Bullying, Cyberbullying, and Hazing

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Bullying disrupts the educational environment and can profoundly affect a student's learning experience. Depending on the circumstances, bullying may also be characterized as harassment, hazing, dating violence, or even a criminal offense—behaviors that the Texas Education Code and federal laws require public schools to address.

The Basic Terminology

I. Bullying and Cyberbullying

Texas Education Code section 37.0832 defines *bullying*:

(a) "[B]ullying" means a single significant act or pattern of acts by one or more students directed at another student that exploits an imbalance of power and involves engaging in written or verbal expression, expression through electronic means, or physical conduct that satisfies the applicability requirements provided by Subsection (a-1) and that:

i. has the effect or will have the effect of 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;

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; and

(b) includes cyberbullying.

Tex. Educ. Code § 37.0832(a).

The statutory definition of bullying (and, therefore, a school district's bullying policy) applies to:

- Bullying that occurs on or is delivered to school property or to the site of a school-related activity on or off school property;
- Bullying that occurs on a publicly or privately owned school bus or vehicle being used for transportation of students to or from school or a school-related activity; and

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- Cyberbullying that occurs off school property or outside of a school-sponsored or school-related event, if the conduct interferes with a student's educational opportunities or substantially disrupts the operations of a school, classroom, or school-related activity.

Tex. Educ. Code § 37.0832(a-1).

"Cyberbullying" is [b]ullying that is done through the use of any electronic communication device, including through the use of a cellular or other type of telephone, a computer, a camera, electronic mail, instant messaging, text messaging, a social media application, an Internet website, or any other Internet-based communication tool. Tex. Educ. Code § 37.0832(a)(2).

Cyberbullying injunctions: A parent of a minor who is the victim of cyberbullying may request a court order (e.g., an injunction or temporary restraining order) requiring that the perpetrator of the bullying stop. If the perpetrator is a minor, the court would then order the minor's parent(s) to cause the bullying to stop. These court orders would not directly apply to schools or school employees. Nonetheless, campus administrators may hear from parents who expect the orders to be enforced at school. Administrators should seek legal advice to understand the implications of a cyberbullying order.

II. Dating Violence

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).

Any student can commit or be a victim of dating violence, regardless of the student's gender or sexual orientation. Dating violence can take many forms, including: threats of harm or suicide; assault; insults; name calling; isolation from family and friends; requiring the victim to spend most or all the victim's time with the person; frequent calls or texts to ask what the victim is doing and who the victim is with; controlling behavior; forced sexual acts; and unwanted touching.

III. Harassment

At times, bullying or dating violence may rise to the level of prohibited *harassment* under federal nondiscrimination law. Harassment can be defined as physical, verbal, or nonverbal conduct based on the target student's race, color, religion, sex, national origin, disability, age, or any other basis prohibited by law that is so severe, persistent, or pervasive that the conduct: (1) affects the 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. See TASB Policy FFH(LOCAL).

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The Texas Education Code also requires districts to prohibit harassment in the form of threatening 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).

In addition, various state and federal laws define a district's obligation to prevent and respond to specific types of harassment:

Race, color, religion, and national origin: Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7, prohibits discrimination on the basis of race, color, or national origin in any educational program or activity that receives federal funds. Districts may violate this law by failure to respond appropriately to harassment based on a protected category. *See, e.g., Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398 (5th Cir. 2015) (dismissing Section 1983 lawsuit because school officials responded to racial harassment of African American students, including placement of nooses on campus and racial epithets, by cooperating with police investigation, suspending offending students, and providing accommodations for victims).

Disability: Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination on the basis of disability in programs or activities receiving federal financial assistance. Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12131-12134, prohibits discrimination on the basis of disability by public entities. As discussed in more detail below, bullying of a student with a disability may constitute discriminatory harassment under these laws, triggering additional district responsibilities and potential liability.

Sex: Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, prohibits discrimination on the basis of sex by an educational program or activity receiving federal funds. As defined by Title IX regulations, student-to-student sexual harassment includes unwelcome verbal, physical, or visual conduct that is based on sex and that a reasonable person would find so severe, persistent, and pervasive that it effectively denies the victim equal access to the district's education program or activity. 34 C.F.R. § 106.30(a).

Additionally, some forms of sexual violence may be categorized as bullying, sexual harassment, and possibly crimes. The definition of sexual harassment under Title IX regulations includes *sexual assault*, *dating violence*, *domestic violence*, or *stalking*, as these terms are defined in the federal Violence Against Women Act (VAWA). 34 C.F.R. § 106.30(a)(3).

For additional information, see TASB Legal Services' eSource article, Discrimination and Harassment on the Basis of Sex and Other Characteristics.

Title IX formal complaint process: Unlike other forms of harassment, when a school district employee has notice of allegations that a student may have been harassed based on sex, Title IX sets out specific procedures for the district's response. Among other requirements, when an alleged victim of sexual harassment files a formal complaint, the district may not discipline the accused student without following the Title IX formal complaint process. See policy FFH(LEGAL) and FFH(LOCAL) for more information.

