



February 1, 2017

Senator José Menéndez  
Texas Senate  
PO Box 12068 Capitol  
Station Austin, TX 78711

Representative Ina Minjarez  
Texas House of Representatives  
PO Box 2910  
Austin, TX 78768

**Re: SB 179 – EFF opposition**

Dear Senator Menéndez and Representative Minjarez:

The Electronic Frontier Foundation (EFF) regrets to inform you that we oppose SB 179.<sup>1</sup> Online harassment is a serious problem.<sup>2</sup> But this bill is not an appropriate solution. Among other things, it would unduly burden First Amendment liberties in the contexts of school discipline, school expulsion, unmasking anonymous speakers, and civil litigation.

EFF is a member-supported, nonprofit civil liberties organization that protects free speech and privacy rights in the digital world. EFF was founded in 1990, is headquartered in San Francisco, and has over 35,000 members.

**1. School discipline**

The bill’s definitions of “bullying” and “cyberbullying” are vague and overbroad. For example, they include a single email directed by one student to another that “infringes on the rights of the victim at school.”<sup>3</sup> The scope of these unnamed “rights” is undefined.

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<sup>1</sup> See Texas SB 179, at <http://www.capitol.state.tx.us/Search/DocViewer.aspx?ID=85RSB001791B&QueryText=%22sb+179%22&DocType=B>. There are four closely related Texas bills. See SB 180, HB 304, HB 305, and HB 306, at <http://www.capitol.state.tx.us/>.

<sup>2</sup> EFF, *Facing the challenge of online harassment* (Jan. 8, 2015), at <https://www.eff.org/deeplinks/2015/01/facing-challenge-online-harassment>.

<sup>3</sup> See SB 179, Section 2, amending Education Code 37.0832(a)(1)(A)(iv).

Suppose that during a current events class, one student made an unpopular statement. Suppose further that in response, another student sent them an email criticizing them, and concluding, “I wish you would keep your opinions to yourself.” School officials might determine that the second student’s email infringed on the first student’s right to speak at school, and thus might impose discipline. This would be true without regard to the content of the speech involved. Maybe the first student (who spoke in class discussion) opposed gay marriage, and the second student (who was suspended for their responsive email) led the school’s Gay-Straight Alliance. Or maybe the first student supported gun control, and the second student led the schools’ NRA chapter. In these and many other circumstances, the bill would allow discipline where none is warranted.

Courts have struck down cyberbullying laws that, like the proposal here, are overbroad in violation of the First Amendment.<sup>4</sup>

## 2. School expulsion

The bill authorizes expulsion from school of a student who engages in bullying that encourages another student to commit suicide.<sup>5</sup> This rule would not take into account the expelled student’s intentions, the consequences of their actions, or how a reasonable student would have interpreted the expelled student’s words.

Suppose in the hypothetical above that the student’s email had said, “Why don’t you jump off a bridge so we don’t have to listen to your opinions?” The student who sent the email could be expelled, though they meant “jump off a bridge” rhetorically, the recipient did not attempt any self-harm, and the rest of the student body, familiar with the students involved, would have known the suggestion was not serious.

The bill also authorizes expulsion of a student who releases intimate visual material of another student.<sup>6</sup> The expelled student might have had no previous relationship with the depicted student; for example, they may have forwarded along an image they received from someone else. The expelled

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<sup>4</sup> See, e.g., *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016); *People v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014).

<sup>5</sup> See SB 179, Section 3, adding Education Code 37.0052(b)(1).

<sup>6</sup> See SB 179, Section 3, adding Education Code 37.0052(b)(3).

student may have intended no harm, caused no harm, or had consent from the depicted person. The released images might be newsworthy; for example, the victim of a sexual assault might release images of their assailant's crime. The bill authorizes expulsion without regard to any of these considerations.

It bears emphasis that school expulsion is highly disruptive to the educational and other needs of expelled children. And all too often, expulsion and other school discipline disproportionately impacts youths who are racial and ethnic minorities and LGBT youths.<sup>7</sup>

### 3. Unmasking anonymous speakers

The bill authorizes pre-suit subpoenas to investigate potential legal claims arising from any undefined "injury" to a minor.<sup>8</sup> This new process would threaten the First Amendment right to communicate anonymously on the Internet.<sup>9</sup> This right is especially important for people who belong to unpopular groups or who express unpopular messages, who might otherwise stay silent rather than risk retaliation.<sup>10</sup>

In the hypothetical above, suppose the second student anonymously blogged about the classroom comments of the first student, and concluded, "only a jerk would say this in class." The first student might try to use the bill's pre-suit subpoena process to unmask the anonymous blogger, based on the pretext of a highly dubious defamation claim. Again, this would be true without regard to the content of the anonymous blog, whether it supported gun rights or LGBT rights or any other message. The risk of unmasking would chill many anonymous speakers.

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<sup>7</sup> Donna St. George, *Researchers point to racial disparities in school suspension, spotlight new practices*, Wash. Post (March 14, 2014), at [https://www.washingtonpost.com/local/education/researchers-point-to-racial-disparities-in-school-suspension-spotlight-new-practices/2014/03/14/0017cd98-aaa7-11e3-adbc-888c8010c799\\_story.html](https://www.washingtonpost.com/local/education/researchers-point-to-racial-disparities-in-school-suspension-spotlight-new-practices/2014/03/14/0017cd98-aaa7-11e3-adbc-888c8010c799_story.html); Gay, Lesbian & Straight Education Network, *Educational exclusion: Drop out, push out, and the school-to-prison pipeline among LGBTQ youth* (2016), at [http://www.glsen.org/sites/default/files/Educational%20Exclusion\\_Report\\_6-28-16\\_v4\\_WEB\\_READY\\_PDF.pdf](http://www.glsen.org/sites/default/files/Educational%20Exclusion_Report_6-28-16_v4_WEB_READY_PDF.pdf).

<sup>8</sup> See SB 179, Section 7, adding Civil Practice Code 18.101(a)(1).

<sup>9</sup> See, e.g., *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001). See also *McIntyre v. Ohio Elections Commn.*, 514 U.S. 334 (1995).

<sup>10</sup> See generally EFF, *Anonymity*, at <https://www.eff.org/issues/anonymity>.

#### 4. Civil cause of action

The bill would authorize civil lawsuits, and the award of treble damages, against a student who sent an email to another student that encouraged them to commit suicide.<sup>11</sup> Again, this is far too broad, because it does not take into account the speaker's intentions, the message's consequences, and the response of a reasonable person to the message.

Moreover, the bill would impose damages liability upon the parents of a minor who sent a prohibited email, whether or not the parents had anything to do with the email.<sup>12</sup> Most parents do not require their adolescent children to obtain parental permission before sending emails, text messages, and posts to social media. Nor should they.

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Thank you for considering EFF's opposition to SB. 179. If you have any questions, please do not hesitate to call me at (415) 436-9333, extension 176, or email me at [adam@eff.org](mailto:adam@eff.org).

Sincerely,

Adam Schwartz  
Senior Staff Attorney

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<sup>11</sup> See SB 179, Section 8, adding Civil Practice Code 100B.001(1)(B)(i).

<sup>12</sup> *Id.* at 100B.005.