Are Florida's Bullying Laws Overreaching?

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I. INTRODUCTION

In light of several highly publicized suicides caused by bullying, state legislatures have been pressured to enact tougher bullying laws to quell this pervasive problem. Remedies to this problem, however, are designed with the intent of regulating student expression, which can lead to vague and overbroad laws. Moreover, it is common amongst legislatures to enact laws that stretch the bounds of constitutionality, when protecting children is the motivation. Part one of this paper will discuss the scope of permissible regulations schools may impose on student expression. Part two will discuss schools’ affirmative duty as federal recipients to ensure no student is denied equal access to education. Part three will discuss Florida’s regulation in terms of the overbreadth doctrine. Finally, part five will discuss potential resolutions to the conflicts discussed in the preceding section.

II. SCOPE OF REGULATIONS ON STUDENT EXPRESSION

Although the Constitution guarantees freedom of speech, the Supreme Court has held that public school officials have the authority to regulate otherwise protected speech if such expression is found to substantially disrupt the work and discipline of the school. Therefore, the level of substantial disruption required to prohibit speech in a school setting is far lower than the level required on the street. Since Tinker, however, the Supreme Court has eased the burden required to justify a restriction on student expression by allowing school officials to regulate speech so long as the restriction is reasonably related to educational concerns. In effect, the Supreme Court has significantly diminished the protections granted under Tinker, favoring

1. U.S. CONST. amend. I.
2. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (holding that school officials must show a restriction of speech was made to prevent a material and substantial interference with the operation and discipline of the school rather than a mere desire to avoid discomfort and unpleasantness of unpopular speech).
4. Compare Tinker, 393 U.S. at 513 (requiring substantial interference with the operation of the school to restrict speech) with Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (requiring restrictions on speech meet only a rational basis standard) and Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986) (asserting that school officials have the authority to categorically prohibit vulgar, lewd, or profane speech if such speech is inconsistent with the fundamental values of public school education).
greater deference to school officials in regulating speech. Consequently, this new approach has created significant ambiguity as to the scope of authority a school has in regulating speech leading to a split in the circuits regarding this matter.

Furthermore, the Supreme Court has further diminished the scope of *Tinker* in *Morse v. Frederick*, concluding that the substantial disruption rule from *Tinker* is not the only basis in restricting student speech. In *Morse*, the Court held that school officials can further restrict student speech based on important governmental interests, such as the interest in curbing student drug abuse. The Court based this argument on the billions of dollars the federal government has allocated to state and local drug prevention programs. In effect, the policies aimed at controlling drug use grant school officials the authority to regulate speech that impedes an important governmental interest.

Despite these decisions delineating the scope of authority over student expression, schools also have an affirmative duty to ensure that no student is deprived of a federal constitutional right. In effect, recipients of federal funding, such as schools, accept such funding under the implied condition that they will comply with federal laws. Consequently, the duty to protect students from deprivation of their federally protected rights concomitant with the school’s right to regulate speech that is inconsistent with the school’s inherent educational goals creates the potential for overly broad regulations. Moreover, the school’s duty to prevent a deprivation of students’ rights also requires schools to prevent such deprivation caused by the acts of third parties acting under their disciplinary authority, particularly acts of one student against another student.

### III. SCHOOLS’ AFFIRMATIVE DUTY

In light of this duty to protect their students from a deprivation of their rights, Florida recently passed the “Jeffery Johnston Stand Up for All Students Act” prohibiting bullying or harassment