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IV. Hazing

Hazing means any intentional, knowing, or reckless act, occurring on or off the campus of an educational institution, by one person alone or acting with others, directed against a student for the purpose of pledging, being initiated into, affiliating with, holding office in, or maintaining membership in an organization whose members are primarily students if the act:

- is any type of physical brutality, such as whipping, beating, striking, branding, electronic shocking, placing of a harmful substance on the body, or similar activity;
- involves sleep deprivation, exposure to the elements, confinement in a small space, calisthenics, or other similar activity that subjects the student to an unreasonable risk of harm or that adversely affects the mental or physical health or safety of the student;
- involves consumption of a food, liquid, alcoholic beverage, liquor, drug, or other substance that subjects the student to an unreasonable risk of harm or that adversely affects the mental or physical health or safety of the student;
- is any activity that induces, causes, or requires the student to perform a duty or task that involves a violation of the Texas Penal Code; or
- Involves coercing the student to consume a drug or an alcoholic beverage or liquor in an amount that would lead a reasonable person to believe that the student is intoxicated.

Tex. Educ. Code § 37.151(6).

Criminal offense of hazing: The Texas Education Code defines a personal hazing offense as:

- Engaging in hazing;
- Soliciting, encouraging, directing, aiding, or attempting to aid another in hazing;
- Recklessly permitting hazing to occur; 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 to an appropriate official of the school district, a peace officer, or law enforcement.

Tex. Educ. Code § 37.152(a).

Note that the statute provides for a person who witnesses hazing and fails to report the incident to be criminally liable. The offense of failure to report is a Class B misdemeanor. Tex. Educ. Code § 37.152(b). Other personal hazing offenses may be punishable as a Class A or Class B misdemeanor, depending on the degree of injury caused. Tex. Educ. Code § 37.152(c)-(d). If the hazing causes the victim to die, the offense is punishable as a felony. Tex. Educ. Code § 37.152(e).

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V. Hit Lists

Hit list means a list of people targeted to be harmed using a firearm or a knife, as those terms are defined by state law; or any other object to be used with intent to cause bodily harm. Districts are required to prohibit making hit lists in their student codes of conduct and to ensure that employees enforce the prohibition. Tex. Educ. Code § 37.001(b)(3).

Overlapping definitions: Keep in mind that a student's conduct may fall into more than one of the above definitions. For example, members of the high school football team subject a new player to a painful initiation ritual that involves spanking or simulations of sexual activity: this one incident could meet the legal definitions of hazing, bullying, and sexual harassment. A male student texts his friends a nude photo of his ex-girlfriend, another student: this act could be characterized as bullying, cyberbullying, sexual harassment, and dating violence. Middle school students consistently make fun of a student's lisp and spread rumors that he is gay: this could be bullying as well as gender-based and/or disability harassment. Educators need to understand that a single act of mistreatment may implicate multiple district policies. Conversely, failure to respond appropriately may expose the district to liability under multiple laws.

Policies and Procedures

State law requires each school district and open-enrollment charter school board of trustees to adopt a policy and procedures that prohibit and prevent bullying. Tex. Educ. Code § 37.0832(c). The policy must contain certain elements, including the actions a student should take to obtain assistance and intervention in response to bullying. Tex. Educ. Code § 37.0832(c)(5). TASB Policy FFI(LOCAL) further provides methods for students, teachers, staff or parents (which may include a guardian or another responsible adult) to report allegations of bullying and delineates the framework the school district will follow when an allegation of bullying is reported.

I. District Policies

At a minimum, district policy must include the following elements.

Prevention and mediation: A school district must establish a district-wide policy, in accordance with minimum standards adopted by the Texas Education Agency (TEA), 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(c).

- **Action procedures:** A school district must establish procedures for reporting, investigating, and determining whether an alleged incident of bullying occurred. District policy must also provide procedures for a student to anonymously report an incident of bullying.
- **Notice procedures:** A school district must establish a procedure to provide notice of an incident of bullying to a parent or guardian of the alleged victim on or before the third business day after the date the incident is reported. The procedure must also require notice to the parent of the student who allegedly engaged in bullying within a reasonable time after the report.

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- **Responsive provisions:** School district policy must prohibit retaliation against any person, including a target, a witness, or another person who in good faith provides information concerning an incident of bullying. Additionally, the policy must set out available counseling options for a student who is a target of, engages in, or witnesses bullying.
- **Disciplinary provisions:** A school district must prohibit the discipline of a student who is found, following an investigation, to be a target of bullying, based on an action taken in reasonable self-defense from the bullying behavior. Additionally, the policy must require discipline of a student with disabilities to comply with applicable federal requirements, including the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. section 1400, and Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. § 794.

Tex. Educ. Code § 37.0832(c). See TASB Policy FFI(LOCAL).

