



Cyberbullying: Anti-Bullying Laws in Texas after SB 179 (David's Law)¹

Today's students face unique challenges, navigating a world both enriched and complicated by technology and social media. State lawmakers responded during the 85th legislative session by strengthening existing anti-bullying laws to confront an increasingly frequent menace to online culture: cyberbullying.

This article reviews the current anti-bullying laws after adoption of Senate Bill 179 (also known as David's Law), discusses how school district policies can address bullying, considers the other laws that may be implicated in bullying situations, and explores hypothetical scenarios involving student online behavior.

Changes Introduced by David's Law

Some of the more significant changes made to the Texas Education Code by Senate Bill 179 include the following:

- **New Definitions of Bullying and Cyberbullying**

The new law broadens the definition of bullying, which now includes a single significant act or pattern of acts by one or more students against another student that exploits an imbalance of power and involves engaging in expression (written, verbal, or electronic) or physical conduct that:

- (i) physically harms a student, damages a student's property, or places a student in reasonable fear of harm to the student's person or of damage to the student's property;
- (ii) is sufficiently severe, persistent, or pervasive enough that the action or threat creates an intimidating, threatening, or abusive educational environment for a student;
- (iii) materially and substantially disrupts the educational process or the orderly operation of a school or classroom; or
- (iv) infringes on the rights of the victim at school.

Tex. Educ. Code § 37.0832(a)(1).

¹ An electronic version of this document is available on TASB School Law eSource at tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Students/documents/cyberbullying.pdf.

The law also now makes clear the term “bullying” includes cyberbullying, and explicitly defines the term “cyberbullying” as any bullying done through the use of any electronic communication device, which includes cellular or other type of telephones, computers, cameras, electronic mail, instant or text messaging, social media applications, websites, or any other internet-based communication tool. Tex. Educ. Code § 37.0832(a)(2).

Additionally, in the past, schools had limited authority to regulate conduct occurring off-campus or in vehicles not operated by the district; however, now, in addition to conduct on school property or at school-related activities, schools must also address cyberbullying that:

- (i) is delivered to school property or site of a school-related activity;
- (ii) occurs on a publicly or privately owned school bus or vehicle being used to transport students to or from school or a school-related activity; or
- (iii) occurs off school property or outside of school-related events and interferes with a student’s educational opportunities or substantially disrupts operations of a school, classroom, or school-related activity.

Tex. Educ. Code § 37.0832(a-1).

- **Reporting Assault and Harassment by Repeated Electronic Communication**

The law now allows reporting to law enforcement by a principal or designee, other than a counselor, if, after an investigation, the principal has reasonable grounds to believe a student engaged in conduct constituting criminal assault or harassment by repeated electronic communication. Any person who makes such a report is immune from civil or criminal liability or disciplinary action. School employees and volunteers who act under related policies and procedures are also immune from suit and liability. Tex. Educ. Code § 37.0151(a), (c), (g), (h).

- **Earlier Parent Notification**

The law requires schools to notify the parent of an alleged victim of bullying within three business days of a report, rather than waiting for the findings of an investigation. Schools must notify the parent of an alleged bully, within a reasonable amount of time after the incident. Tex. Educ. Code § 37.0832(c).

- **Anonymous Reporting Procedures for Students**

The law now mandates that school boards adopt policies allowing students to anonymously report incidents of bullying. Tex. Educ. Code § 37.0832(c)(6).

- **Expansion of DAEP and expulsion for serious bullying and cyberbullying**

Schools may now expel or place in a disciplinary alternative education program (DAEP) any student who: engages in bullying that encourages a student to commit or attempt to commit suicide; incites violence against a student through group bullying; or releases or threatens to release intimate visual material of a minor or a student who is 18 years of age or older without the student's consent. Tex. Educ. Code § 37.0052(b).

- **Injunctive Relief**

Perhaps one of the most important tools added by David's Law is the ability of a minor who is cyberbullied, or the minor's parent, to seek injunctive relief against either the perpetrator of the cyberbullying or, if the perpetrator is a minor, against the perpetrator's parent. The new injunctions require a lower legal burden than other types of injunctions or restraining orders; the person must only show that he or she is likely to succeed in establishing that the cyberbullying occurred. The court also has the authority to order preservation of electronic communication. Tex. Civ. Prac. & Rem. Code § 129A.002(a), (c), (e).

