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Testimony for the House Appropriations Committee
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HB 1332 – Educational Institutions – Personal Electronic Account – Privacy Protection

SUPPORT

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The ACLU of Maryland urges a favorable report on HB 1332. This bill would prohibit public and nonpublic institutions of higher education or postsecondary education from requiring a student or applicant for admission to provide the institution with access to the student or applicant's personal internet or electronic accounts.

Last year the General Assembly led the way in providing privacy protections to employees, by ensuring that employers could not require employee's to turn over their social media passwords. Three other states have now enacted that law, with many others following. HB 1332 is the next step in privacy protection. To date, four other states have enacted a student social media privacy law, with nine others having introduced such bills this year.[1]

Many universities have started requiring student athletes to provide them with access to the private content on their social media accounts.[2] Sometimes schools will require that a student "friend" them on Facebook or allow them to follow them on their private Twitter account. Other times this is done by requiring students to install social media spying software onto their personal electronic devices.[3] An article in the Washington Post reported the following:

> Schools are essentially paying for a software program that scans athletes' Tweets, Facebook posts and other social media activity 24 hours a day. The program zeroes in on keywords (popular ones include expletives, brands of alcohol, drinking games, opponents' names and common misspellings of racial profanities) and sends each athlete and coach or administrator an e-mail alert when a questionable post has been published. Coaches or administrators can log in with a username and password to see a list of student, and each student's "threat level" — green for low, orange for medium and red for high — and a link or screen shot of the comment that set off red flags.

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[1] http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords-2013.aspx

[2] *See, e.g.* http://www.nbcphiladelphia.com/news/tech/Villanova-Athletes-Facebook-Restrictions-138004083.html.

[3] *See http://www.sportsbusinessdaily.com/Daily/Issues/2011/07/26/Media/Social-Media.aspx*; http://www.udiligence.com; http://varsitymonitor.com.

While students must agree to the terms of use and install applications allowing these companies to do so, if their school requires them to agree to these terms as a condition for playing on a particular team, it is hardly done of free will or freely consented to.

Requiring a student to place an app on their device, or to turn over their social media password, raises a number of concerning legal questions. First and foremost, this may be a violation of the 4th Amendment as an unreasonable search and seizure since students have a reasonable expectation of privacy if they have set their settings such that most information is to be kept private and only available to those they wish to have access.[4]

In addition, monitoring the social media private accounts of students will likely lead to censorship of these accounts and this could violate the students' First Amendment rights to freedom of speech.[5]

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A further problem is that to date it appears that only high profile male teams are required to provide this information. Accordingly, such a policy may violate Title IX due to gender discrimination.

Lastly, schools that require their student athletes or any students or applicants to give them access to their personal social media accounts may be subjecting themselves to significant legal liability. By taking on the responsibility of watching over the accounts, the school may be assuming legal liability for student activities reported on the sites. For example, if a student reports criminal activity or intent to commit such activity will the school be liable if they don't catch it and report it?

For the foregoing reasons, we urge you to favorably report HB 1332.

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[4] See e.g. *R.S. v. Minnewaska Area School Dist*., ---F.Supp.2d – 2012 WL 3870868 (D. Minn., Sept. 6, 2012)(student's claim of Fourth Amendment violation when school required her to turn over Facebook password enough to survive motion to dismiss).

[5] *Id*, (court also held First Amendment's protections applied); *Murakowski v. University of Delaware*, 575. F.Supp. 2d 571 (D. Del. 2008)(student's online posting protected by First Amendment); *J.C. v. Beverly Hills Unified School Dist.*, 711 F.Supp.2d 1094 (C.D. Cal. 2010)(discipline of student over video posted online violated First Amendment). *See also Bauer v. Sampson*, 261 F.3d 775 (9th Cir. 2001)(university cannot punish professor for what they state in their publications).