Student code of conduct and handbooks: A school district's board of trustees must adopt a student code of conduct that includes age-appropriate methods and options for preventing and intervening in bullying, harassment, and making hit lists. Tex. Educ. Code § 37.001(a)(7). The district's anti-bullying policy must be included in the student and employee handbooks and the district improvement plan. Tex. Educ. Code § 37.0832(d). Sharing information widely with teachers, staff, students, and parents is not only legally required—getting the word out can help to prevent bullying, promote a positive educational environment, and ensure that alleged incidents are reported and investigated promptly.

Be proactive: Even without a report of bullying, school officials can take steps to prevent bullying and improve the school climate. First, assess current needs. Review current anti-bullying policies and procedures to determine if they are effective and how they can be improved. Ask campus administrators to evaluate facilities and staffing needs, identify any places where bullying is more likely to occur, ensure safe passing periods, and observe the atmosphere at lunchtime and on school buses. Consider conducting a school climate survey. Next, educate the community. In addition to required notices of the district's policy, consider other avenues of communication such as classroom instruction, school assemblies, clubs, or groups on campus. Seek input from counselors and teachers on the best way to inform students, staff, and parents about how to report bullying and ultimately reduce bullying incidents in your district.

II. Dating Violence Policy

The Texas Education Code requires a school district to adopt and implement a dating violence policy as part of the district's improvement plan that defines dating violence and addresses safety planning, enforcement of protective orders, school-based alternatives to protective orders, training for teachers and administrators, counseling for affected students, and awareness education for students and parents. Tex. Educ. Code § 37.0831(b)(1)(A). The dating violence definition must include "the intentional use of physical, sexual, verbal, or emotional abuse by a person to harm, threaten, intimidate, or control another person in a dating relationship." Tex. Educ. Code § 37.0831. Note that this differs from the Texas Family Code definition of dating violence. Dating violence is addressed in districts' policy manuals at FFH(LEGAL) and (LOCAL).

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III. Student Transfers

Bullying student: If an investigation concludes that bullying occurred, as defined by law, the board of trustees may consider the option of transferring the student who engaged in bullying to a different classroom on the same campus or, in consultation with the student's parents, to a different campus. Tex. Educ. Code § 25.0342(b-1). In determining whether a student who has engaged in bullying should be subjected to a transfer, the board may review the student's previous behavior. Tex. Educ. Code § 25.0342(d).

Target of bullying: A student who was the target of bullying may also be transferred to a different classroom or campus if the parent of the target student requests a transfer. Tex. Educ. Code. § 25.0342(b). The board or its designee must verify that the student has been a victim of bullying before transferring the student. Tex. Educ. Code § 25.0342(c). The district is not required to provide transportation services to a student who is transferred under this provision. Tex. Educ. Code § 25.0342(f).

Non-appealable final determination: For students who are transferred as either the target of bullying or after having engaged in bullying, the determination by the board or its designee to allow the transfer of the student is final and may not be appealed. Tex. Educ. Code § 25.0342(e).

Sexual assault: When a student commits a sexual assault against another student, the parent of the victim may request a transfer under sexual assault transfer provisions. Tex. Educ. Code § 25.0341(b). A parent of a victim of sexual assault or another person with the authority to act on behalf of the victim may, in certain circumstances, request that the victim be transferred to a campus other than: the campus to which the victim was assigned at the time of the assault; the campus to which the assailant is assigned at the time of the request, if the assailant was assigned to a different campus following the assault; or a neighboring school district if the victim's home district has only one campus serving the victim's grade level. Tex. Educ. Code § 25.0341(b). If the victim does not want to transfer, the board must transfer the assailant to a campus that the victim does not attend or to the disciplinary alternative education program (DAEP) or the juvenile justice alternative education program (JJAEP), as appropriate, if the district has only one campus for the assailant's grade level. Tex. Educ. Code § 25.0341(b)(2)(B).

The assailant must have been convicted of continuous sexual abuse of a young child, or convicted of or placed on deferred adjudication for sexual assault or aggravated sexual assault, occurring on or off campus, while the victim was assigned to the same campus as the assailant. Tex. Educ. Code § 25.0341(a). If permitted by federal law, the district must notify the victim's parent or person responsible for the victim of the campus or program to which the assailant is assigned. Tex. Educ. Code § 25.0341(d). The district is not required to provide transportation to students who transfer campuses under these provisions. Tex. Educ. Code § 25.0341(g).

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Student privacy: Bullying investigations are subject to the confidentiality requirements of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. District employees involved in investigating or responding to bullying complaints should be aware of the requirement to maintain student privacy. Parents may also need reminders of the district's duties to keep student information confidential to the greatest extent possible. Typically, FERPA grants a parent the right to access his or her own child's education records but not the records of other students. An exception may apply if an education record is directly related to more than one student, such as a video recording of a bullying incident. U.S. Dep't. of Ed., Privacy Technical Assistance Center and the Student Privacy Policy Office, FAQs on Photos and Videos under FERPA. To complicate matters further, compliance with federal nondiscrimination law may require limited disclosure of student information that would otherwise by prohibited by FERPA. *See*, e.g., U.S. Dep't of Ed., Family Policy Compliance Office, *Letter to Anonymous* (Aug. 1, 2017) (finding that OCR resolution agreement requiring district to notify complainant of certain stages of disciplinary process was not a violation of FERPA). When in doubt about whether sharing education records is required or allowed, districts should seek legal advice.

