

Date of Hearing: May 9, 2018

ASSEMBLY COMMITTEE ON EDUCATION
Patrick O'Donnell, Chair
AB 1868 (Cunningham) – As Introduced January 12, 2018

SUBJECT: Pupil instruction: sexual health education: sexually suggestive or sexually explicit materials

SUMMARY: Authorizes school districts to provide instruction, as part of comprehensive sexual health education, on the potential risks and consequences of creating and sharing sexually-suggestive or explicit materials through cell phones, social networking sites, computer networks, or other digital media.

EXISTING LAW:

- 1) Requires school districts to provide comprehensive sexual health education, delivered by trained instructors, to all students in grades 7 to 12, at least once in middle school and once in high school (EC 51934).
- 2) Requires that parents or guardians be given the right to excuse their child from all or part of comprehensive sexual health education (EC 51938).
- 3) Prohibits students from being suspended or expelled, except for specified acts, including cyber sexual bullying (EC 48900).
- 4) Defines "bullying" as any severe or pervasive physical or verbal conduct—including communications made in writing or via an electronic act—that is directed by a pupil or group of pupils towards one or more pupils, and can be reasonably predicted to have one or more of the following effects (EC 48900):
 - a) Causing students to fear for themselves or their property.
 - b) Causing substantial detriment to a student's physical or mental health.
 - c) Interfering with a student's academic performance.
 - d) Interfering with a student's ability to participate in or benefit from the services, activities, or privileges provided by a school.
- 5) Specifies that an electronic act shall not constitute pervasive conduct solely on the basis that it has been transmitted on the internet or is currently posted on the internet (EC 48900).
- 6) Defines "electronic act" as the creation or transmission of a communication, originated on or off school property, using an electronic device such as a telephone, wireless telephone, or other wireless communication device, computer, or pager. Examples of electronic acts include, but are not limited to, the following (EC 48900):
 - a) A message, text, sound, or image.

- b) A post on a social networking website, including, but not limited to:
- i) Posting to or creating a “burn page.” A burn page is defined to mean a website created for the purpose of having one or more of the effects specified under the definition of bullying.
 - ii) Creating a credible impersonation of another pupil for the purpose of having one or more of the effects specified under the definition of bullying. “Credible impersonation” is defined as intentionally impersonating a pupil, without consent, for the purpose of bullying the pupil.
 - iii) Creating a “false profile” for the purpose of having one or more of the effects specified under the definition of bullying. A false profile is defined as a profile of a fictitious pupil or a profile using the likeness or attributes of an actual pupil, other than the pupil who created the false profile.
- 7) Defines cyber sexual bullying as the use of electronic means to disseminate a photograph or visual recording that contains a nude, semi-nude, or sexually explicit depiction of a visually-identifiable minor (EC 48900).
- 8) Requires the CDE to display on its website current, periodically updated information on curricula and other resources that address cyber sexual bullying (EC 234.2).
- 9) Requires the CDE to annually inform school districts of information about cyber sexual bullying, located on its website (EC 234.2).
- 10) Encourages school districts to inform pupils about the CDE website information on cyber sexual bullying (EC 234.2).
- 11) Requires the CDE to develop an online training module to help school staff, school administrators, parents, pupils, and community members understand the dynamics of, and how to address, bullying and cyberbullying (EC 32283.5).
- 12) Prohibits the suspension of a pupil or an expulsion, unless it has been determined that the pupil has committed certain acts, including engaging in an act of bullying or cyberbullying (EC 48900).
- 13) States that every person sending or receiving sexually-explicit images of a minor constitutes child pornography, regardless of the age of the sender or recipient, and specifies punishments that may include fines, imprisonment, or both (Penal Code 288.2, Penal Code 311-311.3).

