

Department of Legislative Services
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2013 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 838 (Senator Young, *et al.*)

Education, Health, and Environmental Affairs

Appropriations

Educational Institutions - Personal Electronic Account - Privacy Protection

This bill prohibits an educational institution from requiring, requesting, suggesting, or causing a student or a prospective student to grant access to, allow observation of, or disclose information that allows access to or observation of the individual's personal electronic account. In addition, an educational institution is prohibited from compelling a student or an applicant, as a condition of acceptance or participation in curricular or extracurricular activities, to (1) add anyone including specified individuals to the list of contacts associated with a personal electronic account or (2) change the privacy settings associated with a personal electronic account. The bill also prohibits an educational institution from disciplining or otherwise penalizing a student or applicant because of their refusal to comply with any of those actions. An educational institution is also prohibited from refusing to admit an applicant as a result of their refusal to comply with any of those actions. Finally, the bill authorizes an individual who is the subject of a violation to bring a civil action and to recover up to \$1,000 in damages plus reasonable attorney's fees and court costs.

The bill takes effect June 1, 2013.

Fiscal Summary

State Effect: Meeting the requirements of the bill does not impact public four-year institutions of higher education or Baltimore City Community College finances. The bill does not materially affect District Court operations.

Local Effect: Meeting the requirements of the bill does not impact local school system or community college finances. County sheriffs may collect additional fees for service of process.

Small Business Effect: Minimal.

Analysis

Bill Summary: An “educational institution” is defined as a public or private educational institution that offers students an organized course of study or training that is academic, technical, trade-oriented, or preparatory for gainful employment in a recognized occupation.

“Personal electronic account” means an account created via an electronic medium or a service that allows users to create, share, or view user-generated content, including uploading or downloading videos or still photographs, blogs, video blogs, podcasts, messages, electronic mail, Internet website profiles or locations, or any other electronic information. However, it does not include an account that is opened on behalf of, or owned or provided by, an educational institution.

An educational institution is not prohibited from requesting or requiring a student to disclose access information to allow the educational institution to gain access to an electronic account opened at the educational institution’s behest or provided by the educational institution.

An educational institution is also not prohibited or restricted from viewing, accessing, or utilizing information about a student, an applicant, or a prospective student that can be obtained without access information, is available in the public domain, or is available to the institution as the result of actions undertaken independently by the student.

The bill may not be construed to create a duty requiring an educational institution to search or monitor the activity of a personal electronic account or make an educational institution liable for failing to request or require a student, an applicant, or a prospective student to grant access to, allow observation of, or disclose information that allows access to or observation of the individual’s personal electronic account.

The bill also does not prohibit a student, an applicant, or a prospective student from allowing an athletic coach or administrator to view their publicly accessible communications.

The bill also authorizes an individual who is the subject of a violation to (1) bring a civil action to enjoin the violation or for damages; (2) add a claim for damages to an action seeking injunctive relief; and (3) recover up to \$1,000 in damages plus reasonable attorney’s fees and court costs. However, an individual may not bring an action for

damages or add a claim for damages to an action seeking injunctive relief until at least 60 days after making a written demand of the alleged violator. The written demand must include reasonable documentation of the violation and be served either in the manner provided for service of process in a civil action under the Maryland Rules or by certified mail to the residence or principal office or place of business of the alleged violator. An action may be brought in the District Court for the county in which the alleged violation occurred or in the county where the alleged violator resides or has a principal office or place of business. It is an affirmative defense to any claim under the bill that the educational institution acted to comply with the requirements of a federal or State law.

Current Law: State law does not specifically address privacy issues related to a student's, or an applicant's, personal user name and password information.

Background: In 2011 the University of North Carolina (UNC) updated its Department of Athletics Policy on Student-Athlete Social Networking and Media Use. The policy requires each team to “identify at least one coach or administrator who is responsible for having access to and regularly monitoring the content of team members’ social networking sites and postings.” The policy was apparently in response to a National Collegiate Athletic Association (NCAA) Notice of Allegation (NOA) that alleged, among other things, that the institution failed to “monitor social networking activity that visibly illustrated potential amateurism violations within the football program, which delayed the institution’s discovery and compounded the provision of impermissible benefits...” The NCAA investigation was apparently triggered by the “tweets” from a former UNC football star.

Despite the NOA, NCAA reports it does not require its members to monitor the social media activity of its members; however, it does encourage institutions to do so. A few entrepreneurs have seen this as a business opportunity, but some legal experts warn that monitoring student athletes’ accounts could expose the schools to litigation.

There are now a few companies that will monitor the Twitter, Facebook, and other social media accounts of student athletes for a fee. In general, the companies monitor the social media activity by installing monitoring software on student athletes’ electronic devices. More than two dozen institutions, including the University of Louisville, Louisiana State University, and Texas A&M, have signed up with a social media monitoring company. According to *The Washington Post*, monitoring companies have approached several Maryland institutions, although none has signed up with a company yet.

Some legal experts say that monitoring student athletes’ social media activity at public institutions could violate the Fourth Amendment of the U.S. Constitution that protects students from unreasonable searches and seizures. Other legal experts warn if a university athletic department does choose to actively monitor its students’ social media

accounts and fails to recognize or act on information that could have predicted or prevented property damage, personal injury, or death, then the school could be sued for negligence or dereliction of duty. On the other hand, acting too quickly on such information could result in a student filing a claim against the school for reputational damage or lost future financial benefits. Finally, an institution could be accused of discrimination or violating a student's Fourteenth Amendment right of equal protection based on how it determines which students to monitor.

In October 2011, the University of Maryland, College Park issued social media guidelines for its more than 700 student athletes. The guidelines remind student athletes to think before using slurs about race, religion, or sexual orientation; to follow NCAA rules; and to monitor comments for offensive language.

The Maryland State Department of Education (MSDE) reports that it adheres to the Family Educational Rights and Privacy Act, a federal law that protects the privacy of student and family information. In addition, MSDE follows guidelines specified by the Maryland Department of Information Technology's information security policy.

Additional Information

Prior Introductions: A similar bill, SB 434 of 2012, passed the Senate and received a hearing in the House Appropriations Committee, but no further action was taken. Its cross file, HB 746, was withdrawn without a hearing.

Cross File: None.

Information Source(s): Baltimore City Community College, Maryland State Department of Education, Maryland Higher Education Commission, Morgan State University, University System of Maryland, *The Washington Post*, *Carolina March*, *Fox Sports*, Department of Legislative Services

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