campus about a school event.<sup>11</sup> The post contained vulgar and misleading language directed at school administrators. Although the court mentioned *Tinker*, it applied the holding in *Fraser*.<sup>12</sup> In *Fraser*, the court did not require proof of a substantial disruption, just that the speech is lewd or vulgar enough to rise to the level of impeding a school's mission in furthering civility amongst its student population.<sup>13</sup>

Therefore, the federal courts have not reached consensus on how to address the rights and responsibilities of individuals and public school settings with the advent of online student speech.<sup>14</sup> In 2011 alone, the U.S. Supreme Court received writs for certiorari from four

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<sup>6</sup> *Id.* at 513.

<sup>7</sup> *Layshock v. Hermitage School District*, 650 F.3d 205, 208-209 (3d Cir. 2011).

<sup>8</sup> *Id.* at 210.

<sup>9</sup> *Id.* at 216.

<sup>10</sup> In the context of challenges of student speech in the social media age, "the circuit courts have reached inconsistent holdings, and some of those results deviate from the core First Amendment principles that the Court articulated in *Tinker*." Aaron J. Hersh, *Rehabilitating Tinker: A Modest Proposal to Protect Public-school Students' First Amendment Free Expression Rights in the Digital Age*, 98 Iowa L. Rev. 1309, 1312 (March 2013).

<sup>11</sup> *Doninger v. Niehoff*, 527 F. 3d 41, 43 (2d Cir. 2008).

<sup>12</sup> *Id.* at 49. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

<sup>13</sup> *Fraser*, 478 U.S., at 683. "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."

<sup>14</sup> See Maryclaire Dale, *Online Student Speech Appeals Rejected by Supreme Court*, Huffington Post, January 17, 2012, at [http://www.huffingtonpost.com/2012/01/17/court-rejects-appeals-in-0\\_n\\_1210399.html](http://www.huffingtonpost.com/2012/01/17/court-rejects-appeals-in-0_n_1210399.html) (last visited on Apr. 11, 2012). See e.g., *Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F. 3d 771 (8th Cir. 2012); *Kowalski v. Berkley Cnty. Schs.*, 652F.3d 565 (4th Cir. 2011); and *Doniger v. Niehoff*, 642 F. 3d 334 (2nd Cir. 2011).

student-speech cases, from various circuit courts of appeal. The Court denied certiorari in each of the cases.<sup>15</sup>

### **Bullying and Harassment**

The 2008, Florida Legislature enacted s. 1006.147, F.S., which prohibits bullying and harassment in the school environment.<sup>16</sup>

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;
- Theft;
- Sexual, religious, or racial harassment;
- Public humiliation; or
- Destruction of property.<sup>17</sup>

Harassment is defined as 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.<sup>18</sup>

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

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<sup>15</sup> Rory Allen Weeks, *The First Amendment, Public School Students, and the Need for Clear Limits on School Officials' Authority over Off-campus Student Speech*, 46 Ga. L. Rev. 1157, 1163(Summer 2012).

<sup>16</sup> Chapter 2008-123, L.O.F., provides the Jeffrey Johnston Stand Up for All Students Act.

<sup>17</sup> Section 1006.147(3)(a), F.S.

<sup>18</sup> Section 1006.147(3)(b), F.S.

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.<sup>19</sup>

School districts are required to have a policy that prohibits bullying and harassment of students and employees of public K-12 educational institutions, and that is integrated with a school's curriculum, discipline policies, and other violence prevention efforts.<sup>20</sup>

### 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;<sup>21</sup> and
- 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.<sup>22</sup>

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

- Approximately 20 percent said they had been a victim of cyberbullying;
- Approximately 20 percent said they had committed cyberbullying; and
- About 10 percent indicated that they had been both victim and offender.<sup>23</sup>

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 also report that they too had cyberbullied others.<sup>24</sup>

<sup>19</sup> Section 1006.147(2), F.S.

<sup>20</sup> Section 1006.147(4), F.S.

<sup>21</sup> Section 1006.147(2)(c), F.S.

<sup>22</sup> Section 1006.147(3)(d)2.b., F.S.

<sup>23</sup> Sameer Hinduja, PhD and Justin W. Patchin, PhD, *Cyberbullying: Identification, Prevention, and Response* (2010) at [http://www.cyberbullying.us/Cyberbullying\\_Identification\\_Prevention\\_Response\\_Fact\\_Sheet.pdf](http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf) . (last visited on Apr. 11, 2013).

