

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 609 Bullying in Public School System

**SPONSOR(S):** Fullwood

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 626

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) K-12 Subcommittee	12 Y, 0 N, As CS	Beagle	Ahearn
2) Education Appropriations Subcommittee	13 Y, 0 N	Seifert	Heflin
3) Education Committee			

### SUMMARY ANALYSIS

Each district school board must adopt a policy prohibiting bullying and harassment in district schools. Among other things, the law prohibits the bullying or harassment of any public K-12 student or employee during a public K-12 education program or activity; during a school-related or school-sponsored program or activity; on a public K-12 school bus; or through a computer, computer system, or computer network that is within the scope of a public K-12 educational institution.

The law defines "bullying" as systematically and chronically inflicting physical hurt or psychological distress on one or more students, which may involve teasing; social exclusion; threat; intimidation; stalking; physical violence; theft; sexual, religious, or racial harassment; public humiliation; or destruction of property. Currently, the law does not specifically include "cyberbullying" within the scope of such policies.

Among other things, the bill amends the definition of bullying to include cyberbullying and defines "cyberbullying" as bullying through the use of specified technology or electronic communications; the creation of a webpage or weblog in which the creator assumes the identity of another person or the knowing impersonation of another person as the author of posted content or messages; or the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that is accessible to others.

The bill expands the scope of school district bullying policies to include computer-related bullying occurring outside the scope of a public K-12 educational institution and bullying using technology or electronic devices not owned, leased, or used by a public school or school district. Such conduct is actionable if it substantially interferes with or limits the victim's ability to participate or benefit from the services, activities, or opportunities offered by a school or substantially disrupts the education process or orderly operation of a school.

The bill adds provisions defining "within the scope of a public K-12 educational institution" as any computer or computer system or network that is physically located on school property or at school-related or school-sponsored programs or activities, regardless of ownership.

The bill does not have a fiscal impact on state or local governments.

The bill takes effect July 1, 2013.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Present Situation

#### **Cyberbullying**

Cyberbullying is the use of the internet, cell phones, and related technologies to hurt, harass, humiliate, or embarrass another person in a deliberate, repeated, and hostile manner. Cyberbullying includes such behaviors as:

- Creating a false online identity to trick another person into revealing personal information;
- Impersonating another person through creation of a false social networking page;
- Spreading lies and rumors about another person by text message or over the internet;
- Sending threatening or hurtful text messages; or
- Posting online embarrassing pictures of another person without their consent.<sup>1</sup>

Victims of cyberbullying experience many of the same effects as children who are bullied in person, such as decreased school performance, low self-esteem, and depression.<sup>2</sup> National Center for Educational Statistics data for the 2009-10 school year indicates that 28 percent of students ages 12–18 reported being bullied at school, whereas approximately 6 percent reported being cyberbullied.<sup>3</sup> Although cyberbullying is less prevalent than face-to-face bullying, the bully's use of technology increases his or her capacity for widespread public dissemination of hurtful, embarrassing, or false information, which may amplify the impact on the victim.<sup>4</sup>

#### **Cyberbullying Laws and Court Precedents**

Forty-nine states and the District of Columbia have laws that address school bullying; however, only 16 of these laws address cyberbullying.<sup>5</sup> States' reluctance to enact cyberbullying laws is likely due to the absence of definitive court precedent regarding public school authority to regulate student speech and expression occurring off-campus, outside the scope of school district control, through internet or other electronic media.<sup>6</sup>

Generally speaking, student speech and expression is protected by the First Amendment of the U.S. Constitution.<sup>7</sup> The U.S. Supreme Court has held that public school officials may regulate student speech or expression that substantially disrupts the school environment or interferes with the orderly operation of the school;<sup>8</sup> is vulgar, lewd, or patently offensive;<sup>9</sup> or promotes illegal activity<sup>10</sup> and in school publications or other "expressive activities that students, parents, and members of the public

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<sup>1</sup> National Crime Prevention Council, *What is Cyberbullying?*, <http://www.ncpc.org/topics/cyberbullying/what-is-cyberbullying> (last visited Feb. 22, 2013).

<sup>2</sup> *Id.*

<sup>3</sup> National Center for Education Statistics, *Indicators of School Crime and Safety: 2011*, at 44 and 48 (Feb. 2012), available at <http://nces.ed.gov/pubs2012/2012002.pdf>. Cyberbullying incidents reported by students included harassing emails, text messages, or instant messaging; internet posting of hurtful information; being excluded online; and being harassed while playing computer games.

*Id.*

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

<sup>5</sup> Cyberbullying Research Center, *Bullying and Cyberbullying Laws Fact Sheet*, [http://cyberbullying.us/Bullying\\_and\\_Cyberbullying\\_Laws.pdf](http://cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf) (last visited Feb. 22, 2013).