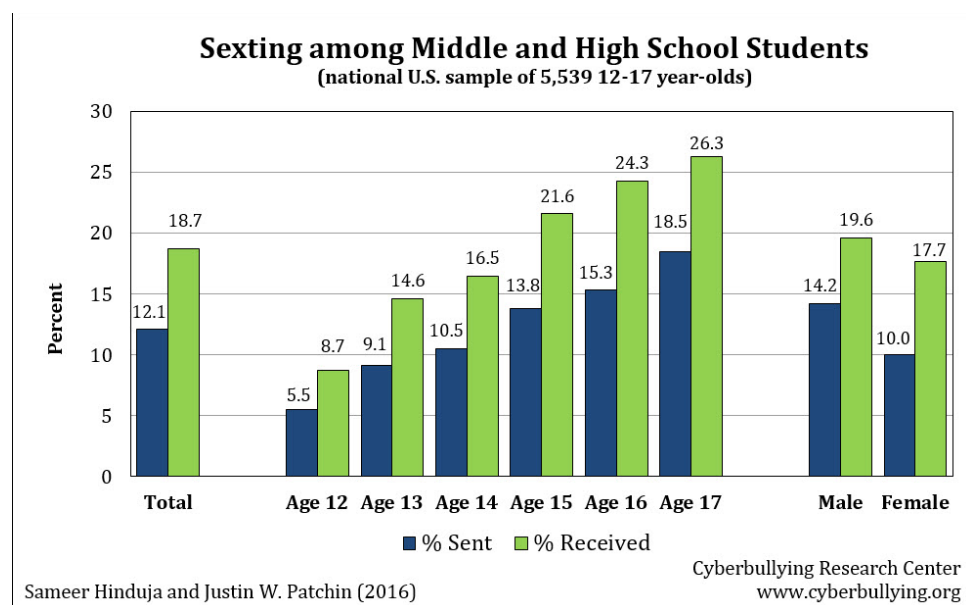
FISCAL EFFECT: This bill has been keyed non-fiscal by the Office of Legislative Counsel.

COMMENTS:

Need for the bill. The author’s office states, “Current law allows for sexual cyber bullying to be an offense worthy of school suspension or other consequences. This bill educates students before it gets to this step and allows schools the option of teaching students about the legal, physical and

emotional dangers of sending sexually explicit messages. AB 1868 accomplishes this by authorizing a school district to provide optional instruction, as part of comprehensive sexual health education and HIV prevention education, on the potential risks and consequences of creating and sharing sexually suggestive or sexually explicit materials through cellular telephones, social networking websites, computer networks, or other digital media.”

Criminal charges against minors for sexting. The Cyberbullying Research Center, established by researchers from Florida Atlantic University and the University of Wisconsin-Eau Claire, defines “sexting” as the “sending or receiving of sexually-explicit or sexually-suggestive images or video via a cell phone.” The center reported in 2016 that the prevalence of sexting increases with student age (see chart below).



In a 2014 book entitled *Adolescent Sexual Behavior in the Digital Age: Considerations for Clinicians, Legal Professionals, and Educators*, researchers state that electronic communications with sexually-themed content are difficult to interpret under existing child pornography laws, when the

communicators are students. For example, when minors take nude photos of themselves and text them to their friends, does this qualify as creation and distribution of child pornography? Should minors receiving such texts from their friends be charged for having possession of child pornography?

The researchers also state that “lawmakers across the United States are struggling to play legislative catch-up with a teen trend that challenges the legislative intent underlying child pornography laws. Those laws originally were designed to protect minors from adults, not to prosecute them for what some see as youthful indiscretions...” Although some states have addressed the issue by adopting new laws that “substantially lessen the punishment for minors who consensually sext with other minors,” individuals in California, regardless of their age, can still be charged under child pornography laws for creating, sending, or receiving sexually-explicit images of a minor. As a result, the authors state that minors have been charged with either misdemeanors or felonies and forced to register as sex offenders. The Cyberbullying Research Center states that “youth should not be prosecuted using laws that were intended to protect them from adults” and that teenagers who unwittingly violate child pornography laws “should not be placed on sexual offender registries, as that will largely ruin their life potential.”

