

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2879 (Low)
Version: June 21, 2022
Hearing Date: June 28, 2022
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Online content: Students: cyberbullying

DIGEST

This bill requires a social media platform, as defined, to disclose its cyberbullying reporting procedures in its terms of service and to have a mechanism for reporting cyberbullying that is available to individuals whether or not they have an account on the platform.

EXECUTIVE SUMMARY

Social media can connect people—for good or for ill. Social media have opened up new avenues for bullies of all ages to harass their victims; research indicates that cyberbullying is now common among teens and tweens. Cyberbullying presents an especially difficult problem to solve because it so often takes place in online spaces parents, school administrators, and other adults cannot access.

This bill would require social media platforms, as defined, to implement a reporting mechanism for the reporting of cyberbullying and other conduct that violates the platform’s terms of service. The mechanism must be useable by individuals who do not have an account on the platform to ensure that all persons can report problematic content. The bill also requires the social media platform to disclose in its terms of service the procedures for using the reporting mechanism. The bill provides that an intentional failure to comply is punishable by a \$7,500 per day, per violation civil penalty that can be recovered in an action by the Attorney General. The enforcement mechanism does not take effect until September 1, 2023, in order to give social media platforms time to come into compliance with the bill’s requirements.

The author has agreed to accept amendments modifying the definition of “social media platform” and to clarify the enforcement mechanism.

This bill is sponsored by the author and is supported by Outschool and the Santa Clara County Office of Education. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Provides a right to free speech and expression. (U.S. Const., 1st amend; Cal. Const., art 1, § 2.)
- 2) Provides that no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. (47 U.S.C. § 230(c)(1).)
- 3) Provides that no provider or user of an interactive computer service shall be held liable on account of:
 - a) Any action voluntarily taken in good faith to restrict access to or availability of material that users consider to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.
 - b) Any action taken to enable or make available to content providers or others the technical means to restrict access to material described above. (47 U.S.C. § 230(c)(2).)
- 4) Defines “interactive computer service,” for purposes of 2) and 3), as any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions. (47 U.S.C. § 230(f)(2).)

Existing state law:

- 1) Provides for the right of every person to freely speak, write, and publish their sentiments on all subjects, being responsible for the abuse of this right. Existing law further provides that a law may not restrain or abridge liberty of speech or press. (Cal. Const., art. I, § 2(a).)
- 2) Provides that a student may be suspended or expelled from an elementary or secondary school for an act of bullying, which is any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act, and including acts of sexual harassment, hate violence, and threats or harassment, as defined, directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following:

- a) Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property.
 - b) Causing a reasonable pupil to experience a substantially detrimental effect on the pupil's physical or mental health.
 - c) Causing a reasonable pupil to experience substantial interference with the pupil's academic performance.
 - d) Causing a reasonable pupil to experience substantial interference with the pupil's ability to participate in or benefit from the services, activities, or privileges provided by a school. (Ed. Code, § 48900(r)(1).)
- 3) Defines an "electronic act," for purposes of 2), as the creation or transmission originated on or off the schoolsite, by means of an electronic device, including, but not limited to, a telephone, wireless telephone, or other wireless communication device, computer, or pager, of a communication, including, but not limited to, any of the following:
- a) A message, text, sound, video, or image.
 - b) A post on a social network internet website, including posting or creating to a burn page, as defined or creating a credible impersonation of another actual pupil or a false profile for another pupil for the purpose of causing one or more of the effects in 2).
 - c) An act of sexual cyberbullying, as defined, which includes the dissemination or solicitation of a photograph or visual recording by a pupil to another pupil that includes the depiction of a nude, semi-nude, or sexually explicit photograph or video recording of a minor. (Ed. Code, § 48900(r)(2).)
- 4) Provides that a pupil cannot be suspended or expelled for an act of bullying or cyberbullying set forth in 2) unless the act is related to a school activity or school attendance occurring within a school under the jurisdiction of the superintendent of the school district or principal or occurring within any other school district, which includes being on school grounds, going to or coming from school, during the lunch period whether on or off campus, and during, or while going to or coming from, a school-sponsored activity. (Ed. Code, § 48900(s).)