The Texas Supreme Court will create publicly available injunctive relief application forms, which must be accepted by courts unless there is a substantive defect that cannot be cured. Tex. Civ. Prac. & Rem. Code § 129A.003.

- **Criminal penalties**

The law amends the Texas Penal Code to increase criminal penalties, adding jail time and higher fines, for harassment by repeated electronic harassment or for violating a cyberbullying injunction. Tex. Penal Code § 42.07(c).

- **Training, Prevention and Mediation, and Mental Health Support**

New laws allow schools to include in continuing education requirements training regarding how grief and trauma affect student learning and behavior. Tex. Educ. Code § 21.054(d-2), (e-2).

In addition, the Texas Education Agency will establish and maintain a website to provide resources for school employees regarding working with students with mental health conditions. Tex. Educ. Code § 21.462.

Furthermore, school districts may establish district-wide policies to assist in prevention and mediation of bullying incidents between students. Tex. Educ. Code § 37.0832(f).

Regardless of whether such policies are established, the law requires school counselors to serve as impartial, non-reporting resources for interpersonal conflicts and discord involving two or more students, including accusations of bullying. Tex. Educ. Code § 33.006(b)(7).

District Policies

School districts are required to adopt a student code of conduct that prohibits bullying, harassment, and making hit lists and to ensure that district employees enforce those prohibitions. Tex. Educ. Code § 37.001(a)(7).

In addition, districts are required to adopt a policy regarding certain issues specifically related to preventing, investigating, and responding to allegations of bullying. The policy must:

- prohibit the bullying of a student;
- prohibit retaliation against any person who, in good faith, reports or provides information of an incident of bullying;
- establish a procedure for providing notice of an incident of bullying to a parent or guardian of the alleged victim on or before the third business day after the incident is reported and to a parent or guardian of the alleged bully within a reasonable time after the incident;
- establish the actions a student should take to obtain assistance and intervention;
- set out available counseling options for students who witness, are victims of, or engage in bullying;
- establish procedures for reporting an incident of bullying (including procedures for a student to anonymously report), investigating a report of bullying, and determining whether the reported incident of bullying occurred;
- prohibit the discipline of a student found to be a victim of bullying if the student engaged in reasonable self-defense in response to the bullying; and
- require that any discipline for bullying of a student with disabilities complies with federal law, including the Individuals with Disabilities Education Act (IDEA).

Tex. Educ. Code § 37.0832(c).

In addition to the elements required by state law, districts may adopt a district-wide policy to assist in prevention and mediation of bullying incidents between students that interfere with a student's educational opportunities or substantially disrupt orderly school operations. Tex. Educ. Code § 37.0832(f).

TASB Model Policy FFI(LOCAL) includes the Texas Education Code's definition of bullying as well as the legally required elements a school district must address in its bullying policy. Under the policy, any district employee who suspects that a student has experienced bullying must immediately notify the principal or designee. Whether a report of suspected bullying is based on in-person conduct or online conduct, the administrator receiving the report must respond in accordance with the investigative procedures and parent notification requirements set forth in the district's bullying policy. If the results of the investigation conclude that bullying or cyberbullying occurred, the policy requires the district to take appropriate disciplinary action in accordance with the district's student code of conduct. The policy also states that the district may take other appropriate corrective measures.

A school district's policy concerning bullying and any necessary procedures must be included annually in student handbooks; employee handbooks; and a district improvement plan under Texas Education Code section 11.252.

School Discipline for Cyberbullying

School officials' ability to discipline students for cyberbullying depends on the *location* of the conduct and the *impact* of the conduct as it relates to the educational environment of a school or to a student's rights at school.

If a student created or accessed the cyberbullying material (e.g., website, posting, or messages) on campus or using the district's technology resources, he or she would be subject to the district's acceptable use policy and, thus, to appropriate school discipline. See TASB Policy CQ(LOCAL). In addition, when there is a clear connection between the online conduct and the school, a district's student code of conduct or other policies must prohibit this type of bullying, as described above. For example, the TASB Model Student Code of Conduct prohibits using an electronic device to: "[s]end, post, deliver, or possess electronic messages that are abusive, obscene, sexually oriented, threatening, harassing, damaging to another's reputation, or illegal, including cyberbullying and 'sexting,' either on or off school property, if the conduct causes a substantial disruption to the educational environment or infringes on the rights of another student at school."