<sup>24</sup> Sameer Hinduja, PhD and Justin W. Patchin, PhD, *Cyberbullying Research Summary: The Influence of Parent, Educators, and Peers* (January 2013) at: [http://cyberbullying.us/Social\\_Influences\\_on\\_Cyberbullying.pdf](http://cyberbullying.us/Social_Influences_on_Cyberbullying.pdf) (last visited on Apr. 11, 2013).

Research also revealed a link between cyberbullying and low self-esteem, family problems, academic problems, school violence and delinquent behavior.<sup>25</sup> Forty-nine states have adopted anti-bullying legislation, with 16 of these states specifically including anti-cyberbullying legislation.<sup>26</sup>

### III. Effect of Proposed Changes:

This bill broadens the authority of a public K-12 school to discipline students for cyberbullying activities. Under existing law, a school may discipline a student for cyberbullying if the student uses a school computer, computer system, or computer network. Under the bill, a school may discipline a student for cyberbullying activities through the use of any computer located:

- On school grounds;
- At the site of a school-related or sponsored program or activity; or
- On a school bus.

The bill further provides that bullying or cyberbullying is prohibited if it is reasonably foreseeable that it could materially and substantially interfere with school operation, an educational program, or a school-related function, including field trips, or a student's safety and security.

Additionally, the bill defines and redefines several terms. The term "bullying" is redefined to include conduct that involves emotional pain and discomfort. The current definition of bullying mainly focuses on a person's acts toward another person. This revised definition allows conduct to be defined as bullying by its effect on another person.

The bill defines "cyberbullying" as bullying or harassment through the use of computers, technology, or electronic communication, including transfer of signs, signals, writing, images, sounds, data, or other intelligence transmitted through email, text, instant messaging, social media, the Internet, or fax.

Examples of cyberbullying include:

- Harassment and cyberstalking;
- Creating a web page in which the creator assumes a false identity, or knowingly impersonates another person.
- Electronically sharing or distributing material and communications to more than one person or posting material accessible by others.

The definition of harassment is expanded to include conduct that has no legitimate purpose and which causes substantial emotional distress to a student or school employee.

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<sup>25</sup> Sameer Hinduja, PhD and Justin W. Patchin, PhD, at note 16.

<sup>26</sup> Sameer Hinduja, PhD and Justin W. Patchin, PhD, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies* (January 2013) at [http://cyberbullying.us/Bullying\\_and\\_Cyberbullying\\_Laws.pdf](http://cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf) (last visited on Apr. 11, 2013).

The bill directs schools to use computers with disabled, or without web-filtering software to investigate alleged cyberbullying.

By October 1, 2013, the Department of Education (DOE) is required to incorporate cyberbullying into its existing anti-bullying model policy.

The bill requires school districts to incorporate the DOE's provisions on cyberbullying from its model policy into the district's anti-bullying policy by December 1, 2013.

The bill takes effect July 1, 2013. Consideration of DOE approval of a district's safe school policy that includes cyberbullying takes effect with funds provided in the 2014-2015 General Appropriations Act.

#### **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:

The Department of Education (DOE) reports that the requirement to investigate cyberbullying through the use of computers that are not web-disabled may result in a fiscal impact for school districts.<sup>27</sup> Some districts may need to purchase new software, or new computers altogether. The cost is indeterminate.

According to a representative of the Panhandle Area Educational Consortium (PAEC):

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<sup>27</sup> DOE 2013 Agency Legislative Bill Analysis, SB 626 (March 7, 2013) (on file with the Senate Judiciary Committee).

- To the extent that this bill creates an affirmative obligation on the school or district to act, this bill may result in increased litigation in instances where a school imposes sanctions against a student, or, in its discretion, does not sanction a student for alleged cyberbullying. For this reason, the PAEC suggested that an immunity clause be included in the bill.
- The bill appears to create a new standard for these types of cases, the “student’s ability to be safe and secure during school.” This language is different from that upheld in the *Tinker* case, which may also result in increased litigation.
- To the extent that schools are subject to increased vigilance under this bill, greater investigation of off-campus activity will be required.<sup>28</sup>

#### 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:

- 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;

<sup>28</sup> Email from Bob Harris, Panhandle Educational Educational Consortium (April 11, 2013) (on file with the Senate Judiciary Committee).



- 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.

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

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