This bill:

- 1) Establishes the Student Cyberbullying Protection Act.
- 2) Defines relevant terms as follows:
 - a) "Cyberbullying" means any severe or pervasive conduct made by an electronic act or acts, as defined in Education Code section 48900(r)(2), committed by a pupil or group of pupils directed toward one or more pupils that has or can reasonably be predicted to have the effect of one or more of (1) placing a reasonable pupil or pupils in fear of harm of their person or property, (2) causing a reasonable pupil to experience a substantially

- detrimental effect on the pupil's physical or mental health, (3) causing a reasonable pupil to experience substantial interference with the pupil's academic performance, or (4) causing a reasonable pupil to experience substantial interference with the pupil's ability to participate in or benefit from the services, activities, or privileges provided by a school.
- b) "Social media platform" is an internet-based service that generated at least \$100,000,000 in gross revenue during the preceding calendar year and allows individuals to do all of the following:
 - i. Construct a public or semipublic profile within a bounded system created by the service.
 - ii. Create a list of other users with whom an individual shares a connection within the system.
 - iii. View and navigate a list of other users' individual connections.
 - c) The definition of "social media platform" in 2)(b) excludes electronic mail and direct messaging between groups of users.
 - d) "Terms of service" means a public-facing policy or set of policies adopted by a social media platform that specified, at least, the user behavior and activities that are permitted on the social media platform and the user behavior and activities that result in the removal, demonetization, deprioritization, or banning of a user or an item of content.
- 3) Requires a social media platform to disclose all cyberbullying reporting procedures in its terms of service.
- 4) Requires a social media platform to establish a mechanism within its internet-based service that allows any individual, whether or not that individual has a profile on the internet-based service, to report cyberbullying or any content that violates the existing terms of service. The reporting mechanism shall allow, but not require, an individual to upload a screenshot of the content that contains cyberbullying or violates the terms of service.
- 5) Provides that a social media platform that fails to do 3) or 4) shall be liable for a civil penalty of up to \$7,500 for each intentional violation per day that the violation was incurred, which may be recovered in a civil action brought in the name of the people of the State of California by the Attorney General. The Attorney General may also seek injunctive relief.
- 6) Provides that 3)-5) do not create a private right of action or limit any existing private right of action.
- 7) Provides that 5) and 6) do not become operative until September 1, 2023.

COMMENTS

1. Author's comment

According to the author:

Cyberbullying is a distinct and extremely damaging form of abuse. Web postings, text messaging, tweets, and other methods are used maliciously to publicly or privately humiliate someone. 1 in 5 tweens (9 to 12 years old) have been cyberbullied, cyberbullied others, or seen cyberbullying. Of note, more than two-third of tweens who had been cyberbullied said it negatively impacted their feelings about themselves. Also one-third said it affected their friendships. Finally, 13.1 percent said it affected their physical health, while 6.5 percent shared it influenced their schoolwork. AB 2879 would require an operator to establish a common sense mechanism that would allow a user (i.e. a parent) to report instances of cyberbullying through the platforms internet website.

2. This bill requires social media platforms to have a mechanism for reporting cyberbullying and other harassing content

Cyberbullying – bullying tactics made through online means – is remarkably prevalent. Studies suggest that around 15 percent of teens and tweens have experienced cyberbullying.¹ Bullying of any kind is associated with negative health effects, but cyberbullying presents unique risks to its victims in light of the nature of social media and the internet in general. Social media platforms can be used to create a false profile for a person, disseminate embarrassing photos or videos, or engage in bullying anonymously in ways that are not available in the real world. Without a mechanism to report cyberbullying, parents and other concerned adults might not have alternative means to protect their children from ongoing online harassment.

This bill requires a social media platform, as defined, to implement a reporting mechanism for the reporting of cyberbullying and other conduct that violates the platform's terms of service. The bill also defines "terms of service" in response to stakeholder concerns. As discussed further below, the author has agreed to amend the definition of "social media platform."

The reporting mechanism required by this bill must include two features: it must be useable by individuals who do not have an account on the platform, and it must permit, but not require, the report to include a screenshot of the problematic post. These measures are designed to make the mechanism as useful as possible for, e.g., a parent

¹ See Basile, et al., *Interpersonal Violence Victimization Among High School Students – Youth Risk Behavior Survey, United States, 2019*, CDC National Center for Injury Prevention and Control, Division of Violence Prevention (Aug. 21, 2020), at p. 1; Patchin & Hinduja, *Tween Cyberbullying in 2020*, Cyberbullying Research Center (2020) at p. 4.

who might not have an account on a particular platform but who wishes to protect their child. The bill also requires the social media platform to disclose in its terms of service the procedures for using the reporting mechanism.

The bill grants the Attorney General the exclusive authority to enforce the bill's requirements, through a civil penalty of \$7,500 per day, per violation, which the Attorney General may recover in a civil action. The Attorney General may also seek injunctive relief as appropriate. The bill specifies that it does not create a private right of action or limit any existing private right of action. Finally, the bill specifies that the provisions relating to enforcement mechanisms do not become operative until September 1, 2023. This delayed enforcement period is intended to give social media platforms the time to develop and implement the required disclosures and mechanisms. As discussed further in Comment 4, the author has agreed to amend the bill to clarify certain elements of the enforcement mechanism.

