

Date of Hearing: July 15, 2015

ASSEMBLY COMMITTEE ON EDUCATION
Patrick O'Donnell, Chair
SB 271 (Gaines) – As Amended June 30, 2015

[Note: This bill was double referred to the Assembly Committee on Privacy and Consumer and was heard by that committee as it relates to issues under its jurisdiction.]

SENATE VOTE: 37-0

SUBJECT: Unmanned aircraft systems

SUMMARY: Makes it an infraction to knowingly and intentionally operate an unmanned aircraft system (UAS) at or less than 350 feet above a public school or to use a UAS to capture images of a public school campus during school hours without the written permission of the school principal or other school official, as specified. Specifically, **this bill:**

- 1) Prohibits the knowing and intentional operation of a UAS at, or less than 350 feet above the grounds of a public school providing instruction in kindergarten or grades 1 through 12 (K-12 school).
- 2) Prohibits the unauthorized use of a UAS to capture images of K-12 school grounds during school hours.
- 3) Provides exceptions to these prohibitions for:
 - a) A publisher, editor, reporter, or other person connected with or employed by a newspaper, magazine, or other periodical publication, or by a radio or television station, or by a press association or wire service, or any person who has been so connected or employed (news media);
 - b) Law enforcement agencies; and
 - c) UAS users who have written permission from the school principal, the principal's designee, or a higher authority.
- 4) Requires the news media to stop using a UAS over a K-12 school's grounds upon the request of a school principal or his or her designee on the basis that the UAS would disrupt class or other school activities.
- 5) Authorizes the imposition of a warning for the first violation, and a fine of \$200 for each subsequent violation.
- 6) Defines "school hours" to include one hour before through one hour after any school session, extracurricular activities, or events sponsored by the school.
- 7) Defines "unmanned aircraft" to mean an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft.

- 8) Defines "unmanned aircraft system" to mean an unmanned aircraft and associated elements, including, but not limited to, communication links and the components that control the aircraft that are required for the pilot in command to operate safely and efficiently in the national airspace system.

EXISTING LAW:

- 1) Requires, under the Federal Aviation Administration (FAA) Modernization and Reform Act of 2012, the FAA to integrate UAS into the national airspace system by September 30, 2015, and to develop and implement certification requirements for the operation of UAS in the national airspace system by December 31, 2015. (Public Law Number 112-095)
- 2) Prohibits, with exceptions, electronic eavesdropping or recording of private communications by telephone, radio telephone, cellular radio telephone, cable or any other device or in any other manner. Violation can result in penalties of up to \$10,000 and imprisonment in county jail or state prison for up to one year. (Penal Code (PC) Sections 630-638)
- 3) Prohibits looking through a hole or opening or otherwise view, by means of any instrumentality, the interior of bedrooms, bathrooms, and various other areas in which an occupant has a reasonable expectation of privacy, with the intent to invade the privacy of one or more persons inside. (PC 647(j)(1))
- 4) Defines "physical invasion of privacy" as the knowing entry on the land of another without permission, or otherwise committed a trespass, in order to capture an image, sound recording or other impression in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person. (CC 1708.8)
- 5) Defines "constructive invasion of privacy" in terms of attempting to capture, in a manner highly offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of another person engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there was a physical trespass, if the image or recording could not have been achieved without a trespass unless the visual or auditory enhancing device was used. (CC 1708.8 (b))
- 6) Establishes the federal Family Educational Rights and Privacy Act (FERPA), which protects the privacy of student information in educational records.

FISCAL EFFECT: According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, negligible state costs.

COMMENTS:

Purpose of this bill. This bill seeks to protect the privacy of public school students and to protect students from potential injury, harassment, stalking, kidnapping or other harms that could stem from the use of UAS to capture students' images or movements on public school campuses. According to the author, "Currently, California has few laws governing drone use and data capture. As drone usage becomes more common, the potential for misuse and abuse of them will

expand as well. This bill is intended to stay ahead of the technological curve by providing safeguards for our children while they are at school. By prohibiting drone flights over public schools grades K-12 and prohibiting data capture (video footage or photographs, e.g.) of activity on school grounds, this bill would provide an important layer of privacy to our students at a place that should be a sanctuary.”

