

Date of Hearing: July 3, 2012

ASSEMBLY COMMITTEE ON HIGHER EDUCATION
Marty Block, Chair
SB 1349 (Yee) – As Amended: June 25, 2012

SENATE VOTE: 28-5

SUBJECT: Social media privacy: postsecondary education.

SUMMARY: Prohibits public and private postsecondary educational institutions from requesting or requiring students, prospective students, or student groups to provide access to their social media information and thoughts. Specifically, this bill:

- 1) Finds that quickly evolving technologies and social media services and websites create new challenges when seeking to protect the privacy rights of students at California's postsecondary institutions.
- 2) Prohibits public and private postsecondary educational institutions and their employees and representatives from requiring or requesting a student, prospective student, or student group do any of the following:
 - a) Disclose a user name or password for accessing personal social media;
 - b) Access personal social media in the presence of a postsecondary educational institution's employee or representative; or,
 - c) Divulge any personal social media.
- 3) Provides that a public or private postsecondary educational institution shall not discharge, discipline, or otherwise retaliate against a student, prospective student, or student group for choosing not to comply with any request or demand that violates this section.
- 4) Provides that nothing in this section shall:
 - a) Prohibit a public or private postsecondary educational institution from terminating or otherwise taking other adverse action against a student, prospective student, or student group for any lawful reason, or,
 - b) Affect a public or private postsecondary educational institution's existing rights and obligations to protect against and investigate allegations of student misconduct or student violations of applicable laws and regulations.
- 5) Provides that private nonprofit and for-profit postsecondary educational institutions in California shall change their relevant policies to ensure compliance with the bill.
- 6) Defines "social media" broadly to include, but not be limited to an electronic service or account, or electronic content, including but not limited to videos or still photographs, blogs,

video blogs, podcasts, instant and text messages, e-mail, online services or accounts, or Internet Web site profiles or locations.

EXISTING LAW:

- 1) Requires the University of California (UC) Board of Regents, the California State University (CSU) Board of Trustees, and the governing board of every California Community College (CCC) district to adopt specific rules and regulations governing student behavior along with applicable penalties for violation of those rules and regulations. (Education Code § 66017 and 66300)
- 2) Authorizes the governing board of a CCC district, the president or an instructor to suspend a student for “good cause,” and prohibits the removal, suspension, or expulsion of a CCC student unless the conduct for which the student is disciplined is related to college activity or college attendance. (EC § 76030)
- 3) Prohibits the UC Regents, the CSU Trustees, and the governing board of every CCC district from making or enforcing any rule subjecting any student to disciplinary sanction solely on the basis of conduct that is speech or other communication, when engaged in outside a campus of those institutions, protected by the United States or California constitutions. An enrolled student may pursue a civil action against these institutions in the event they seek to make or enforce any such rule. (EC § 94367)
- 4) Institutional policies:
 - a) CSU rules of student conduct are outlined in the California Code of Regulations (Title 5, Article 2, Section 41301) and provide that any student may be expelled, suspended, placed on probation or given a lesser sanction for one or more causes, as specified. Conduct that threatens the safety or security of the campus community or substantially disrupts the function or operation of CSU, whether it occurs on or off campus, is within the jurisdiction of the Student Conduct Code. Systemwide procedures for implementing student discipline are set forth in Executive Order #1043, which, among other things, authorizes a student conduct administrator to investigate the matter.
 - b) At UC, enrolled students are subject to university authority, which includes the prerogative of dismissing students for a number of violations including participation in a disturbance of the peace or unlawful assembly. If specified in implementing campus regulations, these standards of conduct may apply to conduct that occurs off campus and that would violate student conduct and discipline policies or regulations had the conduct occurred on campus.

FISCAL EFFECT: Unknown. This bill was referred from the Senate Appropriations Committee pursuant to Senate Rule 28.8.

COMMENTS: This bill was heard by the Assembly Judiciary Committee on June 26, where it was approved by a unanimous vote, after being amended to remove provisions related to employers and to broaden the definition of social media.