<sup>6</sup> See, e.g., Wired Safety, *Cyberbullying/Stalking & Harrassment*, <https://www.wiredsafety.org/subjects/cyberbullying.php> (last visited Feb. 22, 2013); see, e.g., Davis, Michelle. "Schools Tackle Legal Twists and Turns of Cyberbullying." Education Week (Feb. 4, 2011) <http://www.edweek.org/dd/articles/2011/02/09/02cyberbullying.h04.html>.

<sup>7</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513-514 (1969).

<sup>8</sup> *Tinker*, 393 U.S. at 513-514.

<sup>9</sup> *Bethel School District v. Fraser*, 478 U.S. 675, 685 (1986).

<sup>10</sup> *Morse v. Frederick*, 551 U.S. 393, 409-410 (2007).

might reasonably perceive to bear the imprimatur of the school.”<sup>11</sup> Certain forms of speech, such as threats and fighting words, are not constitutionally protected at all.<sup>12</sup> The U.S. Supreme Court has not considered these matters in the cyberbullying context, i.e., student speech or expression occurring off campus, outside the scope of school district control, through internet or other electronic media.<sup>13</sup>

No Florida case has reached the merits on the validity of a public school disciplinary action involving cyberbullying; however, a Florida federal court analyzed the issue in denying a school principal qualified immunity against a student’s claim for attorney’s fees in litigation stemming from her suspension for cyberbullying. The student was suspended for creating a Facebook page criticizing a teacher and inviting students to post derogatory statements about the teacher. In denying the principal qualified immunity, the court held that the suspension was unconstitutional, as the Facebook page “was the opinion of a student about a teacher that was published off-campus; did not cause any disruption on-campus; and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior.”<sup>14</sup>

Numerous lower federal court cases have ruled on the issue; however, the holdings in these cases are mixed.<sup>15</sup> This reflects the reluctance by many courts to extend the reach of public school authority into a child’s home and private actions unless the off-campus internet conduct has a tangible connection to the school environment.<sup>16</sup> This bill clearly provides that cyberbullying occurring off-campus must substantially interfere with or limit the victim’s ability to participate or benefit from the services, activities, or opportunities offered by a school or substantially disrupt the educational process or orderly operation of the school in order to be actionable.

### **The Jeffrey Johnston Stand Up for All Students Act**

Legislation enacted in 2008 required each district school board to adopt a policy prohibiting bullying and harassment in district schools.<sup>17</sup> Among other things, the law prohibits the bullying or harassment of any public K-12 student or employee during a public K-12 education program or activity; during a school-related or school-sponsored program or activity; on a public K-12 school bus; or through a computer, computer system, or computer network that is within the scope of a public K-12 educational institution.<sup>18</sup>

The terms “bullying” and “harassment” constitute the following behaviors:

- **Bullying:** Systematically and chronically inflicting physical hurt or psychological distress on one or more students, which may involve:
  - Teasing;
  - Social exclusion;
  - Threat;
  - Intimidation;
  - Stalking;
  - Physical violence;
  - Theft;
  - Sexual, religious, or racial harassment;

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<sup>11</sup> *Hazelwood School Dist. V. Kuhlmeier*, 484 U.S.260, 270-271 (1988)

<sup>12</sup> *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 573-547 (1942).

<sup>13</sup> *See, e.g., Tinker*, 393 U.S. at 513-514 (Student speech in school); *see, e.g., Morse*, 551 U.S. at 399-401 (Student speech at off-campus school-sponsored events). In *Morse v. Frederick*, the court held that public school authority to regulate student speech and expression extended to school-sponsored off-campus events. In so holding, the court reasoned that such regulation was permissible because the school district’s rules regarding student conduct expressly stated their application to student conduct at school-sponsored off campus events, the event occurred during normal school hours, and teachers and administrators were charged with supervising students attending the event. *Id.* at 400-401.

<sup>14</sup> *Evans v. Bayer*, 684 F.Supp.2d 1365, 1374 (S.D. Fla. 2010).

<sup>15</sup> *Compare Layshock v. Hermitage School District*, 650 F.3d 205 (3<sup>d</sup> Cir. 2011)(holding that student’s off-campus internet conduct was protected speech.) *with Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011)( holding that student’s off-campus internet conduct was not protected speech.).

<sup>16</sup> *See, e.g., Layshock*, 593 F.3d at 260.

<sup>17</sup> Chapter 2008-123, L.O.F.

<sup>18</sup> Section 1006.147(2), F.S.