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6. Hudson, supra note 6 (contrasting 6th Circuit decision holding that a T-shirt depicting a three-faced Jesus with the words “See No Truth. Hear No Truth. Speak No Truth.” as plainly offensive against 2nd and 9th Circuit decisions holding that a banner bearing the words, “Bong Hits 4 Jesus” is not plainly offensive); see also Guiles v. Marineau, 461 F.3d 320 (2d Cir. 2006), cert. denied, No. 06-757, 2007 U.S. LEXIS 8793 (U.S. June 29, 2007) (following substantial disruption rule).
8. *Id.* at *25.
9. *Id.* at *6–8.
10. *Id.* at *29–31.
11. *Id.*
13. § 1681; Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 639–40 (1999) (asserting that an implied private right of action exists for violations of § 1681); see also U.S. v. Lanier, 520 U.S. 259 (1997) (asserting that criminal sanctions may be imposed against anyone acting under the color of law who deprives a person of a federal constitutional right).
15. FLA. STAT. ANN. § 1006.147 (LexisNexis 2009).
within the scope of the school’s disciplinary authority. Although the basis of section 1006.147 is to require schools to regulate student expression that amounts to bullying or harassment, it is important to determine the type of expression this Act intends to restrict. In effect, section 1681 concomitant with section 2000d require schools to ensure no student is deprived of equal access to federally funded programs on the basis of sex, race, color, or national origin. Although bullying or harassment can easily fall within these categories of discrimination, such conduct may also fall outside of these categories. Accordingly, 18 U.S.C.S. section 242, provides that it is against the law to willfully deprive a person of rights protected by the Constitution or laws of the United States. Thus, considering children’s federally protected right to public education, section 242 ensures school officials are required to stop bullying or harassment that amounts to a deprivation of a student’s access to education.

In Davis, the Court determined a school shall not be held liable for the acts of a student unless the school has actual knowledge of the harassment. Moreover, the school must show a deliberate indifference to the harassment or at least make a student vulnerable to it. The type of harassment required, however, must be more than mere name calling or simple teasing, rather the harassment must involve conduct that is so severe, pervasive, and objectively offensive that it has a systemic effect of denying equal access to educational resources and opportunities. The Court emphasized this notion indicating that interactions within the scope of a school setting should not be viewed analogously to adult interactions. In effect, the Court set a higher standard for such harassment in a school atmosphere requiring the harassment or bullying to be more severe and pervasive than ordinary unacceptable harassment in an adult setting. In addition, the Court focuses on the effect the harassment has on the victim requiring a number of factors that amounts to a denial of equal access to education. Although increased absences alone may not be sufficient, increased absences along with an observable change in behavior, and declining grades may suffice or perhaps evidence of suicidal tendencies may also suffice if this behavior is the result of harassment.

A. Florida Goes One Step Further

In addition to Title IX, Florida created the “Florida Educational Equity Act” patterned in the same manner as Title IX to increase the scope of harassment to include discrimination on the basis of race, national origin, sex, handicap, or marital status. While section 1000.05’s assurance that no student shall be denied equal access to educational programs is undoubtedly a

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16. Id.
17. § 1681(a); § 2000d.
19. Lanier, 520 U.S. at 271 (citing § 242); cf. Davis, 526 U.S. at 644 (asserting that a deliberate indifference to a deprivation of federally protected rights amounts to an intentional or willful deprivation).
20. Davis, 526 U.S. at 650.
21. Id.
22. Id. at 652.
23. Id. at 651.
24. Id.
25. Id. at 652.
constitutionally permissible provision,\textsuperscript{28} section 1006.147’s focus on student expression that may lead to a denial of access indicates potentially overbroad proscriptions and thus must be analyzed accordingly.\textsuperscript{29} Furthermore, section 1000.05 of the Florida Statutes—modeled after Title IX and Title VI—prohibits denial of equal access to federally funded programs.\textsuperscript{30} Moreover, Davis requires the harassment to be more than mere name-calling or simple acts of teasing, but rather the school must show deliberate indifference to harassment that is severe, pervasive, and objectively offensive.\textsuperscript{31} Thus section 1006.147’s prohibition against teasing and social exclusion does not rise to the level of harassment required by Davis.