The many uses of UAS. The FAA defines a UAS as an unmanned aircraft system and all of the associated support equipment, control stations, data links, telemetry, and communications and navigation equipment necessary to operate the unmanned aircraft. A UAS is flown either by a pilot via a ground control system or autonomously through use of an on-board computer. UAS are widely available to the public. Retail UAS devices outfitted with cameras now range from roughly \$300 to \$1,500.

Commercial applications for UAS are growing exponentially. UAS gives the news media economical and environmentally-friendly access to aerial views of traffic, storms, and other events when compared to the current use of helicopters and other manned aircraft. UAS are used in the agricultural industry to observe and measure crops while conserving resources and avoiding the use of heavy equipment. And UAS may be the future delivery system for mail order and Internet companies. In fact, Amazon, the largest Internet-based retailer in the United States, plans to seek FAA approval for “PrimeAir” – a new delivery system that uses small UAS to deliver packages instead of using mail trucks. According to the Amazon.com website, the company has UAS delivery development and testing centers in the United States, the United Kingdom and Israel, but has no immediate plans for roll out.

FAA regulation of UAS. Current FAA rules prohibit UAS use in FAA airspace, but allow commercial users to apply for an exemption from the FAA rules along with an FAA Certificate of Authorization (COA) permitting commercial uses, such as real estate marketing, wedding photography, television, film, mapping, and land surveys. Federal, state and local government agencies, law enforcement, and public colleges and universities can also receive a COA from the FAA authorizing specific uses of UAS for specific time periods.

On February 15, 2015, the FAA released a proposed framework of regulations to allow the use of “small” UAS (under 55 pounds) in national airspace, i.e., above 400 feet. If enacted, the proposed rules would limit flights to non-recreational, daylight uses and would require the UAS pilot to maintain a visual line of sight with the UAS. The FAA has stated it may create a less strict regulatory framework for “micro” UAS (under 4.4 pounds).

Once the FAA has finished promulgating regulations governing the use of UAS, a future court may find that those regulations preempt certain state laws – such as this one, if passed - but this remains uncertain.

The privacy implications of UAS use. Despite the myriad practical applications for UAS, the need for laws limiting certain UAS uses is undisputed in light of the profound effect UAS can have on personal privacy. UAS equipped with cameras, microphones, Internet or wireless connections, and remote controls have enormous potential to invade personal space if used, for example, to hover at low heights over fenced backyards, outside the windows of homes, over schools, and in other public and private spaces. Among other things, UAS can be used to capture

close up images of faces, body parts, or personal property, and could be used to listen to private conversations.

This bill requires written permission from the school principal or higher authority before a UAS can be flown above public school grounds when school is in session or during any extracurricular school activity or event. The prohibition starts one hour before and ends one hour after a school session, activity or event. The penalty for a first offense is a simple warning, and the penalty for a second or subsequent offense is an infraction punishable by a fine of \$200 plus approximately 300% in penalty assessments, so the maximum fine for subsequent violations would be approximately \$800.

FERPA. FERPA protects student information in educational records by placing restrictions on the type of information that can be disclosed to outside individuals, agencies, and organizations without parental consent. Protected information can include photographs, videotapes, and other electronic information, but only if they are contained in an educational record that is maintained by an educational agency. For example, a video taken by a surveillance camera operated by law enforcement is not protected by FERPA. But if that video is later used in a disciplinary action and becomes a part of a student's record, then it would become subject to the requirements of FERPA. Similarly, photos and videos of students that are taken by a camera mounted on a UAS are not protected by FERPA, unless they become part of the educational record maintained by the school.

Exemptions for news media and law enforcement. News organizations and law enforcement agencies are exempt from the bill's prohibition, but a news organization may be asked to stop using a UAS if the UAS would disrupt classes or other school activities. According to the author's office, the news media currently have access to school grounds unless the school requests the news media to leave, and this bill adopts the same standard for the news media's use of UAS.

As written, however, the exemption is overly broad. It exempts any person who is employed or "connected with" a news or media organization even if that person is not engaged in information or news gathering or reporting activity. In addition, it exempts any person who *was* so employed or connected, but is no longer. **Staff recommends** the bill be amended to narrow the exemption to (1) individuals in the media who are "engaged in gathering, receiving or processing information for communication with the public" and (2) persons no longer employed by the media, but who were employed at the time they operated the UAS.