3. Constitutional issues

State law regulating social media activity generally implicates two discrete constitutional issues: preemption by federal law governing when an "interactive computer service" may be held liable for third-party content (47 U.S.C. § 230, or Section 230) and the First Amendment to the United States Constitution.² As explained in greater detail below, this analysis concludes that this bill does not clearly run afoul of either.

First, with respect to Section 230, the statute states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."³ The statute further provides that an "interactive computer service" – which includes websites such as social media platforms – may engage in its own content good-faith moderation efforts without being treated as the publisher of other statements, and that no state may pass a law contrary to Section 230's strictures.⁴ This bill does not seek to hold a social media platform liable for the content posted by its users. It merely requires a social media platform to provide a mechanism for reporting instances of cyberbullying and online harassment and set forth in its terms of service the means for doing so. Section 230 is thus not plainly implicated by this bill.

With respect to the First Amendment, this bill does not restrict any speech. It does, however, compel a social media platform to speak, specifically, by making a disclosure about the procedures for reporting cyberbullying or other acts that violate the social media platform's terms of service. Because the right to speak encompasses the right not

² See U.S. Const., 1st amend,

³ 47 U.S.C. § 230(c)(1).

⁴ *Id.*, § 230(c), (e).

to speak, this provision does implicate the First Amendment.⁵ Compelled speech in the commercial context, however, is subjected to much less exacting scrutiny than in other arenas; a law concerning commercial speech is generally upheld if the law advances a substantial government interest and directly advances that interest.⁶ Here, the state's interest in protecting children and others from cyberbullying is clearly substantial, and the requirement that social media platforms explain how to report such harmful speech is clearly related to the state's interest in reducing the volume of, and exposure to, harmful social media posts. It therefore does not appear that there is a First Amendment impediment to this bill.

4. Amendments

The author has agreed to amend the bill to add a definition of "content" and modify the bill's current definition of "social media platform." These amendments ensure that this bill's definitions are consistent with the definitions in other bills to regulate social media platforms. The definitions are the product of discussions with stakeholders and collaboration between the staff of this Committee and of the Assembly Privacy and Consumer Protection Committee, and are intended to make clear that legislation regulating social media platforms should not be applied to other online applications or services that happen to share some features of social media, such as the use of usernames or the mere possibility of social interaction on a site dedicated to other functions. The author has also agreed to amend the bill to clarify some of the enforcement mechanisms.

The amendments are as follows, subject to nonsubstantive changes Legislative Counsel may make:

Amendment 1

Add the following definition:

(a) (1) "Content" means statements or comments made by users and media that are created, posted, shared, or otherwise interacted with by users on an internet-based service or application.

(2) "Content" does not include media put online exclusively for the purpose of cloud storage, transmitting documents, or file collaboration.

Amendment 2

Delete the current definition of "social media platform" and add the following:

⁵ E.g., *U.S. v. United Foods, Inc.* (2001) 533 U.S. 405, 410.

⁶ *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) 477 U.S. 556, 566.

(c) "Social media platform" means a public or semipublic internet-based service or application that has users in California and that meets all of the following criteria:

(1) (A) A substantial function of the service or application is to connect users in order to allow users to interact socially with each other within the service or application.

(B) A service or application that provides email or direct messaging services shall not be considered to meet this criterion on the basis of that function alone.

(2) The service or application allows users to do all of the following:

(A) Construct a public or semipublic profile for purposes of signing into and using the service or application.

(B) Populate a list of other users with whom an individual shares a social connection within the system.

(C) Create or post content viewable by other users, including, but not limited to, on message boards, in chat rooms, or through a landing page or main feed that presents the user with content generated by other users.

Amendment 3

Modify the definition of "Terms of service" as follows:

Terms of service" means a public-facing policy or set of policies adopted by a social media platform that specifies, at least, the user behavior and activities that are permitted on the social media platform and the user behavior and activities that **may** result in ~~the removal, demonetization, deprioritization, or banning of a user or an item of content~~ **the social media platform taking action against the user or content.**

Amendment 4

Add the following definition:

(d) "Public or semipublic internet-based service or application" excludes a service or application used to facilitate communication within a business or enterprise among employees or affiliates of the business or enterprise, provided that access to the service or application is restricted to employees or affiliates of the business or enterprise using the service or application.