IV. Student Discipline

Bullying has consequences. The final component of the required anti-bullying policy addresses issues specific to imposing school discipline on aggressors if a finding of bullying is made after an investigation, as well as identifying students who were targets of bullying and acted in self-defense.

Discipline of student who engaged in bullying: Bullying is prohibited by each district's student code of conduct; therefore, a school district can take disciplinary action against the student who engaged in bullying. Appropriate discipline may include verbal warnings, reprimands, separation from the target, suspension, or other sanctions consistent with the student code of conduct.

DAEP or expulsion for certain types of bullying: Districts may place in DAEP or expel a student for engaging in bullying that encourages a student to commit or attempt to commit suicide; inciting violence against a student through group bullying; or releasing or threatening to release intimate visual material of a minor or of an adult student without the student's consent. Tex. Educ. Code § 37.0052.

DAEP removal for misconduct added by districts to SCOC: Districts may add other types of misconduct to the list of offenses in the student code of conduct that warrant removal to DAEP. *See* Tex. Educ. Code § 37.001(a) (authorizing the board to specify conditions that allow the principal to removal a student to DAEP). Student codes of conduct typically include as general misconduct: fighting, vulgar language, lewd speech or gestures, and threats, as well as bullying, dating violence, hazing, and harassment. If a district adds to its local list of general misconduct offenses that can result in DAEP placement, the district should also add the appropriate notice into the student code of conduct. *See* Tex. Educ. Code § 37.001(a)(6) (requiring student code of conduct to address parental notification of a violation that results in suspension, removal to DAEP, or expulsion).

Mitigating factors: Regardless of whether Chapter 37 describes a disciplinary measure as mandatory or permissive, the campus behavior coordinator must consider certain mitigating

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factors before deciding to suspend, place in DAEP or JJAEP, or expel a student. These mitigating factors are: self-defense; intent or lack of intent at the time the student engaged in the conduct; a student's disciplinary history; a disability that substantially impairs the student's capacity to appreciate the wrongfulness of his or her behavior; a student's status as homeless; or a student's status as being in the conservatorship of the Department of Family Protective Services (i.e., foster care). Tex. Educ. Code §§ 37.001(a)(4), .009(a).

No discipline for self-defense: The Texas Education Code prohibits the school district from imposing discipline on a student who engaged in reasonable self-defense in a bullying incident. Tex. Educ. Code § 37.0832(c)(8). Self-defense includes the use of force used against another person when the force is reasonably believed to prevent further harm or protect oneself from further harm. District staff charged with investigating bullying complaints should be mindful to review any actions taken by the target during the bullying to determine if such actions would constitute reasonable self-defense against the student who engaged in bullying. If the actions are determined to be reasonable self-defense, then no disciplinary action can be taken against that student. Tex. Educ. Code § 37.0832(c)(8).

Discipline for student speech: Administrators frequently ask whether they may discipline students for bullying conduct that includes elements of speech or expression, such as name calling, verbal abuse, or electronic communications. When student speech is protected by the First Amendment, districts must comply with the legal parameters for discipline set out by the federal courts.

Some guidelines for discipline related to student expression are relatively clear:

- Students may be disciplined for speech or conduct that materially and substantially interferes with school operations or impinges upon the rights of other students. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
- Unsubstantiated fear of disturbance is not enough to overcome a student's free speech rights. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). A district must find an actual connection between the expression and potential disruption. *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002). Material and substantial disruption may be substantiated by evidence of disturbance. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
- Vulgar, lewd, obscene, and plainly offensive speech that occurs in the school setting is not protected and may be prohibited regardless of whether it causes a substantial disruption. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).
- Administrators may place restrictions on student speech that appears in school-sponsored publications, theatrical productions, and other expressive activities that might reasonably be perceived to bear the imprimatur of the school. *E.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (concluding that the censorship of articles on pregnancy and divorce submitted for school-sponsored publication was constitutional).
- Students may be disciplined for speech that advocates illegal drug use. *Morse v. Fredrick*, 551 U.S. 393 (2007).

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- A *true threat* is not protected by the First Amendment. The Fifth Circuit Court of Appeals defines a true threat as occurring when an "objectively reasonable person would interpret the speech as a 'serious expression of an intent to cause a present or future harm.' " *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004). Additionally, the Fifth Circuit has held that speech advocating violence in school threatens the safety of students and is not protected by the First Amendment. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007).