On the other hand, when the offensive material is developed, maintained, and accessed wholly off campus, a school's ability to discipline may be limited. The Texas Education Code provisions apply to cyberbullying that occurs entirely off campus and outside of a school-related activity *only if* the conduct interferes with a student's educational opportunities or substantially disrupts orderly school operations. Tex. Educ. Code § 37.0832(a-1)(3).

In addition, a student’s off-campus expression may be protected under the First Amendment. Courts have held that a school may not discipline a student for off-campus electronic communication protected by the First Amendment unless the school can show a material and substantial disruption, or that school officials reasonably foresaw a material and substantial disruption, resulting from the off-campus speech. *See, e.g., J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Commw. Ct. 2000), *aff’d*, 807 A.2d 847 (Pa. 2002) (upholding expulsion of student for “Teacher Sux” website containing violent and derogatory statements about teacher and principal that had substantial, demoralizing impact on school community and eventually caused teacher to take medical leave).

Off-Campus Speech and the First Amendment

Campus-Based Speech

The U.S. Supreme Court has decided four leading cases regarding the First Amendment rights of public school students. Each case governs a different type of speech. In *Bethel School District Number 403 v. Fraser*, the Court held that a student could be disciplined for a vulgar, lewd, and obscene speech at a school event. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). In *Hazelwood School District v. Kuhlmeier*, the Court held that schools could restrict student journalists writing for a school newspaper, because the writings appeared to be school-sponsored. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). In *Morse v. Frederick*, the famous “Bong hits 4 Jesus” case, the Court upheld a student’s discipline for speech advocating drug use (albeit rather cryptically) at a school-sponsored event. *Morse v. Frederick*, 551 U.S. 393 (2007). Student speech that does not fall into any of these specific categories is governed by *Tinker v. Des Moines Independent Community School District*, in which the Court established the basic threshold: schools may restrict student speech that “might reasonably [cause] school authorities to forecast substantial disruption of or material interference with school activities” or that interferes “with the rights of other students to be secure and to be let alone.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

Notably, each of these cases involved student speech at school or a school-related event. Lower federal courts have traditionally applied *Tinker* to off-campus speech, including electronic communications, but there has always been uncertainty as to how the First Amendment applies to student speech that occurs entirely off campus—an uncertainty that has grown more problematic now that off-campus speech can potentially be delivered to campus with one click, swipe, or snap. In the post-Columbine era, courts are increasingly being asked to decide whether the First Amendment protects student off-campus speech that threatens the safety of the school community. *See Wynar v. Douglas Cnty Sch. Dist.*, 728 F.3d 1062, 1070 (9th Cir. 2013) (observing that “[i]t is an understatement that the specter of a school shooting qualifies under either prong of *Tinker*”).

Off-Campus Speech

Case law regarding cyberbullying is limited, and litigation moves so slowly that, by the time a case reaches a federal court of appeals, the technology used often no longer exists or has become irrelevant for future applications. The U.S. Supreme Court has not yet considered the First Amendment implications of school discipline for cyberbullying. As the legal landscape develops, however, observers of federal courts are starting to see a growing consensus that speech originating off campus may be subject to discipline under the right circumstances. See *Ponce v. Socorro*, 508 F.3d 765 (5th Cir. 2007) (upholding discipline when student's private journal expressing Columbine-style violence was discovered and shared with school officials).

