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FISCAL IMPACT REPORT

SPONSOR <u>Munoz/Moores/Hemphill</u>	LAST UPDATED <u>2/23/2023</u> ORIGINAL DATE <u>2/21/2023</u>
SHORT TITLE <u>Age Appropriate Design Code Act</u>	BILL NUMBER <u>Senate Bill 319</u>
	ANALYST <u>Gray</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	No fiscal impact	No fiscal impact	\$90.0	\$90.0	Recurring	NMAG operating budget

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent analysis of this legislation.

Sources of Information

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)
 Children, Youth & Families Department (CYFD)
 Department of Information Technology (DoIT)
 Commission of Public Records (SRCA)
 Human Services Department (HSD)
 Department of Health (DOH)

SUMMARY

Synopsis of Senate Bill 319

Senate Bill 319 (SB319) enacts the New Mexico Age-Appropriate Design Code Act, which would require businesses that create goods or offer services likely to be accessed by children under the age of 18 to comply with standards that consider the best interests of the child. The standards take a variety of forms and are summarized below.

Data Protection Impact Assessment. For any service likely to be accessed by a child, the business must undertake a data protection impact assessment (DIA) and maintain documentation of this assessment as long as the service is likely to be accessed by a child. The DIA is subject to disclosure to the New Mexico Attorney General (NMAG). The DIA must assess whether:

- The design of the product, service or feature could harm children including by exposing children to harmful, or potentially harmful, content;
- The design could lead to children experiencing or being targeted by harmful, or potentially harmful, contacts;

- The design could permit children to witness, participate in or be subject to harmful, or potentially harmful, conduct;
- The design could allow children to be a party to or exploited by a harmful, or potentially harmful, contract;
- Algorithms or targeted advertising systems used could harm children; and
- The system uses design features to increase the use of the online product by children, including automatically playing media, rewarding for time spent, and notifications.

SB319 also provides the following requirements as they relate to applicable businesses:

- **Age of consumers.** SB319 requires businesses to establish the age of consumers with a level of certainty commensurate with the risks that arise from the data management practices, or apply the data standards that apply to children to all consumers.
- **Privacy.** The bill requires businesses to maintain the highest level of privacy possible for children by default.
- **Language.** The bill requires businesses to provide privacy information, terms of service, policies, and community standards concisely, prominently, and using language suitable for the children likely to access that service.
- **Tracking.** The bill requires businesses that provide a service where a parent or guardian can monitor the child’s online activity to provide an obvious signal to the child when they are being monitored or tracked.
- **Best interests.** The bill requires businesses to consider the best interest of children likely to access the service when designing, developing, and providing their service, and, when in conflict with commercial interests, design, develop, and provide the service in a manner that prioritizes the privacy, safety, and well-being of children over commercial interests.
- **Other.** The bill requires businesses to uphold published terms and standards and provide tools to help children exercise their privacy rights and report concerns.

SB319 prohibits, beginning July 1, 2024, applicable businesses from taking any of the following actions, unless certain conditions are met:

- Using the personal information of a child in a way the business knows or has reason to know is materially detrimental to the physical health, mental health, or well-being of a child;
- Profiling a child by default;
- Collecting, selling, sharing or retaining any personal information that is not necessary to provide a service with which a child is actively and knowingly engaged;
- Using the personal information of a child for any reason other than the reason or reasons for which that personal information was collected;
- Collecting, selling, or sharing any precise geolocation information of a child by default or collecting geolocation information without providing an obvious sign to the child for the duration of that collection;
- Using dark patterns or other techniques to lead or encourage children to provide personal information beyond what is reasonably expected to provide that service, to forego privacy protections, or to otherwise take an action that the service provider knows or has reason to know is materially detrimental to the child’s physical health, mental health, or well-being; and
- Using any personal information collected to estimate age or age range for any other purpose or to retain that personal information longer than necessary to estimate age,

proportionate to the risks and data practice of the online service, product or feature.

Under SB319, any business that violates the Age-Appropriate Design Code Act is subject to injunctive relief and a civil penalty up to \$2,500 per affected child for each negligent violation or up to \$7,500 per affected child for each intentional violation. Enforcement shall be brought by NMAG after providing written notice and an opportunity to fix the violations within 90 days.

The effective date of this bill is July 1, 2024.

FISCAL IMPLICATIONS

As noted in significant issues, litigation regarding whether SB319 is allowable under the First Amendment is likely. This will result in increased costs to NMAG.

NMAG notes that the office will have increased operating budget costs for enforcement. This analysis assumes these costs to be equivalent to an additional one law enforcement officer FTE at a cost of \$90 thousand annually beginning in FY25.

SIGNIFICANT ISSUES

Legal Concerns. SB319 appears to be based on a similar law passed in California in September 2022, which also goes into effect on July 1, 2024. In December, a tech industry trade group, NetChoice, whose members include Amazon, AOL, Google, Meta, and TikTok, filed a federal lawsuit to enjoin the California law on the basis the law violates the First Amendment, is unconstitutional, vague, and is preempted by the federal Child Online Privacy Protection Act (COPPA).

