



## School Districts and Robocalls<sup>1</sup>

Many Texas school districts use automated calling and text messaging services to communicate with students, parents, and staff about various issues. Recent developments in the law affect how districts and their vendors may conduct such calls.

### Background

Congress enacted the Telephone Consumer Protection Act (TCPA) in 1991 to address certain telephone calling practices that may invade consumer privacy and threaten public safety. 47 U.S.C. § 227. The TCPA and the [rules](#) adopted by the Federal Communications Commission (FCC) prohibit telemarketing calls using an artificial or pre-recorded voice to residential telephones without prior express consent of the recipient. 47 C.F.R. § 64.1200. They also prohibit any *non-emergency* calls using an automatic telephone dialing system (“auto-dialer”) or an artificial or pre-recorded voice to a wireless number without prior express consent of the recipient. These types of calls are commonly referred to as “robocalls.” The FCC has concluded that robocalls to wireless numbers encompass both voice calls and text messages.

### How does the TCPA affect Texas ISDs?

While the rule for residential numbers applies only to telemarketers, the rule for wireless phones includes both telemarketers and informational calls that do not involve an emergency. Therefore, non-emergency robocalls from a district to wireless phones, without consent, could violate the TCPA.

On August 4, 2016, the FCC issued a declaratory ruling that clarified when schools may make certain robocalls to student family wireless phones without prior express consent. [In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991](#), 31 F.C.C. Rcd. 9054 (2016). Blackboard Inc., a corporation that provides various education technology services for K-12 school districts, asked the FCC whether *all* robocalls made by an educational organization qualified as calls made for an “emergency purpose,” which would mean that schools would not require prior express consent before making robocalls. In its ruling, the FCC declined to find that all robocalls sent by schools qualify as calls made for an “emergency purpose.” Instead, it clarified which types of robocalls fit under that exception and held that robocalls involving matters “closely related to the school’s mission” do not violate the TCPA when the person being called had provided their number to the school.

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<sup>1</sup> An electronic version of this document is available on TASB School Law eSource at [tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Business/documents/sch\\_districts\\_and\\_robocalls.pdf](http://tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Business/documents/sch_districts_and_robocalls.pdf).

### **What types of calls fall under the “emergency purpose” exception?**

In its ruling, the FCC confirmed that, in the school context, robocalls that relate to a situation affecting the health and safety of students and faculty fall under the emergency purpose exception and do not require prior consent. The FCC provided examples of situations that affect the health and safety of students, including but not limited to messages or calls relating to:

- weather-related closures,
- incidents of danger to the school due to fire,
- dangerous persons or health risks (such as toxic spills), and
- unexcused absences.

Regarding unexcused absences, the FCC noted that this situation affects student safety as a missing child could be in danger, and some states require schools to notify parents of an unexcused absence for safety reasons.

Although emergency robocalls do not require prior express consent, the FCC encouraged schools to update their emergency contact lists regularly so that their calls reach the intended authorized parties. Not only do robocalls to the wrong party implicate the privacy of those who mistakenly receive the call, such calls could also violate the privacy and safety of students. For example, disclosing information from a student’s attendance records to someone who is not authorized to receive the information may be a violation of the Family Educational Rights and Privacy Act (FERPA).

### **What is considered to be “closely related to the school’s mission”?**

In limited cases, the FCC has acknowledged that an individual merely providing his or her telephone number could constitute consent, but only as long as the robocall is closely related to the purpose for which they initially provided the number. The FCC extended this idea to conclude that when a parent or student provides only their wireless number as a point of contact, they are consenting to receive communications “closely related to the school’s mission.”

In considering Blackboard’s petition, the FCC recognized the following as closely related to the school’s mission:

- Messages about parent-teacher conferences; and
- Surveys to provide input on school related issues.

The FCC rejected Blackboard’s suggestion that announcements of local community events not associated with the school district could be considered closely related to the school’s mission. Without further guidance, schools may be left guessing what the FCC will deem to be closely related to the school’s mission; therefore, schools may prefer to seek express consent.

### **What does prior express consent look like?**

In its ruling, the FCC emphasized the importance of prior express consent, which makes non-emergency calls lawful. Both Blackboard and the schools that filed comments in the proceedings confirmed that they usually obtain prior consent to make such calls. When prior express consent has been given, and the call falls within the scope of consent, such calls are permissible under the TCPA, absent any instructions to the contrary.

When a call does not introduce an advertisement or constitute telemarketing, the FCC does not require any specific method for gaining prior express consent, allowing it to be provided orally or in writing. A school district would be wise, however, to obtain consent in writing for non-emergency robocalls.

### **Can prior express consent be revoked?**

The TCPA does not speak directly to the issue of revocation of consent. The FCC, however, has determined that consumers may revoke consent through any reasonable means. [\*In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991\*](#), 30 F.C.C. Rcd. 7961 (2015). This reasonableness standard was subsequently upheld in court. *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

### **Can calls be made to phone numbers that have been reassigned to a different subscriber?**

Generally, no; however, additional guidance may come from the FCC. Prior to March 2018, the FCC had interpreted the TCPA to require that express consent be given by the person who holds the telephone number (the subscriber), not the person the caller intended to reach (the call recipient). Under this interpretation, if a phone number belonging to a consenting parent was reassigned, a robocaller (such as a school) would be in violation of the TCPA after one call to the new, nonconsenting call recipient. The only safe harbor from TCPA violation was a single post-reassignment call, after which violation would occur. This presented practical problems for robocallers who were not generally notified of the reassignment of a phone number from a consenting person to a new, non-consenting person.

