

# CYBERBULLYING & STUDENT SPEECH

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TEXAS HIGH SCHOOL ATHLETIC DIRECTORS ASSOCIATION  
REGION 5 MEETING

MAY 2, 2018

## S.B. 179 – DAVID’S LAW

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David Bartlett Molak, aged 16, took his own life in 2016 in his hometown of San Antonio, Texas. David had recently achieved the prestigious rank of Eagle Scout. Among David’s passions were hunting, fishing, and playing video games with his older brothers. He was extremely knowledgeable about professional football and could lead any fantasy association to success. In the last few months before his death, David was overwhelmed with hopelessness after being continuously harassed, humiliated and threatened by a group of students through text messages and social media

# IMPACT OF DAVID'S LAW™

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- Redefines bullying
- Expands district jurisdiction for off-campus cyberbullying
- Requires school districts to adopt certain practices and procedures to prevent and respond to bullying & cyberbullying
- Increases latitude in school discipline
- Legal Remedies

# “BULLYING” REDEFINED

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A single act or a 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:

- 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 or harm to the student’s person or damage to the student’s property;

# “BULLYING” REDEFINED

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- Is so severe, persistent, or pervasive that the action or threat creates an intimidating, threatening or abusive educational environment for a student;
- Materially and substantially disrupts the educational process or the orderly operation of a classroom or school; OR
- Infringes on the rights of the victim at school.

# EXPANDED JURISDICTION FOR BULLYING

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- 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
- 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 operation of a school, classroom, or school-related activity.

# “CYBERBULLYING” REDEFINED

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Bullying through the use of electronic communication, including a cellular or other telephone, computer, camera, e-mail, instant messaging, text messaging, a social media application, an Internet website, or any other Internet-based communication tool.



# REQUIRED BOARD POLICIES REGARDING BULLYING

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School boards must adopt policy establishing procedures to:

- enable a student to anonymously report an incident of bullying;
- provide notice of an incident of bullying to a parent or guardian of an alleged victim on or before the third business day after the date an incident is reported; and
- provide notice to the parent or guardian of an alleged bully within a reasonable time after the incident.

# DAEP REMOVAL OR EXPULSION

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A student may be placed in a DAEP or expelled for engaging 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 of an adult student without the student's consent.

# TRANSFER OF THE VICTIM OR BULLY

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- A victim of bullying may request and “shall” be granted a transfer to another class or another campus
- The bully “may” be transferred to another class or campus in consultation with that student’s parent or guardian

# REPORT TO LAW ENFORCEMENT

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A principal, or an employee designated by the principal other than a counselor, may make a report to law enforcement if, after an investigation is completed, the principal has reasonable grounds to believe that a student engaged in conduct that constitutes:

- assault (Tex. Penal Code §22.01) or
- criminal harassment by repeated electronic communication (Tex. Penal Code §42.07)

# CRIMINAL ELECTRONIC HARASSMENT

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While criminal harassment is typically punishable as a Class B misdemeanor, SB 179 creates a Class A misdemeanor offense for 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
- when the actor has previously violated a cyberbullying court order.

# INVASIVE VISUAL RECORDING

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- State jail felony to, without the other person's consent and with the intent to invade the privacy of the other person, photograph, or by videotape or other electronic means, record, broadcast, or transmit a visual image of an intimate area of another person if the other person has a reasonable expectation that the intimate area is not subject to public view.

# LEGAL REMEDIES

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- A victim of cyberbullying who is under 18, or the victim's parent, may seek a court order enjoining the defendant from engaging in cyberbullying or compelling the parent of a minor who engages in cyberbullying to take reasonable actions to stop the cyberbullying.
- A plaintiff is entitled to a TRO on showing a likelihood of success in establishing that cyberbullying occurred. May order preservation of communication.

# SNAPCHAT & OTHER SCARY STUFF

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- Snapchat has 178 million daily active users opening the app an average of more than 25 times per day, averaging 30 minutes of total use
- Secret calculator style apps that hide contacts, web browsers, notes, photos and other content
- “Burner” phone apps that create a second “private” phone number
- Self-destructing message apps

# CARTHAGE ISD LAWSUIT

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CARTHAGE — A Carthage ISD parent has filed a federal civil rights lawsuit against the school district, saying officials didn't act after a Carthage High School quarterback secretly recorded a nude video of her daughter before sharing it with his teammates, a coach and other students. The school district, the lawsuit states, created a hostile environment for the daughter by failing to stop the spread of the video.

“Despite actual notice and evidence of (the football player’s) conduct, as well as other distributing students, they were given no discipline whatsoever by the school and instead (the football player) was allowed to continue as the star quarterback,” the lawsuit states. “Meanwhile, (the daughter) is left to attend Carthage High School, the only public school available to her, while enduring the looks and sneers of students, faculty and administrators who have seen her naked and can continue to do so.”



# CARTHAGE ISD LAWSUIT

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Also named as defendants are former Carthage High School Principal, Athletic Director and head football coach and Superintendent. According to the lawsuit, the daughter went to a friend's house to shower and hang out with friends after playing volleyball in April 2016.

The daughter of the parent who filed the lawsuit, a freshman at the time, took a shower and then realized that another student hanging out at the house, the football player, had set up a cellphone in a bedroom to record girls undressing and dressing while showering. The daughter and another girl confronted the football player, who told them he would only delete the video if they kissed him, the lawsuit states. The girls reluctantly kissed him and thought they saw him delete the video. But the football player didn't, and the daughter heard other students joking at school later that fall about her being nude.



# CARTHAGE ISD LAWSUIT

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After confronting the football player and being told she was paranoid, the daughter was told by fellow students that the football team and an unnamed assistant football coach had shared the video, according to the lawsuit. The daughter's mother learned of the video in February 2017 and reported it to the principal, who deflected a response, said the football player denied knowledge about the video and told the mother to report the incident to police, the lawsuit states.

Carthage Police Chief said that his department investigated the case and turned over findings to the DA's Office. He said they were contacted by and cooperated with a federal investigator. In following up with the Superintendent, the lawsuit states, he told the mother it was a "he said, she said" situation and there was nothing he could do. The daughter and mother "have been harassed by students and parents who believe their efforts have harmed (the football player's) football career or the school football team's chance at winning another Texas state UIL championship," according to the lawsuit.



# STUDENT SPEECH

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- *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 1969
- School districts cannot prohibit all student protests on campus
- First Amendment gives students the right to peacefully assemble and to exercise free speech in school
- Not all speech is protected
  - Pure speech
  - Expressive conduct and symbolic speech vs. non-expressive conduct
  - Unprotected speech (vulgar, offensive, threatening, school-sponsored, speech advocating criminal activity)

# EXPRESSIVE CONDUCT

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- A school may place reasonable time, place and manner restrictions on expressive conduct.
- Content neutrality
- A school may prohibit otherwise protected expression if a school official has reason to believe the expression will materially and substantially interfere with school operations or the rights of others.

# EXPRESSIVE CONDUCT

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- Black armbands
- I “heart” boobies
- Confederate flag
- Dress code prohibiting all messages
- Walk-outs
- Burning a draft card
- Taking a knee

# EXPRESSIVE SPEECH DURING EXTRACURRICULAR ACTIVITY

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- Student has agreed to do a “job” where compelled speech may be included (cheerleader who refused to cheer for a certain basketball player).
- BUT, religious speech on run-through banners considered private, not school-sponsored speech.
- District rule that athletes must stand for the national anthem found unconstitutional .

# QUESTIONS

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