An initial analysis from the NMAG noted significant issues related to SB319 with respect to First Amendment protections of free speech, and the agency analysis provided a substantive analysis of the potential First Amendment considerations. A subsequent analysis—sent to LFC on February 23, 2023—removes most of the substantive analysis of the First Amendment considerations. NMAG reports the original analysis contained mistakes.

The NMAG’s revision means no agency provided any substantive discussions of the bill’s First Amendment implications. Accordingly, this analysis utilizes other legal resources to provide a transparent analysis of the issue.

Freedom of Speech. According to the Congressional Research Service (CRS), the “First Amendment’s Free Speech Clause prohibits the government from suppressing or requiring adherence to particular ideas or messages.” The U.S. Supreme Court has recognized that law restricting or compelling speech based on its content have the potential to expel certain ideas or viewpoints from public debate and have typically regarded such “content-based laws” as “presumptively unconstitutional” (*Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

To determine whether a content-based law passes constitutional muster, courts generally apply a legal standard called strict scrutiny, under which the government must show the law is the “least restrictive means” of advancing a “compelling” governmental interest. (*Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989)). CRS writes the government “rarely prevails under strict

scrutiny” and that lawmakers may consider “whether a contemplated regulation of speech may be content based and whether an exception to strict scrutiny might apply.”

The Supreme Court has recognized a legitimate government interest in protecting children from potentially harmful materials (*Ginsberg v. State of N.Y.*, 390 U.S. 629, 639 (1968)). But the court has also invalidated law regulating speech on the internet even where the stated purpose was the protection of children. For example, in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) the court unanimously held that the federal Communications Decency Act (CDA) violated the First Amendment because it amounted to a content-based blanket restriction of free speech.

The Supreme Court wrote:

The CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. Although the Government has an interest in protecting children from potentially harmful materials, see, e. g., *Ginsberg*, 390 U. S., at 639, the CDA pursues that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive, see, e. g., *Sable*, 492 U. S., at 126. Its breadth is wholly unprecedented. The CDA's burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the Act's legitimate purposes.

Like the CDA in *Reno*, SB319 appears to suppress a large amount of speech that adults have the right to receive and address to one another. SB319 purports to limit its regulations to online products and services that are “likely to be accessed by a child,” the definition of that phrase includes products and services which, “based on competent and reliable evidence regarding audience composition, [is] routinely accessed by a significant number of children.” By a lay interpretation of that definition, SB319 would apply to websites where the majority of users are adults, so long as the minority of users who are children is “significant.”

Conflict with Federal Law. The lawsuit from NetChoice to enjoin the California law also notes that California’s Age Appropriate Design Code (CAADCA) is preempted by federal law, including the Children’s Online Privacy Protection Act (COPPA). Notably, no agency analysis—either original or revised—commented on the preemption issues that may be raised by SB319. As noted above, this analysis relies on other sources of legal information to draw comparisons for the reader.

NetChoice argues CAADCA is preempted by both COPPA and Section 230 of the Communications Decency Act (CDA). COPPA preempts states from imposing child-focused privacy requirements that are inconsistent with it, and Section 230 of the CDA grants immunity from liability to service providers for publishing third-party content. Section 230 immunity is currently being heard before the U.S. Supreme Court in *Gonzalez v. Google LLC*, 21-1333.

In November 2022, many nonprofits, including the American Civil Liberties Union, wrote to Congress expressing concern about a similar federal act that contemplates obligating online service providers to mitigate heightened risks that may arise from using online services, similar to the CAADCA. The letter authors assert the act was both unconstitutional and that it “would harm young people by restricting their access to certain online content.”

SB319 may raise similar issues raised by those letter writers.

Health Concerns. Analysis from the Human Services Department (HSD) notes that using online services are known to adversely affect children’s mental health. According to an analysis in *Frontiers in Human Dynamics*, too much screen time could cause mental health burdens like

- Anxiety,
- Depression,
- Attention deficit hyperactivity disorder,
- Concentration problems,
- Obsessive behaviors,
- Irritability,
- Isolation,
- Sleep problems,
- Screen fatigue/social media fatigue.

The Department of Health (DOH) notes these online behavior impact New Mexico children. The analysis states:

In 2021, among New Mexico high school students; 72.3 percent spent three or more hours a day on an average school day in front of a screen, and 38.7 percent spent five or more hours a day on an average school day in front of a screen. In 2021, NM high school students who spent three or more hours a day in front of a screen were 31 percent less likely to get seven or more hours of sleep a night than students who spent less than three hours a day in front of a screen, 45 percent more likely to experience persistent sadness or hopelessness than students who spent less than three hours a day in front of a screen, 65 percent more likely to experience frequent mental distress than students who spent less than three hours a day in front of a screen, and 42 percent more likely to have attempted suicide in the past year than students who spent less than three hours a day in front of a screen.

The Surgeon General’s Youth Mental Health Advisory writes that online platforms take up an increasing share of people’s time, a trend exacerbated by the pandemic. “During the pandemic, the time teenagers spent in front of screens for activities not related to school more than doubled, from 3.8 to 7.7 hours per day.... Most importantly, technology companies must step up and take responsibility for creating a safe digital environment for children and youth. Today, most companies are not transparent about the impact of their products, which prevents parents and young people from making informed decisions and researchers from identifying problems and solutions. At a minimum, the public and researchers deserve much more transparency.”

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