On March 16, 2018, the U.S. Court of Appeals for the D.C. Circuit issued a decision that struck down not only the FCC’s definition of what constitutes an “auto-dialer,” but also the one-call safe harbor rule associated with calling reassigned phone numbers. *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). The court found the one-call safe harbor rule arbitrary and capricious.

Therefore, at least for now, school districts may have some temporary relief from the strict one-call safe harbor limit when they send automated messages or texts concerning non-emergency items to a phone number for which the school previously obtained express consent, but has since been reassigned to a nonconsenting call recipient. However, because it remains a violation to knowingly call someone who has not consented to receive the calls or who has reasonably revoked consent, a school district (or the district's vendor) must have an ongoing means of updating contact information and removing phone numbers from call lists upon reasonable request of call recipients. For sample parent consent and revocation forms, see TASB policy CQ(EXHIBIT).

### **What are the consequences for violating the TCPA?**

The TCPA generally bars the use of a robocaller to make any call (or send any text message) without prior express consent, and tags each violation with a minimum \$500 penalty in damages for each individual recipient of each prohibited call or message. If a robocaller calls a person with a reassigned number, the robocaller could incur liability under the TCPA, including a fine of up to \$16,000. FCC, DA 16-264 (2016). Thus, a district or its vendor could face monetary consequences for making robocalls that require prior consent when the district or vendor does not have that consent.

Individuals also have the right to sue the district for \$500 or the actual monetary damage for each violation, whichever is greater, with higher damages for willful or knowing violations. 47 U.S.C. § 227(b)(3). Therefore, districts have a vested interest in ensuring that they do not make robocalls to persons without consent. In fact, several individuals have sued school districts for their unwanted robocalling under the TCPA. Willie Willis, a man in Florida filed suit against Broward County School District, seeking \$25,000 in damages. Willis claims that the district sent him more than two dozen robocalls, despite not having a child in the school district. David Ovalle, [\*Man Sues Over Repeated School 'Robocalls' About Child he Doesn't Have\*](#), Miami Herald (Feb. 8, 2017). In Illinois, four individuals from three different states brought a class action lawsuit against West Interactive Services Corporation (WISC). Jonathan Bilyk, [\*Court filings: Lawsuit vs SchoolMessenger Imperils Schools' Ability to Text, Call Parents, Students\*](#), Cook County Record (Mar. 28, 2017). WISC does business as SchoolMessenger, and the four individuals allege that SchoolMessenger sent automated voice and text messages to possibly millions of wireless phones on behalf of tens of thousands of schools and other educational institutions throughout the U.S. WISC has argued that the case may prevent several schools from sending messages to parents about important school events, such as school closings and emergencies. It is uncertain whether these lawsuits have been pursued further.

In a case involving the Wayne County Board of Education (BoE) in West Virginia, a school board trustee (Hurley) who was running for re-election sued the BoE for violating the TCPA because one of its employees had obtained a list of phone numbers from the BoE and used a robocall service to convey pre-recorded messages that stated "Hurley votes no for students and for

schools,” and encouraged voters to vote responsibly. *Hurley v. Wayne Cnty. Bd. of Educ.*, 2017 WL 2454325 (S.D. W. Va. 2017). The calls reached Hurley’s cell phone without her consent on the day before Election Day. Hurley alleged several violations of the TCPA, including provisions that require certain identification information to be part of the pre-recorded messages. The court found that these sections do not provide for private causes of action by individuals; therefore, the court dismissed the allegations against the BoE. However, the court pointed out that the TCPA does provide for state attorneys general to pursue legal action against violators—thus laying out a legal pathway for aggrieved consumers to seek redress under the TCPA.

The FCC has publicly stated that robocalls are its number one priority at this time, yet it remains to be seen how it will redefine autodialers or redraw the scope of safe harbor. [Fcc.gov](https://www.fcc.gov/press-releases/2017/07/20), [Fighting the Scourge of Illegal Robocalls](#).

### **What about the district’s mass communications vendor?**

School districts that have agreements with vendors for their robocalls should review their contracts carefully to make sure the vendors, rather than the school districts, are responsible for any mistaken robocalling. Districts should also ensure that vendors have processes for updating outdated numbers immediately. All agreements with telecommunications vendors should be reviewed in advance by districts’ school attorneys.

### **Tips for Districts:**

Consider these suggestions for minimizing the risk presented by robocalls.

- If the district’s only purpose in making robocalls will be notice of emergency items, robocalls are permitted, even without prior express consent.
- If informational calls or text will be sent, work with counsel to either limit message subjects to those “closely related” to school operations or to obtain prior effective consent for the calls.
- Establish a clear protocol between the district and its vendor, if any, to correct wrong numbers immediately.
- Seek legal review of vendor robocall agreements to ensure that the vendor, rather than the district, will be responsible for any errors.

Keeping these tips in mind, robocalls may be an efficient and effective way to keep parents and others informed about school matters.

For more information on this and other school law topics,  
visit TASB School Law eSource online at [schoolawesource.tasb.org](http://schoolawesource.tasb.org).

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