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Friend Request Denied: Chapter 619 Prohibits Colleges from Requesting Access to Social Media Accounts

Katherine Pankow

Code Sections Affected

Education Code §§ 99120, 99121, 99122 (new).
SB 1349 (Yee); 2012 STAT. Ch. 619.

It's just a technology; it can be used either benevolently or harmfully. . . . And I'm sure after Facebook it will be the little cameras that we have implanted into the palms of our hands and we'll be debating whether we should get them, and then we'll all get them.

—Jesse Eisenberg, star of *The Social Network*¹

I. INTRODUCTION

Some say that when you accommodate a request for your social media information, it is analogous to allowing a stranger to open your mail.² Picture the stranger pulling a fistful of letters from your mailbox, getting cozy on the wicker furniture that adorns your porch, and swiftly ripping open the envelopes.³ Others might observe that it is more like dropping your house keys into anyone's hands and giving them free rein to inspect your medicine cabinet, poke around in your delicatessen drawer, and maybe even grab a quick snack from your fridge.⁴ Still others might posit that disclosing the user names and passwords to your social media accounts is exactly like being “virtually strip searched”—feel the shame as a college official's cold, emotionless gaze casually drifts over your bare and vulnerable online persona.⁵

1. Catherine Shoard, *Jesse Eisenberg: Privacy Settings Engaged*, GUARDIAN (Oct. 14, 2010), <http://www.guardian.co.uk/film/2010/oct/14/jesse-eisenberg-the-social-network> (on file with the *McGeorge Law Review*).

2. E.g., Doug Gross, *ACLU: Facebook Password Isn't Your Boss' Business*, CNN TECH (Mar. 22, 2012), <http://www.cnn.com/2012/03/22/tech/social-media/facebook-password-employers/index.html> (quoting attorney Catherine Crump) (on file with the *McGeorge Law Review*) (describing an employer's obtaining access to an employee's Facebook account as analogous to the employer opening and reading the employee's personal mail).

3. *Id.*

4. See Shannon McFarland, *Job Seekers Getting Asked for Facebook Passwords*, USA TODAY (Mar. 21, 2012, 10:56 AM), <http://www.usatoday.com/tech/news/story/2012-03-20/job-applicants-facebook/53665606/1> (quoting law professor Orin Kerr) (on file with the *McGeorge Law Review*) (likening an employer's request for an employee's Facebook password to a requirement that the employee turn the keys to their home over to the employer).

5. See Editorial, *State: Vetting Overreach*, PRESS-ENTERPRISE (Apr. 26, 2012), <http://www.pe.com/opinion/editorials-headlines/20120426-state-vetting-overreach.ece> (on file with the *McGeorge Law Review*) (concluding that bosses' efforts to get details about their workers should not become a “virtual strip search”).

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The social media phenomenon is undeniable.⁶ As of October 2012, Facebook boasts one-billion active users.⁷ Estimates indicate that Twitter has around 500 million users⁸ and that roughly seventy-million blogs are floating around in cyberspace.⁹ Social media is an excellent way to stay in touch with friends and family and keep current on all of the latest happenings in the world.¹⁰ However, social media is a blessing and a curse; while it sometimes is an effective form of communication, it can cause social-media users to inadvertently embarrass themselves.¹¹

The word “overshare” won the title of Webster’s 2008 Word of the Year, and it describes situations when social-media users reveal too much personal information, either on purpose or inadvertently.¹² It is “a new word for an old habit made astonishingly easy by modern technology.”¹³ Case in point: Anthony Weiner, the aptly named Democratic Senator from New York who sent lewd photos of himself to a female college student from his Twitter account.¹⁴ The scandal played out in the media for nearly one month and culminated with Senator Weiner’s admission of guilt and his resignation.¹⁵ In light of these often uninhibited displays of personal information, Chapter 619 attempts to provide increased protections to social-media users who attend or are applying to college.¹⁶

6. See Christopher E. Parker, *The Rising Tide of Social Media*, 58 FED. LAWYER 13, 14 (2011) (“The prevalence of social media is quite clear.”).

7. FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited June 7, 2012) (on file with the *McGeorge Law Review*).

8. Shea Bennett, *Twitter on Track for 500 Million Total Users by March, 250 Million Active Users by End of 2012*, ALL TWITTER (Jan. 13, 2012, 6:00 AM), http://www.mediabistro.com/alltwitter/twitter-active-total-users_b17655 (on file with the *McGeorge Law Review*).

9. Parker, *supra* note 6, at 14.

10. See FACEBOOK, *supra* note 7 (stating that Facebook users “stay connected with friends and family, to discover what’s going on in the world, and to share and express what matters to them”).

11. See, e.g., Alex Altman, *Weinergate: Anatomy of a Social Media Scandal*, TIME (May 31, 2011), <http://swampland.time.com/2011/05/31/weinergate-anatomy-of-a-social-media-scandal> (on file with the *McGeorge Law Review*) (describing the “Weinergate” scandal, which was the result of the lewd photo that Anthony Weiner posted on Twitter).

12. *Webster’s New World Word of the Year, Word of the Year 2008: Overshare*, WORDPRESS, <http://wordoftheyear.wordpress.com/2008/12/01/2008-word-of-the-year-overshare> (on file with the *McGeorge Law Review*).

13. *Id.*

14. Raymond Hernandez, *Weiner Resigns in Chaotic Final Scene*, N.Y. TIMES (June 16, 2011), <http://www.nytimes.com/2011/06/17/nyregion/anthony-d-weiner-tells-friends-he-will-resign.html> (on file with the *McGeorge Law Review*).

15. *Id.*

16. See CAL. EDUC. CODE § 99121(a) (enacted by Chapter 619) (prohibiting colleges from requesting a student’s user name and password to their social media accounts).

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II. LEGAL BACKGROUND

California education law charges the governing bodies of each college with establishing rules to govern student conduct.¹⁷ If a student violates the rules that govern conduct, then California law vests the governing boards of public colleges with the power to reprimand the student.¹⁸

The power to discipline students rests with the respective governing boards of the University of California, California State Universities, and California Community Colleges (collectively, governing boards).¹⁹ A governing board may discipline a student if a “campus body” holds a timely hearing and determines that the student “willfully disrupted the orderly operation of the campus.”²⁰ However, the board may impose immediate suspension in special circumstances.²¹

The Education Code charges each of the governing boards with adopting or delegating their authority to adopt rules and regulations that govern student behavior along with corresponding penalties that apply should students violate those rules.²² As an example, the California State University sets forth various campus values along with disciplinary measures for violating those values in the Section 41301 of the California Code of Regulations.²³

Suspension and expulsion are among the tools that the boards have in their arsenal of punishment, but certain restrictions still apply.²⁴ A board cannot suspend a student without good cause, for example.²⁵ Expulsion also requires good cause, but it is reserved for instances when other punishments fail or the student’s presence on campus endangers others.²⁶ While presidents and instructors have the power to suspend, the Education Code does not give them authority to expel.²⁷ The statute reserves that power for the governing board.²⁸

17. *Id.* § 66017 (West 2012).

18. *Id.* § 66300.

19. *Id.* § 66017.

20. *Id.*

21. *Id.* Immediate suspension is appropriate when it “is required in order to protect lives or property and to insure the maintenance of order” *Id.*

22. *Id.* § 66300.

23. CAL. CODE REGS. tit. 5, § 41301 (2012).

24. *See* EDUC. § 76030 (West 2003) (stating that the law grants the governing board the power to expel a student).

25. *Id.* Good cause will usually exist if the student has broken any of the college’s rules. *See id.* § 76033 (presenting examples of student conduct that violate rules for student conduct and constitute good cause). For example, the board would have good cause if a student is under the influence of drugs or sells drugs on campus. *Id.* Good cause may also exist if a student commits an assault, a battery, or some other act of violence on another student. *Id.* Section 76033 lists other instances where good cause might exist, but the list is not exhaustive. *Id.*

26. *Id.* § 76030.