**IV. STUDENT EXPRESSION AND OVERBREADTH**

The free speech clause protects various forms of speech, including speech listeners may find deeply offensive.\textsuperscript{32} Thus statutes against harassment that attempt to restrict oral or written expression are heavily scrutinized by courts because such statutes are considered content-based restrictions, which are generally protected forms of speech.\textsuperscript{33} Content-based restrictions, however, are permissible so long as the primary rationale for the regulation is not based on “secondary effects” or the emotive impact it may have on the listener.\textsuperscript{34} Thus restrictions on speech that is content-neutral and prohibits a type of activity based solely on the conduct with regards to the time, place, and manner in which the conduct takes place may be constitutionally valid despite any incidental emotive impact it may have on listeners.\textsuperscript{35} Moreover, a content-neutral regulation must be supported by compelling governmental interest along with a level of interference with the speaker that allows alternative avenues of communication.\textsuperscript{36}

A. **Limitations**

With regards to section 1006.147 of the Florida Statutes, this Act prohibits any verbal or physical conduct that has the purpose or effect of substantially interfering with a student's educational performance, or placing a student or school employee in reasonable fear of harm, or substantially disrupting the orderly operation of a school.\textsuperscript{37} Although this statute’s heavy focus on the secondary effect on listeners may render it unconstitutional, some courts have suggested that offensive speech may be unconstitutional when the listeners are considered a captive audience and cannot avoid the speech, such as children and employees in a school.\textsuperscript{38} Moreover, the Supreme Court has specified a number of exceptions to free speech including, obscenity, libel, and “fighting” words because such speech is considered to be “of such slight social value…

\textsuperscript{28} See Davis, 526 U.S. at 651-53; see also Hawkins, 322 F.3d at 1286-90.
\textsuperscript{29} See generally 16A AM. JUR. 2D Constitutional Law § 411 (2008).
\textsuperscript{30} See supra note 12 and accompanying text; see supra note 27 and accompanying text.
\textsuperscript{31} Davis, 526 U.S. at 652.
\textsuperscript{33} Id. at 207 (citing R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)).
\textsuperscript{34} Id. at 209.
\textsuperscript{35} Id.
\textsuperscript{36} Id. (citing Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537 (1987)).
\textsuperscript{37} FLA. STAT. ANN. § 1006.147 (LexisNexis 2009).
\textsuperscript{38} Saxe 240 F.3d (citing Aguilar v. Avis Rent a Car Sys., 980 P.2d 846 (Cal. 1999)).
that any benefit that may be derived from it is clearly outweighed by the social interest in order and morality."39 Thus within the context of a school, a content-based anti-harassment regulation may be permissible if the provisions focused on the Supreme Court’s designated exceptions. Section 1006.147 of the Florida Statutes, however, created a much wider scope for impermissible speech that includes teasing and social exclusion, which creates significant potential for overly broad proscriptions.40

B. Overbreadth

Turning to the doctrine of overbreadth, section 1006.147 must be analyzed under the three rules expounded by the Supreme Court in Tinker, Fraser, and Hazelwood.41 With regards to Fraser, the regulation must only regulate speech that is deemed vulgar or lewd. Section 1006.147, however, is aimed at speech that interferes with a student’s educational performance, creates a reasonable apprehension of harm, and a list of factors that constitutes bullying.42 Although some of this speech may undoubtedly fall within the scope of lewdness or vulgarity, the restrictions within this Act proscribe constitutionally protected speech and are thus overbroad under the Fraser rule.43 Turning to Hazelwood, section 1006.147 could survive a facial attack if the Act restricts speech in school-sponsored activities and such restrictions are reasonably related to legitimate pedagogical concerns.44 The Act, however, covers private student speech, going beyond restrictions on school-sponsored, such as private student speech on a school bus or on a school’s computer network.45

Finally, applying the Tinker test to section 1006.147 may offer the Act’s best chance to survive a facial attack as the substantial interference standard is sufficiently broad to include acts of bullying or harassment as described in section 1006.147.46 The Tinker Court held that a school must reasonably believe that the speech will cause actual material interference with school activities.47 Similarly section 1006.147 requires harassment to have the effect of substantially interfering with a student’s educational performance, opportunities, or benefits or substantially disrupt the orderly operation of a school.48 Accordingly, substantial interference with a student’s performance as a result of bullying or harassment may in fact suffice under Tinker’s substantial disruption rule.49 Most acts of bullying or harassment, however, may not rise to a level of material interference to suffice under Tinker, thus this Act proscribes constitutionally protected speech and is therefore overly broad.