The Fifth Circuit Court of Appeals considered the issue of a student's off-campus, online expression in the case of *Bell v. Itawamba County School Board*. Strictly speaking, the conduct at issue in the case was not cyberbullying, because it involved a student's online expression about school employees rather than other students. Nonetheless, the case is instructive for how the court applied *Tinker* to the student's off-campus speech. Using his home computer, Mississippi high school student Tyler Bell created and published a rap song on Facebook and YouTube accusing two coaches of misconduct with female students. Bell's song contained vulgar language and profanities and referred to shooting the coaches with a gun. As a consequence, the district sent Bell to an alternative school and barred him from extracurricular activities. When Bell challenged his discipline in court, a panel of the Fifth Circuit initially ruled that the district had violated the First Amendment because the district could not produce any evidence of a material and substantial disruption based on Bell's rap. When the case was appealed to the entire Fifth Circuit, however, the court held differently. Recognizing that "[o]ver 45 years ago, when *Tinker* was decided, the internet, cellphones, smartphones, and digital social media did not exist," the court determined that it was reasonable for school officials to forecast a material and substantial disruption based on Bell's rap, which he acknowledged placing online in order to reach his school community. *Bell v. Itawamba Cnty Sch. Bd.*, 799 F.3d 379, 399 (5th Cir. 2015) (en banc), cert. denied sub mom., *Bell v. Itawamba Cnty Sch. Bd.*, 136 S. Ct. 1166 (2016). Therefore, the court concluded that, because the speech was intended to reach the school community and to threaten, intimidate, and harass employees, the school had disciplinary jurisdiction. *Bell v. Itawamba Cnty Sch. Bd.* 799 F.3d 379 (5th Cir. 2015).

In another case, Kara Kowalski, a high school student in West Virginia, created a MySpace social networking post promoting the idea that a fellow classmate had herpes and featuring a picture of the classmate with the caption, "portrait of a whore." Kowalski created the post off campus, after school, using her home computer, but she invited approximately 100 of her MySpace friends to join the discussion group, and at least two dozen of her classmates responded. When the parents of the student portrayed on the MySpace page complained to the school, the district suspended Kowalski from school for five days, issued a 90-day "social suspension" from school events, and prohibited her from participating on the cheerleading squad for the rest of

the school year. The Fourth Circuit Court of Appeals upheld the discipline, observing that school officials could reasonably expect that Kowalski's off-campus activities would reach the school community. Further, the court found a sufficient nexus between Kowalski's expression and the school officials' pedagogical interests in providing a safe educational environment. *Kowalski v. Berkeley Cnty Sch.*, 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

Courts may be applying greater deference to school officials' attempts to discipline for off-campus speech than in the past, due in part to increased public concern about school violence as well as greater awareness of the insidious effects of cyberbullying. Nonetheless, each case is fact-specific, and different courts hearing cases with similar facts to the cases above have reached the opposite conclusion. *See J.S. ex. rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc) (barring school district from disciplining eighth grade student for fake MySpace profile of his principal); *Layshock ex. rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3rd Cir. 2011) (en banc) (overturning discipline of student for fake MySpace profile of principal including profanity, even though students accessed the site on campus during school hours).

Cyberbullying and Other Laws

Depending on the situation, conduct defined as bullying or cyberbullying might also be considered unlawful harassment, dating violence, hazing, or even a criminal offense.

The Texas Education Code defines harassment as:

[T]hreatening to cause harm or bodily injury to another student, engaging in sexually intimidating conduct, causing physical damage to the property of another student, subjecting another student to physical confinement or restraint, or maliciously taking any action that substantially harms another student's physical or emotional health or safety.

Tex. Educ. Code § 37.001(b)(2).

The Texas Family Code defines *dating violence* as an act, other than a defensive measure to protect oneself, by a person that is committed against a victim with whom the person has or has had a dating relationship; or because of the victim's marriage to or dating relationship with an individual with whom the person is or has been in a dating relationship or marriage; and is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the victim in fear of imminent physical harm, bodily injury, assault, or sexual assault. Tex. Fam. Code § 71.0021(a).

Federal nondiscrimination laws, such as Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act, and Title VI of the Civil Rights Act of 1964, protect a public school student against harassment based on the student's protected characteristic. 20 U.S.C. §§ 1681-1688; 29 U.S.C. § 794; 42 U.S.C. §§ 2000d-2000d-7.

In compliance with these laws, TASB Model Policy FFH(LOCAL) prohibits *harassment*, defined as "physical, verbal, or nonverbal conduct based on the student's race, color, religion, sex, gender, national origin, disability, age, or any other basis prohibited by law that is so severe, persistent, or pervasive that the conduct:

1. Affects a student's ability to participate in or benefit from an educational program or activity, or creates an intimidating, threatening, hostile, or offensive educational environment;
2. Has the purpose or effect of substantially or unreasonably interfering with the student's academic performance; or
3. Otherwise adversely affects the student's educational opportunities."