27. *Id.*

28. *Id.*

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The punishment that a private college may render is subject to regulation.²⁹ Private colleges cannot subject students to rules that discipline off-campus conduct protected by the First Amendment of the California Constitution.³⁰ If a private college violates the statute, the aggrieved student may bring a civil action.³¹ An analogous provision applies to public universities.³²

III. CHAPTER 619

Chapter 619 prohibits public and private colleges from requiring or requesting that students disclose their user names and passwords to their social media accounts.³³ Chapter 619 defines social media as “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, email, online services or accounts, or Internet Web site profiles or locations.”³⁴ Although colleges are legally prohibited from requesting the information, if they do so despite the illegality and thereby violate Chapter 619, the college may not impose a penalty of any kind if the student refuses to furnish the information that the college would need to access the student’s social media accounts.³⁵ The new law does not change anything regarding investigations of student misconduct, and it does not prohibit the college from punishing a student for “any lawful reason.”³⁶ The statute protects current and prospective students.³⁷ Additionally, private colleges must now post their social media privacy policies on their websites.³⁸ Finally, Chapter 619 implements a broad catch-all provision that prohibits colleges from asking students to “[d]ivulge any personal social media information.”³⁹

29. *See id.* § 94367 (West 2002 & Supp. 2012) (prohibiting private colleges from punishing student speech in certain instances).

30. *Id.* § 94367(a).

31. *Id.* § 94367(b).

32. *See id.* § 66301 (West 2012) (prohibits the governing boards of California’s public university systems from adopting and enforcing rules that discipline students based on conduct protected by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution).

33. *Id.* § 99121 (enacted by Chapter 619).

34. *Id.* § 99120 (enacted by Chapter 619). Specific examples of user-generated content include blogs, podcasts, instant messages, e-mail, and online accounts. *Id.*

35. *Id.* § 99121(b) (enacted by Chapter 619).

36. *Id.* § 99121(c) (enacted by Chapter 619).

37. *Id.* § 99121(a) (enacted by Chapter 619).

38. *Id.* § 99122 (enacted by Chapter 619). Chapter 619 does not require public colleges to post their social media policies on their websites. *Id.*

39. *Id.* § 99121(a)(3) (enacted by Chapter 619).

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IV. ANALYSIS

The plain language of Chapter 619 clearly prohibits any requests by colleges for the social media passwords of students.⁴⁰ However, the implications of Chapter 619's catch-all provision are less clear.⁴¹ Further, Chapter 619 does not set forth any consequences for colleges that may violate its provisions.⁴² It also does not address the fact that a college may simply conduct an internet search to view students' public social media profiles.⁴³ Chapter 619 might increase privacy protections for college students,⁴⁴ but there was not a widespread problem of California colleges requesting access to students' social media accounts in the first place.⁴⁵

A. *Legal Implications*

Along with prohibiting colleges from requesting a student's user name and password to their social media accounts,⁴⁶ Chapter 619 also sets forth a catch-all provision.⁴⁷ This provision likely exists to prohibit any methods that a college might invent so that they may gain access to a social media account without actually asking for a password.⁴⁸

Chapter 619 bolsters the laws that prohibit discrimination based on a person's protected status by further restricting the ways that a college may discover information like age, race, and sexual orientation, because the college may no longer gain access to a student's private social media account.⁴⁹ However, the new legislation does not address the fact that this information can be obtained without requesting access to a social media account if a student has configured their account settings so that the public may view the account.⁵⁰

40. *Id.* § 99121(a) (enacted by Chapter 619).

41. *Id.* § 99121(a)(3) (enacted by Chapter 619); *see also supra* note 39 and accompanying text.

42. *See id.* §§ 99120–22 (enacted by Chapter 619) (failing to provide any consequences for violations of Chapter 619).

43. *See id.* § 99121(a) (enacted by Chapter 619) (prohibiting colleges from requesting a student's social media password, but not prohibiting the college from conducting an internet search to discover the student's social media accounts).

44. SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 1349, at 2 (Apr. 18, 2012).

45. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1349, at 4 (Aug. 17, 2012).

46. EDUC. § 99121(a) (enacted by Chapter 619).

47. *Id.* § 99121(a)(3) (enacted by Chapter 619).