Courts struggle with balancing free speech and discipline for misconduct: Questions remain, however, about when a student's off-campus speech can give rise to discipline. For example, in *Mahonoy Area School District v. B.L.,* a student who tried out for the varsity cheerleading squad and a private softball team posted two images to Snapchat using her personal cell phone after school hours. The first image contained the student and her friend with their middle fingers over a caption containing an expletive before each of the words, "school," "softball," "cheer," and "everything." The cheerleading coaches decided to suspend the student from cheerleading for the upcoming year because the online posts violated team rules by using profanity in connection with the extracurricular activity. The court found that the *Tinker* standard should apply to off-campus student expression. The off-campus location of the student's post and the fact that she only transmitted it to her circle of friends on Snapchat diminished the school district's interest in disciplining her for the speech. While the school district had an interest in preventing vulgar speech on campus, this interest does not authorize regulation of off-campus student speech purely because of vulgarity or lewdness. In addition, there was no evidence that the student's speech disrupted school operations to the extent necessary to lead to discipline. While some students were upset, and an Algebra class was disrupted for a brief discussion of the posts, this minor disturbance did not rise to the level of material or substantial disruption required by *Tinker* in order to authorize school discipline of a student's protected speech. Consequently, the Supreme Court determined that the school district violated the student's First Amendment rights when they disciplined her for her off-campus expression. *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180 (2021).

On the other hand, in 2015, the Fifth Circuit Court of Appeals upheld a Mississippi school district's discipline of a student for a rap video that he posted to YouTube off campus, during a school holiday. The court observed that "[o]ver 45 years ago, when *Tinker* was decided, the Internet, cellphones, smartphones, and digital social media did not exist." *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 392 (5th Cir. 2015). 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 may have become irrelevant. Still, federal courts are recognizing the serious impact that off-campus bullying can have on a student's education; with the speed of technology, traditional distinctions between on-campus and off-campus speech are also not as compelling. *See, e.g., Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011) (upholding student suspension for website created at home and shared with classmates depicting another student with the caption, "Portrait of a Whore"). In addition, a growing body of legal authority recognizes that the U.S. Supreme Court in *Tinker* permitted discipline for student expression that "impinges on" or "invades the rights of other students." *See, e.g., C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142 (9th Cir. 2016)

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(stating that "[s]exually harassing speech, by definition, interferes with the victim's ability to feel safe and secure at school" in decision upholding student's two-day suspension for off-campus speech). 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).

For information about disciplining students for their dress or appearance, see TASB Legal Services' eSource article, Student Dress and Appearance.

State law supports discipline for off-campus cyberbullying: In keeping with these trends in federal law, the Texas Education Code bullying statute incorporates both the "material and substantial disruption" and "rights of others" prongs of *Tinker*. Tex. Educ. Code § 37.0832(a)(1)(A)(iii). State law, therefore, may support school discipline for off-campus speech if the discipline is challenged in federal court. Nonetheless, each case is fact-specific, and there is no bright-line rule or U.S. Supreme Court precedent regarding how the First Amendment applies to discipline for off-campus cyberbullying. Therefore, administrators should use caution and seek legal advice before imposing disciplinary measures for off-campus speech.

Think outside the box: When in doubt as to the district's jurisdiction, administrators may want to consider responding to cyberbullying in ways that do not involve formal discipline under the student code of conduct. This could include involving the student's parents, voluntary mediation, counseling, or a behavior agreement with the students involved. State law requires counselors to serve as impartial resources for conflicts involving students, including bullying. Tex. Educ. Code § 33.006(b)(7).

Students with disabilities: Special considerations apply when a bullying incident involves a student with disabilities. If a student with a disability is the aggressor, both federal and state laws require that any disciplinary measures imposed against the student comply with applicable federal laws, including the Individuals with Disabilities Education Act. Tex. Educ. Code § 37.0832(c)(9). See TASB Policy FOF(LEGAL).

ARD review before discipline: Under state law, an admission, review, and dismissal (ARD) committee must review the conduct of a student receiving special education services before the student may be disciplined for bullying, harassment, or making hit lists. Tex. Educ. Code § 37.001(b-1). In addition, the ARD committee of a student who engages in bullying would be wise to consider whether this issue should be addressed in the student's individualized education program (IEP) to prevent future misconduct. For example, the student may need a behavior intervention plan (BIP), counseling, or additional adult supervision to model appropriate personal interactions. (Note that students who do not receive special education may also have behavior plans.)

Protection for targets of bullying: Students with disabilities are frequent targets of bullying. In some cases, bullying of a student with a disability may violate federal law.
OCR takes the position that bullying of a student on *any* basis, not just disability-related, can result in a denial of a free appropriate public education (FAPE) under IDEA or Section 504. U.S. Dep't of Educ., Office of Civil Rights, Dear Colleague Letter (Oct. 21, 2014).

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Special Risks

I. Reports to Law Enforcement

At times, the district may want to ask local law enforcement to help conduct a bullying investigation when alleged conduct is fairly serious or places a student's safety is at risk. In fact, a principal is legally required to contact law enforcement if he or she has reasonable grounds to believe that a student's alleged misconduct is criminal in nature and occurred on campus or at a school-sponsored or school-related activity. Tex. Educ. Code § 37.015. TASB Policies GRAA(LEGAL) and (EXHIBIT) list specific offenses requiring notice to law enforcement.