TASB Model Policy FFH(LOCAL) prohibits dating violence as a form of prohibited harassment, as defined above, and considers dating violence to occur "when a person in a current or past dating relationship uses physical, sexual, verbal, or emotional abuse to harm, threaten, intimidate, or control the other person in the relationship" and "when a person commits these acts against a person in a marriage or dating relationship with the individual who is or was once in a marriage or dating relationship with the person committing the offense."

If an administrator determines that allegations of bullying or cyberbullying may meet the legal definition of harassment, dating violence, or other prohibited conduct on the basis of a student's protected characteristic, the district's investigation and response should proceed under model policy TASB FFH(LOCAL). Nonetheless, if the conduct could be both bullying and harassment, the district should make a determination as to both.

The Texas Education Code also authorizes discipline for *hazing*, which is defined as any intentional, knowing, or reckless act occurring on or off the campus of an educational institution directed against a student, by one person alone or acting with others, that endangers the mental or physical health or the safety of a student for the purpose of pledging, being initiated into, affiliating with, holding office in, or maintaining membership in any organization whose members are or include other students. Tex. Educ. Code § 37.151. A personal hazing offense is a criminal act of engaging in hazing; soliciting, encouraging, directing, aiding, or attempting to aid another in hazing; or having firsthand knowledge of the planning of a specific hazing incident involving a student, or firsthand knowledge that a specific hazing incident has occurred, and knowingly failing to report that knowledge in writing to the principal, superintendent, or designee. Tex. Educ. Code § 37.152(a). See TASB Policy FNCC(LEGAL) and FOD(LEGAL).

Other criminal penalties may also apply to a student's online conduct in addition to school discipline. For example, a person commits the offense of *online impersonation* by creating certain web pages or messages, using the name or persona of another person without consent, and with the intent to harm, threaten, or intimidate that person. Tex. Penal Code § 33.07(a). If a student records, broadcasts, transmits, or promotes intimate images of another student, without consent and with the intent to invade the student's privacy, the conduct may also be subject to prosecution as an *invasive visual recording or disclosure or promotion of intimate visual material*. Tex. Penal Code §§ 21.15-.16. Cyberbullying may also meet the definition of *harassment by electronic communication*: a person commits this offense by sending repeated electronic communications in a manner that is intended and reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another. Tex. Penal Code § 42.07(a)(7).

Ultimately, educators need to understand that a single act of mistreatment may implicate multiple district policies, and failure to respond appropriately may expose the district to liability under multiple laws.

Determining Appropriate Discipline for Online Misbehavior

There is no simple rule governing when school discipline for cyberbullying is appropriate, but some guidelines are clear:

- If there is an obvious connection between a student's online activity and school, such as a website created and maintained on campus, the school district should have jurisdiction to discipline for cyberbullying under both state and federal law.
- If the cyberbullying takes place entirely off campus, a traditional application of the *Tinker* case would require showing a substantial and material disruption to school operations in order for the school to take disciplinary measures. A growing body of law recognizes that, in some circumstances, *Tinker* also permits discipline for off-campus speech that infringes on the rights of other students. To support discipline for off-campus cyberbullying, campus administrators should be prepared to show that cyberbullying resulted in a serious impact to school operations or interfered with a student's right to a safe educational experience. Ideally, the school would be able to document both types of impact.
- Courts may be more likely to defer to school administrators when the off-campus speech targets a student or threatens school safety, as opposed to making fun of school personnel.
- Courts are more likely to uphold disciplinary measures that are reasonably tailored to match the severity of the offense.

- If a district seeks to punish a student for off-campus internet activity, TASB Legal Services recommends that administrators investigate and document any evidence of a connection between this online behavior and school.
- Do not forget to evaluate the conduct under other policies or to consider other laws that may apply.
- When in doubt as to the district's jurisdiction, administrators can always consider involving the parents and responding to cyberbullying in non-punitive ways. For example, consider voluntary mediation, counseling, or a behavior agreement with the students involved.

Before deciding on appropriate discipline for off-campus behavior, contact your local school district attorney or call TASB Legal Services at 800.580.5345.

Sample Scenarios: Can Your District Discipline for Online Behavior?