48. *E.g.*, Pete Thamel, *Tracking Twitter, Raising Red Flags*, N.Y. TIMES (Mar. 30, 2012), <http://www.newyorktimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legal-concerns.html?pagewanted=all> (on file with the *McGeorge Law Review*) (noting that some student athletes were required to give the university access to their social media accounts by downloading monitoring software or adding a coach to their friend list).

49. EDUC. § 99121 (enacted by Chapter 619).

50. *See State: Vetting Overreach, supra* note 5 (explaining that public sections of social media accounts, unlike the private sections of an account that are reserved by the social media user for friends only, can be

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Chapter 619 also imposes limits on a college's investigative power and its authority to reprimand students.⁵¹ It further restricts the college's power to punish students, including with suspension or expulsion, by prohibiting the college from disciplining a student or student groups who refuse to disclose the user names and passwords to their social media accounts.⁵² However, it remains to be seen why a college should avoid violating the newly enacted code sections in Chapter 619, because the new law does not provide for any penalties if a college violates them.⁵³ Thus, it is unclear what kind of deterrent effect Chapter 619 will have.⁵⁴

B. Protecting University Officials from Themselves

By providing added student social media protections, Chapter 619 may help colleges avoid legal battles over discriminatory enrollment practices.⁵⁵ Supporters note that a college could run afoul of laws that prohibit colleges from obtaining an applicant's private information by looking at an applicant's social media account;⁵⁶ moreover, if the practice goes unchecked it could be used as a way around antidiscrimination laws entirely.⁵⁷ As an example, California voters have already decided that colleges may not consider race when admitting students,⁵⁸ but applicants may also "decline to state" their race on their college applications.⁵⁹ In this situation, Chapter 619 would not prevent an admissions officer from simply putting the student's name into a search engine and discovering the student's social media profiles.⁶⁰ If the student's social media

readily examined by anyone with an internet connection). There is reason for college applicants to be wary: admissions officers at their school of choice may be running applicant's names in an internet search to vet their suitability for admission. See Kashmir Hill, *What College Admission Officers Don't Like Seeing on Facebook: Vulgarity, Drinking Photos & 'Illegal Activities'*, FORBES (Oct 12, 2012, 11:11 AM), <http://www.forbes.com/sites/kashmirhill/2012/10/12/what-college-admission-officers-dont-like-seeing-on-facebook-profiles-vulgarity-drinking-photos-and-illegal-activities/> (on file with the *McGeorge Law Review*) (discussing a recent survey by Kaplan, which showed that twenty-seven percent of admissions officers Google applicants when the officers are reviewing their applications).

51. EDUC. § 99121(b)–(c) (enacted by Chapter 619).

52. *Id.*

53. *Id.*

54. *Id.*

55. See SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 1349, at 3 (Apr. 18, 2012) (questioning how reasonable it is to restrict postsecondary educational institutions' access to information concerning student activity).

56. Press Release, Leland Yee, Senator, Cal. State Senate, Committee 'Likes' Yee's Social Media Bill (Apr. 25, 2012) (on file with the *McGeorge Law Review*).

57. *Id.*

58. See Jean Cowden Moore, *Not Stating Race for College Entry a Growing Trend*, VENTURA CNTY. STAR, July 6, 2008, available at 2008 WLNR 12680151 (on file with the *McGeorge Law Review*) (stating that Proposition 209 amended the California Constitution to prohibit California colleges from using a student's race, religion, age, or gender as a factor in admittance); CAL. CONST. of 1879, art. I, § 31 (1996).

59. See Moore, *supra* note 58 (stating that some students who applied to California colleges elected to check "decline to state" in response to the application question that asks applicants to identify their race).