According to the California Department of Justice, convicted sex offenders in California are added to a tiered registry, in which high-risk offenders are required to register for life, while low-

risk offenders can petition to be removed after either 10 or 20 years if they do not reoffend. Sex offenders in California must regularly update their residency and contact information with local law enforcement.

Tragic outcomes associated with cyber sexual bullying. Current law defines “cyber sexual bullying” as the dissemination of photographs or visual recordings containing nude, semi-nude, or sexually-explicit depictions of minors that negatively impact a student (e.g., by impairing academic performance, causing fear, etc.). It also identifies cyber sexual bullying as an offense for which students can be expelled or suspended.

According to the Cyberbullying Research Center, sexually-explicit images that are initially sent between romantic partners can find their way to unintended recipients via social networking sites, email, instant messaging programs, and video chats. In some cases, these actions have led to tragic outcomes. For example, the Cyberbullying Research Center describes a case in which a 13 year old girl sent a revealing “selfie” photo to a peer, who distributed it to other students, prompting weeks of bullying that ultimately led her to commit suicide.

Inclusion of cyber bullying and safe internet use in the revised health curriculum framework. In 2008, the Instructional Quality Commission (IQC) began the process of revising the Health Education Framework to reflect current health education statutes, as well as the state’s health content standards, adopted by the State Board of Education (SBE) in 2008. However, AB 4 X2 (Evans) Chapter 2, Statutes of 2009 halted all work on instructional materials adoptions and framework revisions until the 2013-14 school year, a response to the state’s fiscal emergency. That suspension was later extended until the 2015-16 school year by SB 70 (Committee on Budget), Chapter 7, Statutes of 2011.

The health curriculum framework revision has since been reinitiated, and final adoption by SBE is scheduled for May 2019. In April 2018, the CDE released on its website a draft of the Health Education Framework. The topics required by this bill are already integrated throughout the framework. For example, the framework states that as early as third grade, students may begin using online resources for school assignments and recreational purposes, making it necessary that they “learn the school rules for Internet use” and understand that “the rules are meant to help protect [them] from online dangers and also to prevent cyber bullying.” The framework also encourages teachers to discuss potentially dangerous situations that third graders may encounter online. For grades 4-6, the framework introduces a discussion of unsafe uses of mobile devices and the internet, including sexting and the sharing of provocative photos. Students in these grades also “learn about the consequences of being a cyber bully and sexting,” and “sending sexually suggestive photos through social networks.” For grades 7-8, the framework includes an activity in which students “discuss the dangers of the Internet and sharing sexually explicit photographs,” and “recognize that once they send or allow someone else to take an explicit photograph, they no longer have control of who sees it or where it may be shared...” For grades 9-12, the framework includes a suggested activity in which students learn about the “possible negative, legal, and lasting consequences of sexting by researching and analyzing current events related to sexting and then discussing the outcomes.”

Status of comprehensive sexual health mandate implementation. While the mandate to provide comprehensive sexual health education has been effective since January 1, 2016, instructional materials aligned to the content required by law will not be adopted until well after the Health Curriculum Framework is completed and adopted in May 2019. In the interim, schools are

required by law to provide this instruction, and school districts may look to the CDE for guidance on how to meet the requirements of the law.

Opposing arguments. The American Civil Liberties Union states, “AB 1868 injects unnecessary confusion into [comprehensive sexual health education] because the bill adds permissive instruction to a program that is otherwise limited to mandatory instruction. Furthermore, the terms “sexually suggestive” and “sexually explicit” are vague and open to interpretation that may not align with the health-positive framework of the California Healthy Youth Act (CHYA). Moreover, this vague addition to the curriculum is superfluous because under CHYA, young people already receive information about healthy decision-making.”

Related legislation. AB 1861 (Rodriguez) of this Session requires that students receive instruction on how social media and mobile device applications are used in human trafficking, by adding it to the content included in comprehensive sexual health education.

AB 2601 (Weber) of this Session requires charter schools to ensure that all pupils in 7th through 12th grade receive comprehensive sexual health education and HIV prevention education.