Let's examine some hypothetical situations involving student online behavior and apply Senate Bill 179's new definition of bullying to determine whether or not a school district should find that cyberbullying exists.

Scenario No. 1

A group of seniors on the varsity tennis team create a website at a slumber party where they post stories, hurtful jokes, and photos making fun of a fellow schoolmate, Riley, who just made the junior varsity team as an incoming freshman. The website allows all viewers to submit their own comments and even includes a link to Riley's personal email address. Riley starts receiving hurtful emails and misses a week of school due to anxiety. Riley also requests rescheduling of all classes to avoid varsity team members.

Does this conduct meet the legal definition of cyberbullying?

Start with the threshold definition provided by Texas Education Code § 37.0832:

- *Has there been a single significant act or a pattern of acts?* Yes, both; building an entire website targeting an individual is significant, and posting on multiple occasions is a pattern of acts.
- *Did the act or acts by one or more students directed at another student exploit an imbalance of power?* Yes; differences in age, grade, and longevity on the team create an imbalance of power that the senior students exploited.
- *Did the act or acts involve written expression, verbal expression, expression through electronic means, or physical conduct?* Yes; creating a website is an expression using electronic means. The students who commented or sent emails to Riley were also engaging in verbal, electronic expression.

Then, look at the impact of the conduct:

- *Could the conduct be described as: (1) physically harming a student, damaging a student's property, or placing a student in reasonable fear of harm to the student's person or of damage to the student's property; (2) sufficiently severe, persistent, or pervasive enough that the action or threat creates an intimidating, threatening, or abusive educational environment for a student; (3) materially and substantially disrupting the educational process or the orderly operation of a classroom or school; or (4) infringing on the rights of the victim at school?* Yes; these acts were sufficiently severe, persistent, or pervasive to create an intimidating educational environment because Riley did not want to come to school.

Finally, consider the location or context of the conduct:

- *Did the conduct occur on school property, a school-related activity or a publicly or privately owned school bus or vehicle being used to transport students to or from school or a school-related activity? If not, was the conduct delivered to school property or a school-related activity?* The website was created off campus at a slumber party; however, if Riley received one or more of the emails at school, then arguably those emails were “delivered to school property.”
- *If the conduct occurred off school property and outside of school events, was it done through an electronic communication device and did it interfere with a student’s educational opportunities or substantially disrupt the orderly operation of school activities?* Yes. The students used a website and email, both of which are electronic communication devices through which cyberbullying can occur. The conduct occurred off campus and not at a school-related activity; however, since Riley has missed class and rescheduled all classes in order to avoid the other students, the conduct has interfered with Riley’s educational opportunities.

Based on the new definition of bullying, the set of facts above likely does meet the necessary criteria to be considered cyberbullying.

Disclaimer: To date, there have been no cases interpreting cyberbullying under Texas Education Code § 37.0832. The general analysis of the scenario above does not constitute legal advice and should not be used to evaluate any specific legal matter. Always consult your school attorney to apply legal principles to specific fact situations.

Scenario No. 2

During class, Jamie posts a message about a fellow classmate on a closed social media page that alleges the classmate is a loser and deserves to be excluded from their group. The message is viewed only by four of Jamie's friends who do not know the classmate. Other than two "likes" noted under the message, no one commented on or shared the message, and the classmate who was the subject of the message never learned about it. There is no evidence Jamie or message viewers took any further action. Several months later, one of the friends had a falling out with Jamie and reports the mean message posting to the principal.

Does this conduct meet the legal definition of cyberbullying?

Start with the threshold definition provided by Texas Education Code § 37.0832:

- *Has there been a single significant act or a pattern of acts?* The law does not define "significant." Not every hurtful statement, however, constitutes bullying. Based on the facts provided, there does not appear to be a significant act or a pattern of acts.
- *Was the act or acts by one or more students directed at another student that exploits an imbalance of power?* No; there is no apparent differences in age, size, classification, or other known facts.
- *Did the act or acts involve written expression, verbal expression, expression through electronic means, or physical conduct?* Yes; creating a message on a social media site is an expression using electronic means.