- Public humiliation; or
- Destruction of property.<sup>19</sup>
- Harassment: Threatening, insulting, or dehumanizing gestures, use of computers, or written, verbal, or physical conduct directed against a student or school employee that causes reasonable fear of harm to person or property; substantially interferes with a student's educational performance, opportunities, or benefits; or substantially disrupts the orderly operation of a school.<sup>20</sup>

The law further specifies that bullying and harassment include:

- Retaliating against a student or school employee for reporting bullying or harassment;
- Reporting bullying or harassment, which reporting is not made in good faith;
- Perpetuating bullying or harassment with the intent to demean, dehumanize, embarrass, or cause physical harm to a student or school employee by incitement or coercion; use of (or providing access to) a school district's computer, computer system, or computer network; or conduct substantially similar to bullying or harassment.<sup>21</sup>

The law does not specifically define and address cyberbullying; however, it does specify that conduct falling within the statutory definitions for computer crimes<sup>22</sup> and cyberstalking<sup>23</sup> are within the scope of school district bullying policies.<sup>24</sup> Furthermore, a person charged with a disciplinary action under a school district's bullying policy or other prosecution may not raise the "physical location" or "time of access" of a computer-related incident as a defense to the charges.<sup>25</sup>

### Effect of Proposed Changes

The bill amends the scope of the definition of bullying to include cyberbullying and adds "private humiliation" as a behavior that may constitute bullying.

The bill adds provisions defining "cyberbullying" as bullying through:

- The use of technology or any electronic communication, which includes, without limitation the transmission of signs, signals, writing, images, sounds, data, or intelligence of any nature by a wire, radio, electromagnetic system, photoelectronic system, or photooptical system, electronic mail, internet communications, instant messages, or facsimile communications.
- The creation of a webpage or weblog in which the creator assumes the identity of another person or the knowing impersonation of another person as the author of posted content or messages.
- The distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that is accessible to others.

The bill adds provisions defining "within the scope of a public K-12 educational institution" as any computer or computer system or network that is physically located on school property or at school-related or school-sponsored programs or activities, regardless of ownership.

The bill expands the scope of school district bullying policies to include computer-related bullying occurring outside the scope of a public K-12 educational institution and bullying using technology or

<sup>19</sup> Section 1006.147(3)(a), F.S.

<sup>20</sup> Section 1006.147(3)(b), F.S.

<sup>21</sup> Section 1006.147(3)(d), F.S.

<sup>22</sup> Section 815.03, F.S., defines terms used to proscribe computer-related crimes. It defines the terms "access," "computer," "computer network," "computer software," "computer system," and "data," as they apply to the bullying law.

<sup>23</sup> Section 784.048(1)(d), F.S., defines "cyberstalk" as engaging in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose."

<sup>24</sup> Section 1006.147(3)(c), F.S.

<sup>25</sup> Section 1006.147(7)(a), F.S.

electronic devices not owned, leased, or used by a public school or school district. Such conduct is actionable if it substantially:

- Interferes with or limits the victim's ability to participate or benefit from the services, activities, or opportunities offered by a school; or
- Disrupts the education process or the orderly operation of a school.

The bill specifies that such provisions may not be construed to require a public school to staff or monitor any nonschool-related activity, function, or program. School district officials investigating computer-related bullying must use a computer in which web-filtering software is not installed.

Current law requires school district bullying policies to include, among other things, procedures for providing instruction to students, parents, teachers, school administrators, counseling staff, and school volunteers on identifying, preventing, and responding to bullying or harassment. The bill adds that such procedures must include instruction regarding recognizing behaviors leading to bullying and harassment and appropriate preventive measures.

#### B. SECTION DIRECTORY:

**Section 1.** Amends s. 1006.147, F.S., relating to bullying and harassment; authorizes regulation of bullying occurring outside the scope of a public K-12 educational institution through internet or other electronic media if such conduct has certain impacts on the student or school; revises the definition of bullying to include "cyberbullying;" defines the terms "cyberbullying" and "within the scope of a public K-12 educational institution;" and specifies procedures for bullying-related investigations and instruction.

**Section 2.** Provides that the bill takes effect July 1, 2013.

### II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

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

None.

#### D. FISCAL COMMENTS:

The bill does not have a fiscal impact on state or local governments.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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

On March 13, 2013, the K-12 Subcommittee adopted two amendments and reported HB 609 favorably as a committee substitute. The amendments:

- Clarify that cyberbullying perpetrated from an off-campus computer or device that is outside the scope of school district control must substantially interfere with or limit the victim's ability to participate or benefit from the services, activities, or opportunities offered by a school to be actionable.
- Clarify that school officials are not required to monitor non-school related activities, functions, or programs.
- Remove provisions which added "emotional pain or discomfort" to the list of behaviors that may constitute bullying.