SB 947 (Jackson) of this Session requires the Superintendent of Public Instruction (SPI), on or before December 1, 2019, and in consultation with an advisory committee, to identify best practices and recommendations for instruction in digital citizenship, internet safety, and media literacy.

SB 830 (Dodd) of this Session requires the IQC to develop, and the SBE to adopt, modify, or revise, a model curriculum in media literacy.

Prior legislation. SB 203 (Jackson) of the 2017-18 Session would have required the CDE, on or before December 1, 2018 and in consultation with the SPI and an advisory committee, to identify best practices and recommendations for instruction in digital citizenship, Internet safety, and media literacy, and to report to the appropriate fiscal and policy committees of the Legislature on strategies to implement the best practices and recommendations statewide. This bill died in the Senate Appropriations Committee.

SB 135 (Dodd) of the 2017-18 Session would have required the CDE to identify, in consultation with the SPI and an advisory committee, best practices and recommendations for instruction in digital citizenship, internet safety, and media literacy, and to report to the appropriate fiscal and policy committees of the Legislature on strategies to implement the best practices and recommendations statewide, on or before December 1, 2018. This bill died in the Assembly Appropriations Committee.

AB 2536, Chapter 419, Statutes of 2016 added “cyber sexual bullying” as a type of bullying, by means of an electronic act, for which a student could be suspended or expelled from school. This bill also required the CDE to provide, on its internet website, information on the dangers and consequences of cyber sexual bullying to school districts and encouraged school districts to inform students of this information. The introduced, but not the chaptered, version of the bill would have required comprehensive sexual health education to include information on sexting, including the following: the legal consequences and penalties for sharing sexually suggestive or explicit materials; the non-legal consequences of sharing sexually suggestive or explicit materials, including impacts on relationships, loss of educational and employment opportunities,

and removal from school programs and extracurricular activities; the potential long-term consequences of sharing sexually suggestive or explicit materials over the internet; and the connection between cyber bullying and sharing sexually suggestive or explicit materials.

AB 2212, Chapter 412, Statutes of 2016 added video to the definition of “an act of bullying by means of an electronic act.”

AB 329 (Weber), Chapter 398, Statutes of 2015 required schools to provide comprehensive sexual health education in grades 7-12, and modified the required components of sexual health education and HIV/AIDS prevention education. This bill also renamed the California Comprehensive Sexual Health and HIV/AIDS Prevention Education Act the California Healthy Youth Act.

SB 1435 (Jackson), Chapter 633, Statutes of 2016 required the Instructional Quality Commission to consider including comprehensive information for kindergarten and grades 1 to 8, inclusive, on the development of healthy relationships in the health curriculum framework revision that occurred after January 1, 2017.

SB 919 (Lieu) of the 2011-12 Session would have defined sexting, required a School/Law Enforcement Partnership to have the purpose of reducing sexting, and added sexting directed toward a pupil or school personnel as an offense for which a student may be suspended or expelled. This bill died in the Assembly Appropriations Committee.

AB 1043 (Torres) of the 2011-12 Session would have specified that any minor engaged in "sexting" images of himself or herself or another minor may be adjudicated a ward of the juvenile court. This bill died in the Assembly Committee on Public Safety.

AB 321 (Hernández) of the 2011-12 Session would have authorized a school district to provide instruction on the potential risks and consequences of creating and sharing sexually suggestive or explicit materials through cellular telephones, social networking websites, computer networks, or other digital media. This bill died in the Assembly Appropriations Committee.

AB 1993 (Fox), Chapter 418, Statutes of 2014 required the CDE to develop an online training module on bullying and cyberbullying.

REGISTERED SUPPORT / OPPOSITION:

Support

AIDS Healthcare Foundation

California Association for Health, Physical Education, Recreation and Dance

California Police Chiefs Association

California State PTA

Crime Victims United of California

National Rural Education Association

Opposition

American Civil Liberties Union

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