Reporting bullying to law enforcement: School districts are not required to report bullying, in general, but bullying or cyberbullying may rise to the level of criminal conduct in some cases. State law specifies that a principal, or an employee designated by the principal, other than a counselor, may report to any school district police department or local law enforcement if, after an investigation is completed, the principal has reasonable grounds to believe that a student (1) engaged in conduct that constitutes an assault under Texas Penal Code section 22.01 or (2) engaged in *criminal harassment by repeated electronic communication* under Texas Penal Code section 42.07. Tex. Educ. Code § 37.0151. Criminal harassment is typically punishable as a Class B misdemeanor; however, harassment of a minor by electronic communication with the intent that the child commit suicide or engage in conduct causing serious bodily injury to the child, or harassment by electronic communication when the actor has previously violated a cyberbullying court order, are subject to stricter penalties as Class A misdemeanor offenses. Tex. Penal Code § 42.07.

Immunity for reporting: If a principal or designee reports bullying to law enforcement, the reporting person may include the name and address of each student the person believes may have participated in the conduct. A person who acts under this section is immune from civil or criminal liability or discipline resulting from the action. Tex. Educ. Code § 37.0151.

Role of security personnel: Each board of trustees, in coordination with the campus behavior coordinator and other employees must establish the law enforcement duties of peace officers, school resource officers (SROs), and security personnel (collectively, "officers"). School district security personnel must perform law enforcement duties, which includes protecting the safety and welfare of any person in the officer's jurisdiction and the property of the school district. The law further provides that districts may not assign officers routine student discipline, school administrative tasks, or contact with students unrelated to the officers' law enforcement duties. Tex. Educ. Code § 37.081(d)-(d-2). Campus administrators should keep these parameters in mind when involving security personnel in a bullying issue. For example, a principal may consult with the district's SRO, in accordance with the SRO's law enforcement duties outlined by the board of trustees, to determine whether bullying conduct rises to the level of a crime. The principal should not, however, routinely require the SRO to intervene in bullying investigations when the alleged conduct is not related to the officer's law enforcement duties.

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II. Sexting

Sexting means the act of sending sexually explicit messages, pictures, or videos through an electronic device. Districts are required annually to make available to appropriate grade levels certain information about the consequences of sharing visual information depicting a minor engaging in sexual conduct, including its connection to bullying, cyberbullying and harassment. Tex. Educ. Code § 37.218(c). For more information and to access the required sexting and bullying prevention program, see the Texas School Safety Center website.

Administrators need to approach allegations of sexting with caution due to the explicit content and digital format; it may also be necessary to involve law enforcement. Depending on the circumstances, a student who creates, possesses, sends, or shares sexting material may be involved in one or more of the following criminal offenses:

- *Electronic transmission of certain visual material depicting a minor*, if a student under 18 years of age intentionally or knowingly electronically promotes to another minor an image depicting a minor, including the student, engaging in sexual conduct. A student also commits the offense if the student possesses an electronic image depicting another minor engaging in sexual conduct. In both instances, the student must have created or contributed to the creation of the image or must know that another minor created the image. Electronic transmission is typically a misdemeanor offense. Tex. Penal Code § 43.261(a)-(b), (d).
- *Possession or promotion of child pornography*, if a person knowingly or intentionally possesses or accesses visual material that depicts a child who was younger than 18 years of age at the time the image was made engaging in sexual conduct. Possession or promotion of child pornography is a felony. Tex. Penal Code § 43.26. A school administrator conducting a good faith investigation into alleged electronic transmission of a minor engaging in sexual conduct is protected from being convicted of possessing child pornography. Tex. Penal Code § 43.26(h).
- *Possession or promotion of lewd visual material depicting a child*, if a person knowingly possesses, accesses with intent to view, or promotes visual material that: depicts lewd exhibition of the genitals or pubic area of a child younger than 18; appeals to a prurient interest in sex; and has no serious literary, artistic, political or scientific value. Tex. Penal Code § 43.262. The Texas legislature created this offense in 2017 to ensure that possessing or sharing a lewd image of a minor is punishable as a felony, even if the minor is not engaged in sexual conduct.
- *Disclosure or promotion of intimate visual material,* if, under certain circumstances spelled out in the law, a student discloses or promotes visual material depicting another person with the person's intimate parts exposed or engaged in sexual activity. Tex. Penal Code § 21.16.
- *Unlawful electronic transmission of sexually explicit material*, also known as "digital sexual harassment," is when a person knowingly transmits by electronic means visual material depicting any person engaging in sexual conduct or depicts the person's intimate parts exposed or covered genitals of a male person in a discernibly turgid state, and the material is not sent at the request of or with the express consent of the recipient. This offense is a Class C misdemeanor. Tex. Penal Code § 21.19.