Then, look at the impact of the conduct:

- *Did the act or acts result in the effect or will have the effect of: (1) physically harming a student, damaging a student's property, or placing a student in reasonable fear of harm to the student's person or of damage to the student's property; (2) sufficiently severe, persistent, or pervasive enough that the action or threat creates an intimidating, threatening, or abusive educational environment for a student; (3) materially and substantially disrupting the educational process or the orderly operation of a classroom or school; (4) or infringing on the rights of the victim at school?* No; the act did not cause any of the above results.

Finally, consider the location or context of the conduct:

- *Did such conduct: (1) occur on or was delivered to school property or a school-related activity; (2) occur on a publicly or privately owned school bus or vehicle being used to transport students to or from school or a school-related activity; or (3) occur off campus, not at a school-related activity, but the cyberbullying interfered with a student's educational opportunities or substantially disrupted the orderly operation of school activities? Yes; the posting of the message occurred during class.*

The set of facts above likely does not meet the necessary criteria to be considered cyberbullying; however, a principal in this scenario may consider appropriate discipline for the use of social media or electronic devices during class in violation of school policies or student code of conduct, issue a warning, or counsel students on acceptable means of expression.

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Scenario No. 3

On a school field trip, Sam secretly uses a cell phone to photograph another student changing clothes in a bathroom. Sam shows the photo to other classmates who begin to laugh at the subject student. The subject student asks for the photo to be deleted and begins to cry when Sam refuses to do. At home, the first student posts the picture on social media with a caption making fun of the student's weight and a message encouraging viewers to share the post if they thought it was funny. The post is seen by many students. Other classmates make derogatory comments on the post and share the messages, which eventually get back to the subject of the comments. Over the next two weeks, administrators required additional staff and time to clear student crowds during passing time and teachers reported an increase in redirecting students distracted by their cell phones.

Does this conduct meet the legal definition of cyberbullying?

Start with the threshold definition provided by Texas Education Code § 37.0832:

- *Has there been a single significant act or a pattern of acts?* Yes; taking a photo of someone who reasonably expects privacy (dressing and undressing in a bathroom) is a significant act. The derogatory posts by other students could also be considered a pattern of acts.
- *Was the act or acts by one or more students directed at another student that exploits an imbalance of power?* Yes; Sam, who has an embarrassing or intimate photo, now has an advantage over the subject student. In addition, the implication that other students are making fun of a student's weight could indicate that they are exploiting an imbalance of power.
- *Did the act or acts involve written expression, verbal expression, expression through electronic means, or physical conduct?* Yes; invading a student's privacy to take a picture could be considered physical conduct. In addition, posting a picture on social media is expression through electronic means. The other students' derogatory comments also represent verbal expression.

Then, look at the impact of the conduct:

- *Did the act or acts result in the effect or will have the effect of: (1) physically harming a student, damaging a student's property, or placing a student in reasonable fear of harm to the student's person or of damage to the student's property; (2) sufficiently severe, persistent, or pervasive enough that the action or threat creates an intimidating, threatening, or abusive educational environment for a student; (3) materially and substantially disrupting the educational process or the orderly operation of a classroom or school; or (4) infringing on the rights of the victim at school?* Yes; the student created

an intimidating and threatening educational environment for the subject student. In addition, the distraction of other students at school, requiring staff intervention, is a material disruption to both the educational process and orderly operation of school.

- *Did such conduct: (1) occur on or was delivered to school property or a school-related activity; (2) occur on a publicly or privately owned school bus or vehicle being used to transport students to or from school or a school-related activity; or (3) occur off campus, not at a school-related activity, but the cyberbullying interfered with a student's educational opportunities or substantially disrupted the orderly operation of school activities? Yes; the conduct occurred during a school-related activity.*

Based on the new definition of bullying, the set of facts above likely does meet the necessary criteria to be considered cyberbullying. Furthermore, depending on whether the photo depicts any intimate parts to be considered intimate visual material as defined by Texas Education Code section 37.0052, a principal in this scenario may consider expulsion or removal to a disciplinary alternative education program (DAEP).

Disclaimer: To date, there have been no cases interpreting cyberbullying under Texas Education Code § 37.0832. The general analysis of the scenario above does not constitute legal advice and should not be used to evaluate any specific legal matter. Always consult your school attorney to apply legal principles to specific fact situations.

For more information on this and other school law topics,
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This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.

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