



Contact: Manuel Quinto-Pozos  
512.478.7300 x 128  
mquintopozos@aclutx.org

Frank Knaack  
512.478.7300 x 104  
fknaack@aclutx.org

## Constitutional Concerns with SB 242

**SB 242** amends the Texas Education Code to create a new definition for bullying and grants district officials broad discretionary authority to discipline minors for actions committed on and off-campus. In addition, SB 242 does not address district officials' failure to protect the students in their care.

The ACLU of Texas has long advocated for the rights of victims of bullying and harassment in Texas, and is committed to fighting for real legislative solutions to ending bullying in Texas schools. Through our constant interaction with impacted children, including through our legal and public education work, we have learned that the solution requires holding district officials accountable to the existing law prohibiting bullying in Texas schools. By failing to address the issue of accountability, SB 242 fails to adequately address the issue of bullying.

**SB 242 allows district officials to unconstitutionally infringe on the rights of parents and minors.**

- “[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>i</sup>
- **Extending school authority to actions occurring off-campus infringes on the fundamental right of parents to direct the upbringing of their children free from government intervention.** The authority to discipline minors for off-campus conduct is reserved for parents, or, for criminal actions, for law enforcement. The authority of district officials to use their state-conferred power to discipline students for inappropriate behavior ends at the schoolhouse gate. By extending district officials' authority into parents' homes, SB 242 permits the violation of parents' constitutional rights.
- **Extending school authority over minors' off-campus speech violates their First Amendment rights.** The U.S. Supreme Court has stated that district officials have limited authority to curtail students' free speech rights in order to “facilitate education and maintain order” in school, but once students exit the schoolhouse gate they are no longer students, but minors who happen to be students, and therefore regain whatever rights they shed upon entry.<sup>ii</sup> By extending district officials' authority to include the ability to police off-campus speech, SB 242 takes the radical position that district officials' existing authority to curb their students' in-school speech extends into the community, including into their homes.<sup>iii</sup> SB 242 will enable district officials to engage in unconstitutional content and viewpoint censorship. In reality, content- and viewpoint-based restrictions on minors' First Amendment rights are subject to strict scrutiny, just like restrictions of adults' First Amendment rights.
- **The “sufficient nexus to a substantial disruption” constitutional test is difficult to meet and the standard in SB 242 raises serious constitutional concerns.** The language of the bill requires a mere finding that “*the conduct interferes with a student's educational opportunities or substantially disrupts the orderly operation of a school or school-sponsored or school-related activity.*” Merely interfering with a student's educational opportunities, which alone under this standard would be enough to grant the district officials the authority to punish students, is not a strong enough standard to extend the District's reach beyond the

campus.<sup>iv</sup> Furthermore, the established test requires a “substantial disruption of the school environment,” which is significantly narrower than “the orderly operation of a school *or school-sponsored or school-related activity*,” which may be used to extend the School District’s authority well outside of the school environment.

- **Students are not agents of their schools.** Students are required to attend school, and cannot leave because they reject the limitations placed on their off-campus speech.<sup>v</sup> Thus, SB 242 would create a two-tiered system of rights whereby private and home-schooled students would enjoy more First Amendment rights than their public school counterparts. Such a result is forbidden under our Constitution.
- **Conclusion.** School officials can punish students who actually cause a disruption in school; they can inform students’ parents if they have concerns about the students’ off-campus speech; and can even, under some circumstances, contact the police if they believe the expression constitutes a crime.<sup>vi</sup> But, school officials’ ability to use their state-conferred authority to punish ends when students exit the schoolhouse gate.

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<sup>i</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

<sup>ii</sup> In each of the Supreme Court’s four student-speech cases, the Court focused on school officials’ control over in-school speech. In upholding a school’s punishment of a student for unfurling a banner advocating drug use during a school-sponsored field trip, the Court recognized that “the rights of students must be applied in light of the special characteristics of the school environment.” *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (citations and quotations omitted). In upholding censorship of school-sponsored student newspapers, the Court noted that “[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). The Court has also held that lewd and profane speech “has no place” in a “high school assembly or classroom.” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686-87 (1986). And the Court’s holding that schools can prohibit students from engaging in speech at school if it will cause a material and substantial disruption to the school day recognized school officials’ “comprehensive authority ... to prescribe and control conduct in the schools.” *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508 (1969).

<sup>iii</sup> The Court in *Morse* noted that *Fraser* drew an explicit distinction between in-school and out-of-school speech, and the Court emphasized the strict limits on a school district’s authority to punish a student under *Fraser*’s rationale. “Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser’s First Amendment rights were circumscribed ‘in light of the special characteristics of the school environment.’” *Morse*, 551 U.S. at 405 (citations omitted) (quoting *Tinker*, 393 U.S. at 506). *Morse* also noted that *Kuhlmeier* drew the same in- and out-of-school speech distinction. See *Morse*, 551 U.S. at 405-06 (“*Kuhlmeier* acknowledged that schools may regulate some speech ‘**even though the government could not censor similar speech outside the school.**’”) (emphasis added) (quoting *Kuhlmeier*, 484 U.S. at 266).

<sup>iv</sup> Even for in-school speech, *Tinker* requires proof of either an actual substantial and material disruption or a concrete and particularized reason to anticipate that disruption would result from the student speech that is punished. See *Tinker*, 393 U.S. at 508 (“[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”); see also *Morse*, 551 U.S. at 422 (Alito, J., concurring) (*Tinker* “permits the regulation of student speech that threatens a concrete and ‘substantial disruption.’”) (quoting *Tinker*, 393 U.S. at 514).

<sup>v</sup> *Morse*, 551 U.S. at 424 (2007) (Alito, J., concurring) (recognizing that “[m]ost parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school”).

<sup>vi</sup> TEX. EDUC. CODE § 37.015.