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- *Invasive visual recording*, if, without the other person's consent and with intent to invade the privacy of the other person, the person:
  - photographs or by videotape or other electronic means records, broadcasts, or transmits a visual image of an intimate area of another person (including genitals, buttocks, or a female breast) if the other person has a reasonable expectation that the intimate area is not subject to public view;
  - photographs or by videotape or other electronic means records, broadcasts, or transmits a visual image of another in a bathroom or changing room (including a locker room); or
  - knowing the character and content of the photograph, recording, broadcast, or transmission, *promotes* (meaning, to circulate, send, or disseminate) a photograph, recording, broadcast, or transmission described above.
    This offense is a felony. Tex. Penal Code § 21.15.

Seek legal advice on potential criminal conduct: Before determining that a student's conduct is criminal in nature, administrators may want to seek legal advice. Unless the situation involves potential child abuse, reporting to law enforcement is not required, even though a student may be subject to discipline under the student code of conduct.

Discipline: If sexting contains the elements of a crime that is punishable as a felony and occurs on or within 300 feet of campus or at any school-related event, the student is subject to mandatory DAEP. Tex. Educ. Code § 37.006(a)(2)(A). Keep in mind that a district may also impose DAEP or expulsion if a student releases or threatens to release intimate visual material of a minor or of an adult student without the student's consent. Tex. Educ. Code § 37.0052(b)(3).

Duties to report child abuse or sexual harassment: In addition, school employees aware of a sexting incident should consider whether the situation triggers any duties under district policies related to sexual harassment and child abuse. Sexting itself can be an instance of dating violence, harassment, or cyberbullying: for example, a student engages in "revenge porn" by sending an intimate image of another student to their classmates in retaliation for a perceived slight. Slurs or rumors about the subject of the sexting may also meet the definition of sexual harassment. Any time sexual harassment is suspected, a report should be made to the district's Title IX coordinator. See TASB Policy FFH(LOCAL).

Evidence matters: District personnel may have a difficult time obtaining evidence of sexting. As a practical matter, the physical evidence is fleeting and can quickly be altered or deleted. In addition, courts have held that students retain some expectation of privacy in the use of personal electronic devices at school; therefore, campus officials are not as free to monitor student electronic communications if the communications are not flowing through the school's Internet service. *See State v. Granville*, 423 S.W.3d 399 (Tex. Crim. App. 2014) (holding SRO violated student's constitutional rights by searching his cell phone for a photo of another student taken in school bathroom). Allegations of students recording or distributing inappropriate images of other students need to be approached carefully, using common sense, and ideally in cooperation with the parents of the students involved. Remember that searching a student's cell phone to obtain evidence may not be necessary if there are other reasons to believe the incident occurred, such as student witness statements.

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III. Mental Health and Suicide Prevention

David's Law: Driven by increased awareness of mental health issues and depictions in popular culture such as the TV show, *13 Reasons Why*, youth suicide, and its connection with bullying, is a frequent topic of concern. In Texas, parents who lost their 16-year-old son to suicide after months of cyberbullying created a foundation to raise awareness of cyberbullying and suicide, eventually leading to passage of Senate Bill 179 (also known as "David's Law") in 2017. David's Law increased resources and strengthened state laws regarding professional development for educators working with students who suffer from mental health conditions. In addition, the law amended Texas Health and Safety Code statutes requiring the best-practice based programs to address student mental health, substance abuse, and suicide prevention.

Increased resources and programs: Other recent legislation has further increased resources and strengthened state laws regarding professional development for educators working with students suffering from mental health conditions, with a new emphasis on connecting bullying, suicide prevention, substance abuse, and acts of violence in schools. House Bill 18, enacted by the Texas Legislature in 2019, expands the topics addressed in continuing education for teachers to emphasize school climate issues and evidence-based mental health first aid programs. House Bill 18 and a companion bill, Senate Bill 11, added many other requirements and resources to state law in an effort to support awareness of mental health issues and school safety.

Training: School districts are required to provide suicide prevention programs that include training for counselors, teachers, nurses, administrators, and other staff, as well as law enforcement officers and social workers who regularly interact with students, to:

- Recognize students at risk of committing suicide, including students who are or may be the victims of or who engage in bullying;
- Recognize students displaying early warning signs and a possible need for mental health or substance abuse intervention, which warning signs may include declining academic performance, depression, anxiety, isolation, unexplained changes in sleep or eating habits, and destructive behavior toward self and others;
- Intervene effectively with these students by providing notice and referral to a parent or guardian so that appropriate action, such as seeking mental health services, may be taken by the parent or guardian; and
- Assist students in returning to school following treatment of a mental health concern or suicide attempt.

Tex. Educ. Code § 38.351(e).

Counseling: State law also requires school district policy to set out available counseling options for students who are targets, aggressors, or witnesses to bullying. Tex. Educ. Code § 37.0832(c)(6). TASB Policy FFI(LOCAL) indicates that the appropriate administrator will notify the students involved in an incident as targets, aggressors, or witnesses of the available counseling options.