40. Saxe 240 F.3d (asserting that states may adopt regulations more protective than existing law so long as they do not violate the Constitution).
41. Id. at 216.
42. FLA. STAT. ANN. § 1006.147 (LexisNexis 2009).
43. See Saxe 240 F.3d at 216.
44. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); see also Saxe 240 F.3d at 216.
45. See Hazelwood, 484 U.S. at 272-73; see also Saxe 240 F.3d at 216.
46. § 1006.147(3)(a)–(b).
48. Id. § 1006.147(3)(b)(2) – (b)(3).
49. See Tinker, 393 U.S. at 513; see generally Robin M. Kowalski, “I Was Only Kidding!”: Victims’ and Perpetrators’ Perceptions of Teasing, 26 PERSONALITY & SOC. PSYCHOL. BULL. 231 (2000).
V. Potential Remedies

Although the rationale for the “Jeffrey Johnston Stand Up for All Students Act” is noble in its aim, the overreaching provisions within this Act impermissibly proscribe speech that is otherwise protected by the Constitution.\(^{50}\) Furthermore, the solution to bullying and harassment in Florida’s public schools is not to create draconian rules whereby students and teachers are subject to constant scrutiny of a conceptual “bully police.” Moreover, the sheer scope and magnitude of this Act is designed in a manner that makes it impossible to fully enact and enforce in every Florida school. In effect, this Act mandates school employees to scrutinize every act that may fall under the unconstitutionally broad umbrella of bullying or harassment delineated in the Act and address and dissect every complaint to avoid liability.\(^{51}\)

The overly broad proscriptions in this Act, however, can be remedied if the provisions are revised to fit within the constraints of permissible regulations of student expression. First, schools must ensure the provisions of the revised Act are content-neutral so as to avoid regulations that focus on the content of the bully’s speech rather than the conduct. In doing so, the State will have a far easier burden to meet as courts are reluctant to approve laws that restrict content or viewpoint based restrictions. Additionally, the restrictions must fit within the permissible scope delineated in \(Tinker, Hazelwood,\) and \(Fraser.\) That is, the restrictions must apply only to lewd or vulgar speech or speech that materially interferes with the inherent educational goals of a school and in the case of school-sponsored expression; the school shall have greater deference to restrict speech so long as the regulations are reasonably related to legitimate educational concerns.\(^{52}\) Moreover, simple acts of teasing and exclusion must not be included, but the act may include restrictions on \(persistent\) bullying or harassment that becomes so severe, pervasive, and objectively offensive that it denies a student equal access to the institution’s resources and opportunities.\(^{53}\) In effect, these revisions ensure harassment and bullying are regulated without overly broad restrictions on student expressions.

Perhaps the most simple and straightforward solution is to rely on common law rules regarding third party liability of schools for neglecting harassment that is so severe it effectively denies a student equal access to an education. Although most states limit the damages available to victims as a result of a school’s negligence,\(^{54}\) revising these remedies may be sufficient to put schools on notice of their duty to protect students and employees from severe harassment. Moreover, imposing third party liability on schools will effectively circumvent the necessity for pervasive restrictions on student expression.

VI. CONCLUSION

While section 1006.147 is facially invalid due to provisions that proscribe constitutionally protected expression, schools must not relent in their duty to uphold each student’s right to equal access to educational resources and opportunities. Although, the Supreme

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\(^{50}\) § 1006.147

\(^{51}\) See \(Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650–51 (1999)\) (asserting for a school to be liable for student on student harassment a higher threshold than ordinary adult interactions is necessary).

\(^{52}\) See \(Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)\).

\(^{53}\) See \(Davis, 526 U.S. at 652.\)

\(^{54}\) See \(Davis, 526 U.S. at 645.\)
Court—under the requirements of Title IX and Title VI—requires schools to ensure all students under their disciplinary authority are not denied an equal access to educational opportunities, the Court has also set boundaries to this affirmative duty to ensure schools do not overreach in their efforts. In sum, a balance between these two principles is necessary by maintaining narrowly focused restrictions on student expression on one hand and ensuring equal access to educational opportunities to all students on the other.
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