Arguments in support. The KlaasKids Foundation states in support that this bill is "a preemptive strike at those who would use unmanned aircraft (drone) technology to photograph children (K-12) during those hours that they are present at school. By staying ahead of the technology curve, SB 271 will provide assurances to children, teachers, and parents that students privacy will not be compromised by covert photo images secured via unmanned aircraft."

Arguments in opposition. The California Public Defenders Association states in opposition that this bill "seem[s] to criminalize the operation of a remote-controlled airplane of the type used by children for recreation, rather than only the operation of more sophisticated drone aircraft as such are commonly understood in the popular mind."

Related legislation. AB 14 (Waldron) creates the Unmanned Aircraft Systems Task Force, comprised of 10 members. AB 14 failed passage in the Assembly Transportation Committee on a 5-9 vote.

AB 56 (Quirk) regulates the use of unmanned aircraft systems (UAS) by public agencies, including law enforcement. AB 56 passed the Assembly on a 61-12 vote and is will be heard in the Senate Judiciary Committee on July 14, 2015.

AB 856 (Calderon) expands the scope of the cause of action in existing law for physical invasion of privacy by making a person liable for physical invasion of privacy when the person knowingly enters “into the airspace” above the land of another person without permission. AB 856 passed the Assembly on a 78-0 vote and will be heard in the Senate Judiciary Committee on July 14, 2015.

SB 142 (Jackson) extends liability for wrongful occupation of real property and damages to a person who without permission operates a UAS below 350 feet over the real property. SB 142 passed the Senate on a 24-9 vote and is pending in the Assembly Judiciary Committee on July 7, 2015.

SB 170 (Gaines) creates a felony crime for the use of a UAS to deliver contraband into a prison or county jail and creates a misdemeanor crime for the use of UAS over a prison or capture images of a prison. SB 170 passed the Senate on a 40-0 vote and is pending in the Assembly Public Safety Committee on July 7, 2015.

SB 262 (Galgiani) authorizes a law enforcement agency to use a UAS if it complies with the U.S. Constitution and the California Constitution, federal law applicable to the use of UAS by a law enforcement agency, state law applicable to a law enforcement agency’s use of surveillance technology that can be attached to a UAS, and if the local governing board approves the use. SB 262 is sponsored by the California Police Chief’s Association. SB 262 was held in the Senate Judiciary Committee and is a two-year bill.

Prior legislation. AB 1256 (Bloom), Chapter 852, Statutes of 2014, created a cause of action for the capture of a visual image or sound recording of another person with the use of an enhanced visual or audio device liable for "constructive" invasion of privacy, and made it illegal, and subject to civil liability, to attempt to obstruct, intimidate, or otherwise interfere with a person who is attempting to enter or exit a school, medical facility, or lodging, as defined.

AB 2306 (Chau), Chapter 858, Statutes of 2014, expanded a person’s potential liability for constructive invasion of privacy, by removing the limitation that the person use a visual or auditory enhancing device, and instead made the person liable when using any device to engage in the specified unlawful activity.

SB 606 (De León), Chapter 348, Statutes of 2013, increased the penalties for the intentional harassment of a child or ward of another person because of that person's employment and it specified that conduct occurring during the attempt to capture a child's image or voice may constitute harassment if specified conditions occur. SB 15 (Padilla) of 2013 would have imposed a search warrant requirement on law enforcement agency use of a UAS in certain circumstances, would have applied existing civil and criminal law to prohibited activities with devices or instrumentalities affixed to, or contained within a UAS, and would have prohibited

equipping a UAS with a weapon, and would have prohibited using a UAS to invade a person's privacy. SB 15 failed passage in the Assembly Public Safety Committee.

AB 524 (Bass), Chapter 499, Statutes of 2009, amended the "invasion of privacy" statute so that a person who sells, transmits, publishes, or broadcasts an image, recording, or physical impression of someone engaged in a personal or familial activity violates the state's "invasion of privacy" statute. Previously, the statute had only applied to the person who wrongfully obtained the image, recording, or physical impression, but not necessarily the entity that sold or published the image, recording, or impression.

REGISTERED SUPPORT / OPPOSITION:**Support**

California Police Chiefs Association, Inc.
Klass Kids Foundation

Opposition

California Public Defenders Association

Analysis Prepared by: Rick Pratt / ED. / (916) 319-2087