Amendment 5

Delete all except for subdivision (b) in section 22589.2.

Amendment 6

Add the following:

22589.3 (a) (1) Any social media platform that violates a requirement of this chapter shall be liable for a civil penalty of not more than seven thousand five hundred dollars (\$7,500) for each intentional violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General.

(2) In a successful action brought by the Attorney General to enforce this chapter, the court may order injunctive relief to obtain compliance with this chapter.

(b) For purposes of this section, each day a social media platform is in violation of a requirement of this chapter constitutes a separate violation.

(c) This section shall become operative September 1, 2023.

22589.4 This chapter shall not apply to a social media platform that generates less than \$100,000,000 in gross revenue during the preceding calendar year.

5. Arguments in support

According to the Santa Clara County Office of Education, writing in support:

In order to mitigate the impact of bullying, school administrators need to be able to report incidents to social media companies and request that content be removed or users be sanctioned. However, most social media platforms currently do not allow those without a profile to file complaints or report inappropriate or bullying content directed at another person. These policies have made it very difficult for school administrators to respond or stop cyberbullying.

AB 2879 would require social media operators to establish a mechanism that would allow school administrators to report cases of reported cyberbullying against students without a user account. It is imperative that school administrators have the tools they need as social media becomes increasingly prevalent in the daily lives of students. Left unaddressed, even for a short time frame, cyberbullying can have significant effects on a young person's mental health.

SUPPORT

Outschool
Santa Clara County Office of Education

OPPOSITION

None known⁷

RELATED LEGISLATION

Pending Legislation:

SB 1056 (Umberg, 2022) requires a social media platform, as defined, with 1,000,000 or more monthly users to clearly and conspicuously state whether it has a mechanism for reporting violent posts, as defined; and allows a person who is the target, or who believes they are the target, of a violent post to seek an injunction to have the violent post removed. SB 1056 is pending before the Assembly Judiciary Committee.

SB 1018 (Pan, 2022) requires social medial platforms, as defined, to make annual public disclosures relating to the content on the platform and their content moderation efforts. SB 1018 is pending before the Assembly Judiciary Committee.

AB 2826 (Muratsuchi, 2022) among other things requires social media platforms, as defined, to annually disclose information relating to the content on the platform, the platform's use of algorithms and metrics, and the platform's content moderation efforts. AB 2826 is pending before the Assembly Privacy and Consumer Protection Committee.

AB 2408 (Cunningham, 2022) establishes the Social Media Platform Duty to Children Act, which imposes on an operator of a social media platform a duty not to addict, as defined, child users and would, among other things, prohibit a social media platform from addicting a child user through specified means. AB 2408 is pending before this Committee and is set to be heard on the same day as this bill.

AB 587 (Gabriel, 2021) requires social media companies, as defined, to post their terms of service and report certain information to the Attorney General on a quarterly basis. AB 587 is pending before this Committee and is set to be heard on the same day as this bill.

⁷ CalChamber and TechNet opposed prior versions of the bill but removed their opposition following the June 20, 2022, amendments.

Prior Legislation:

SB 388 (Stern, 2021) would have required a social media platform company, as defined, that, in combination with each subsidiary and affiliate of the service, has 25,000,000 or more unique monthly visitors or users for a majority of the preceding 12 months, to report to the Department of Justice by April 1, 2022, and annually thereafter, certain information relating to its efforts to prevent, mitigate the effects of, and remove potentially harmful content. SB 388 died in the Senate Judiciary Committee.

AB 1114 (Gallagher, 2021) would have required a social media company located in California to develop a policy or mechanism to address content or communications that constitute unprotected speech, including obscenity, incitement of imminent lawless action, and true threats, or that purport to state factual information that is demonstrably false. AB 1114 died in the Assembly Arts, Entertainment, Sports, Tourism, and Internet Media Committee.

AB 2391 (Gallagher, 2020) would have prohibited social media sites from removing user-posted content on the basis of the political affiliation or viewpoint of that content, except where the social media site is, by its terms and conditions, limited to the promotion of only certain viewpoints and values and the removed content conflicts with those viewpoints or values. AB 2931 died in the Assembly Committee on Arts, Entertainment, Sports, Tourism, and Media.

AB 2219 (Chiu, Ch. 491, Stats. 2018) required local educational agencies to develop procedures for preventing acts of bullying, including cyberbullying.

PRIOR VOTES:

Assembly Floor (Ayes 55, Noes 0)

Assembly Judiciary Committee (Ayes 8, Noes 0)

Assembly Privacy and Consumer Protection Committee (Ayes 9, Noes 0)