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Threat assessment: Each school district and open-enrollment charter school in Texas must establish a threat assessment and safe and supportive school team to serve at each campus. The purpose of the teams is to provide a coordinated program for assessing risks and threats in schools and provide appropriate interventions. A team must conduct a threat assessment when a student exhibits *harmful, threatening, or violent behavior*, which may include verbal threats, threats of self-harm, bullying, cyberbullying, fighting, use or possession of a weapon, sexual assault, sexual harassment, dating violence, stalking, or assault that could result in specific interventions, including mental health and behavioral supports or school discipline. See TASB Policies FFB(LEGAL) and FFB(LOCAL).

IV. District Liability

Third party conduct: Parents of students who are bullied may sue school districts in court, seeking monetary damages. Often, families of students who have died by suicide related to bullying sue school districts and district employees, arguing that the district should have done more to address the harmful impacts of bullying. Plaintiffs in these cases have a difficult burden. The Fifth Circuit Court of Appeals, which has jurisdiction in Texas, has established that public schools do not have a constitutional duty to protect students from harm committed by third parties. *See Doe ex rel. Magee v. Covington Cnty. Sch. Dist.*, 675 F.3d 849 (5th Cir. 2012) (en banc) (affirming school district did not have a special relationship with students based on compulsory attendance and, therefore, could not be held liable in Section 1983 lawsuit for failure to protect student from sexual abuse by third party); *see also Brown v. Cypress-Fairbanks Indep. Sch. Dist.*, 863 F. Supp. 2d 632 (S.D. 2012) (mem.) (finding that bullying policies did not give rise to special relationship with student who killed himself after experiencing bullying).

Deliberate indifference: If a lawsuit alleges that the district failed to respond to harassment of a student based on a protected category, however, including race, sex, or disability, a different standard applies. The U.S. Supreme Court in *Davis ex rel. Lashonda v. Monroe County Bd. of Educ.* held that a school district can be liable under Title IX if a student can show that district officials knew about sexual harassment but responded with deliberate indifference. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999). The Fifth Circuit has applied this standard to claims arising under other federal statutes, such as Section 504 and Title VI. *See Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982 (5th Cir. 2014) (citing courts that applied *Davis* reasoning to student-to-student harassment based on disability and race).

In order to hold a school district liable for student-to-student harassment, a plaintiff's lawsuit must show five things:

- The school had actual knowledge of the harassment;
- The harasser was under the school's control;
- The harassment was based on the student's membership in a protected category (e.g., sex, disability, race, national origin);
- The harassment was so severe, pervasive and objectively offensive that it effectively prevented the student's access to an educational opportunity or benefit; and

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- The school was deliberately indifferent to the harassment.

K.S. ex rel. K.S. v. Northwest Indep. Sch. Dist., 689 F. App'x 780, 783 (5th Cir. 2017).

The fifth element is crucial, as it is the only element entirely within the school district's control. Courts are not likely to hold a school district liable for student-to-student harassment if school officials can show that they took complaints seriously and responded appropriately based on what was known at the time. Nonetheless, school officials should recognize the likelihood of such claims and take steps to adopt and implement effective policies to prevent bullying and harassment.

School Climate

There are multiple steps that school districts can take to improve school climate and reduce incidents of bullying. Educating students, staff, and parents about the district's policies and procedures can promote a culture of respect and encourage prompt reporting to address problems. Some types of training are also legally required. As of December 1, 2019, staff development for educators other than principals must include training on preventing, identifying, responding to, and reporting incidents of bullying as well as strategies for establishing and maintaining positive relationships among students and conflict resolution. Tex. Educ. Code § 21.451(d).

Rules adopted by the Texas State Board of Education require each school district to incorporate instruction in digital citizenship into the district's curriculum, including information regarding the potential criminal consequences of cyberbullying. The law defines *digital citizenship* as the standards of appropriate, responsible, and healthy online behavior, including the ability to access, analyze, evaluate, create, and act on all forms of digital communication. Tex. Educ. Code § 28.002(z)(2). Districts may also offer general curriculum focused on preventing and responding to bullying, which may assist a student in coping with the experience.

In addition, many districts have developed local strategies and programs or worked with outside groups such as Common Sense Education to teach students how to be good digital citizens. A number of outside organizations offer bullying prevention programs for schools, such as:

- The National Academies of Science, Engineering and Medicine's Preventing Bullying Through Science, Policy, and Practice; or
- The U.S. Department of Health & Human Services - Stop Bullying program.

Conclusion

In Texas, state law imposes high expectations on school officials to prevent and address bullying. As society grows increasingly aware of how bullying relates to mental health, suicide, and school safety, new legislation underlines the need for educators to understand these relationships. Bullying may never be completely eradicated, but now more than ever parents, lawmakers, and educators are united in believing that bullying does not have to be an inevitable part of growing up.

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