60. See CAL. EDUC. CODE § 99121(a) (enacted by Chapter 619) (prohibiting colleges from requesting a

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profile is public, the admissions officer may be able to discover the applicant's race.⁶¹

C. Privacy in the Age of Overshare

Chapter 619's proponents also tout the law as a mechanism to ensure the privacy of students.⁶² According to Chapter 619's author, the risk that curious colleges will infringe on the rights of students is real,⁶³ and this practice may violate the California Constitution.⁶⁴ Additionally, by accessing a student's social media, a college may simultaneously invade the privacy expectations of friends and family who shared personal information with the student.⁶⁵

While Chapter 619 requires private colleges to post their social media privacy policies on their websites, it does not require public colleges to do so.⁶⁶ This could be because public colleges assert that they do not request social media information from students.⁶⁷ However, it seems just as important that students at public schools be as aware of their rights related to social media privacy as students at private schools, especially because Chapter 619's prohibitions apply equally to both public and private schools.⁶⁸

D. A Missile to Kill a Mouse?

It is unclear how widespread the practice of colleges requesting social media user names and passwords really is.⁶⁹ Although the author of Chapter 619 insists that there is a growing nationwide trend of colleges who request social media passwords, he does not set forth any numerical data to corroborate this

student's social media password, but not prohibiting the colleges from conducting an internet search to discover the student's social media accounts).

61. See *State: Vetting Overreach*, *supra* note 5 (explaining that public sections of social media accounts, unlike the private sections of an account that are reserved by the social media user for friends only, can be readily examined by anyone with an internet connection).

62. SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 1349, at 2 (Apr. 18, 2012).

63. *Id.*

64. CAL. CONST. of 1879, art. I, § 1 (1974); Press Release, Leland Yee, Senator, Cal. State Senate, California Senate Approves Social Media Privacy Act (May 25, 2012) [hereinafter Yee Press Release May 2012] (on file with the *McGeorge Law Review*) ("SB 1349 is a significant step towards securing Californian's constitutional right to privacy, both online and offline, in the workplace and in school" (quoting Jon Fox, Consumer Advocate of CALPIRG)).

65. Yee Press Release May 2012, *supra* note 64.

66. CAL. EDUC. CODE § 99122 (enacted by Chapter 619).

67. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1349, at 4 (Aug. 17, 2012).

68. EDUC. §§ 99121–22 (enacted by Chapter 619).

69. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1349, at 4 (Aug. 17, 2012) (stating that although public postsecondary educational institutions claim they do not search students' media sites, there are some private universities that require student athletes to provide access to their social media accounts).

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assertion.⁷⁰ The state's public colleges claim they do not request social media information from students.⁷¹ According to the author of Chapter 619, "some" private institutions do, but he failed to give any specific examples.⁷² Instead of referring to the practice of requesting social media passwords as a pervasive problem at California colleges, the author couched the importance of the legislation in terms of "risk."⁷³ Thus, there are probably no specific instances that the author can point to.⁷⁴ Since most colleges do not appear to be requesting social media information from students, one may wonder why the legislation was introduced in the first place.⁷⁵ Chances are that Chapter 619 was the legislature's reaction to a perceived, but not necessarily real, problem; the law is partly a byproduct of the media attention surrounding employers who requested access to the social media accounts of job applicants.⁷⁶

V. CONCLUSION

Chapter 619 may at least provide the students who are aware of it with a sense of relief or justice knowing that it is illegal for a college to require its students to disclose their social media information.⁷⁷ Additionally, colleges might now have a better idea of what the law prohibits with respect to social media.⁷⁸ That new knowledge may not matter, though, because Chapter 619 does not impose any penalties on colleges that violate it.⁷⁹ The most certain aspect of Chapter 619 is that it cannot cure a social media user's bad judgment.⁸⁰ The responsibility is still on the social media user to exercise caution with respect to their postings to ensure that they do not get caught up in a scandal of "Weinergate" proportions.⁸¹

70. *Id.*

71. *Id.*

72. *Id.*

73. SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 1349, at 2–3 (Apr. 18, 2012). "[T]he author contends that [social media] has also put employees, job applicants, and students at risk of having their privacy blatantly violated by employers and schools." *Id.* at 3.

74. *See id.*

75. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1349, at 4 (Aug. 17, 2012) (mentioning that public universities claim to not request social media information from their students, while some private universities do).

76. *See* SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF SB 1349, at 3 (Apr. 21, 2012) (noting a news story that discussed the Maryland Department of Public Safety and Correctional Services request to access Robert Collins' Facebook profile).

77. CAL. EDUC. CODE § 99121 (enacted by Chapter 619).

78. *Id.*

79. *Id.*

80. *Id.*

81. Altman, *supra* note 11.