Need for this bill. According to the author, "There is a growing nationwide trend of colleges and universities who are requiring user names and passwords to the social media accounts of students. Student athlete cases have involved requiring that the student athlete download an application which monitors the content of their social media account or requires that the student athlete allow a coach or other designated person access to the private content of their social media account."

Current policies/practice and NCAA compliance. According to the public postsecondary educational institutions, they do not currently engage in the activities prohibited by this bill. However, it appears that some private postsecondary educational institutions do request that their student athletes provide information on their social media accounts. Reportedly this is to ensure that these students adhere to student athlete ethics codes, as required under National Collegiate Athletic Association (NCAA) rules. However, the University of Southern California (USC), which previously submitted Facebook "friend requests" to its student athletes in an effort to monitor the student athletes' social media postings and behavior, reports that the NCAA will not penalize California schools for complying with this measure. According to USC, the NCAA requires member schools to monitor its student athletes' *publicly available* social media activity in an effort to catch possible NCAA violations. However the NCAA does not require California or any other postsecondary educational institutions to seek to monitor the private personal information contained in their athletes' non-publicly available social media. Thus, this measure should not present any NCAA compliance concerns.

"Require and request". As noted in the Assembly Judiciary Committee analysis, measures being considered in other states seeking to protect privacy in the social media realm typically seek to bar employers or universities from *requiring* social media information from employees and students. This measure, by contrast, appropriately seeks to also prohibit postsecondary educational institutions from *requesting* that students provide access to social media. The need for this broader protection is clear: truly uncompelled consent is impossible when a power relationship is as unbalanced as that of a student and his or her university administration or as that of an employee or job applicant and his or her employer or prospective employer. Given that students are often young and unaware of their rights, a student asked for access to her social media by a university's investigatory body or application review board may reasonably worry that declining a request for social media access will either lead to possible retaliation or a lack of college acceptance. The practical effect of such a request may be that a student (as with employees and job applicants) feels she or he has no real choice but to comply with any such "requests." This approach is consistent with that taken in similar legislation related to employees and job applicants (see Related legislation below).

Social media definition. The Assembly Judiciary Committee amended the bill to broaden the definition of social media to include but not be limited to "an electronic service or account, or electronic content." This definition includes websites and services on which digital media is commonly created, shared, and viewed (e.g., Facebook, Twitter, email accounts), as well as digital media itself (e.g., photos, video, text messages). It also allows for changing technology that may include new types of media content or services that deserve equal privacy protection.

As the Assembly Judiciary Committee analysis notes, "Some observers may initially be tempted to assume that media stored on an individual's mobile phone, and not posted to or shared on a website or service, should not properly fall within the protections of such privacy protection measures. However it quickly becomes clear that a photo, message, or other form of electronic

content contained on an individual's mobile device should be deserving of equal -- or perhaps even more -- privacy protection than a photo, message, or other form of electronic content posted on an online profile or account that the owner already understands that specified friends or associates can view, or perhaps a very broad number of individuals may view. Indeed, if anything, a piece of electronic content that a student (or employee or job applicant) has kept on her or his mobile device -- and chosen *not* to share with a bounded universe of online friends -- may arguably be deserving of even *greater* privacy protections. Thus this measure appropriately includes such content in the ambit of its privacy protections."

Public safety exceptions. Institutions retain the ability to protect against and investigate potential student misconduct to the extent they already can and should do so under current law and regulations.

Author's amendment. The author has agreed to accept an amendment to delete language requiring private institutions from reporting and certifying their policies to the Bureau for Private Postsecondary Education, which does not regulate some of these institutions. Instead the author has agreed to require these institutions to post their social media privacy policies on their websites.

Efforts in other states. Legislation recently introduced at the federal level (known as the "Social Networking Online Protection Act" or SNOA) similarly seeks to ban employers from requiring or requesting access to the private email accounts or private social media accounts of employees and similarly seeks to bar higher education institutions and schools from requiring or requesting access to the private email accounts or private social media accounts of students. Maryland has already passed social media privacy legislation protecting employees, and employee-focused legislation has been introduced including in New Jersey, Illinois, Massachusetts, New York, and other states.

Related legislation. AB 1844 (Campos), pending in the Senate, would prohibit employers from requiring or requesting social media access from their employees and job applicants.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

None on file.

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