

Date of Hearing: January 10, 2024

ASSEMBLY COMMITTEE ON EDUCATION
Al Muratsuchi, Chair
AB 801 (Joe Patterson) – As Amended March 23, 2023

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

SUBJECT: Student privacy: online personal information

SUMMARY: Requires an operator of an internet website, online service, online application, or mobile application to delete a student’s information, as defined, at the request of the student’s parent or guardian, if the student is no longer attending a school or school district. Specifically, **this bill:**

- 1) Requires an operator, pursuant to the Student Online Personal Information Protection Act (SOPIPA), to delete a student’s California Consumer Privacy Act (CCPA)-excluded covered information if a student over 16 years of age, or the student’s parent or guardian in the case of a student who is under 16 years of age, requests an operator to delete the covered information under the operator’s control if the student is no longer attending the school or district. Requires, before deleting any information the operator to require documentation that the student no longer attends the school or district.
- 2) States that “covered information” does not include official records, files, and data directly related to a student and maintained by the school or local educational agency (LEA), including, but not limited to, records encompassing all the material kept in the student’s cumulative folder, including, but not limited to, general identifying data, records of attendance and of academic work completed, records of achievement and results of evaluative tests, health data, disciplinary status, test protocols, and individualized education programs (IEPs).
- 3) Defines “California Consumer Privacy Act-excluded covered information” or “CCPA-excluded covered information” to mean covered information that is not subject to the California Consumer Privacy Act of 2018.
- 4) Requires an operator, pursuant to the Early Learning Personal Information Protection Act (ELPIPA), to delete a student’s CCPA-excluded covered information if a student over 16 years of age, or the student’s parent or guardian in the case of a student who is under 16 years of age, requests an operator to delete the covered information under the operator’s control if the student is no longer attending the preschool, prekindergarten, or district. Requires, before deleting any information, the operator to require documentation that the student no longer attends the preschool, prekindergarten, or district.

EXISTING LAW:

- 1) Establishes the CCPA and provides various rights to consumers pursuant to the Act. Subject to various general exemptions, a consumer has, among other things: the right to know what personal information a business collects about consumers, including the categories of third parties with whom the business shares personal information; the right to know what personal

information a business sells about consumers; and the right to delete information that a business has collected from the consumer. (Civil Code (CC) 1798.100 et seq.)

- 2) Defines “personal information” as information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. Personal information includes such information as: name, alias, postal address, unique personal identifier, email address, social security number, or other identifier, and internet activity information, including browsing history and search history. (20 U.S.C. 1232g; 34 C.F.R. Part 99) (CC 1798.140(v))
- 3) Establishes the California Privacy Protection Agency (CPPA), vested with full administrative power, authority, and jurisdiction to implement and enforce the CCPA. The agency is governed by a five-member board, with the chairperson and one member appointed by the Governor, and the three remaining members are appointed by the Attorney General, the Senate Rules Committee, and the Speaker of the Assembly. (CC 1798.199.10)
- 4) Prohibits a business from selling or sharing the personal information of consumers if the business has actual knowledge that the consumer is less than 16 years of age, unless the consumer, in the case of those who are between 13 and 16 years of age, or the consumer's parent or guardian, in the case of consumers who are less than 13 years of age, has affirmatively authorized the sale or sharing of the information. (CC 1798.120)
- 5) Establishes the SOPIPA, which prohibits an operator of a website, online service, online application, or mobile application from knowingly engaging in targeted advertising to students or their parents or legal guardians using covered information, as defined, amassing a profile of a K-12 student, selling a student's information, or disclosing covered information, as provided. (Business and Professional Code (BPC) 22584-85)
- 6) Establishes the ELPIPA, which prohibits an operator of an Internet website, online service, online application, or mobile application with actual knowledge that the site, service, or application is used primarily for preschool or prekindergarten purposes and was designed and marketed for preschool or prekindergarten purposes from knowingly engaging in targeted advertising to students or their parents or legal guardians using covered information, as defined, amassing a profile of a student, selling a student's information, or disclosing covered information, as provided. (BPC 22586-22587)
- 7) Defines an “operator” to mean the operator of an internet web site, online service, online application, or mobile application with actual knowledge that the site, service, or application is used primarily for K–12 school purposes and was designed and marketed for K–12 school purposes. (BPC 22584(a))
- 8) Defines “covered information” as personally identifiable information or materials, in any media or format that meets any of the following:
 - a) It is created or provided by a student, or the student's parent or legal guardian, to an operator in the course of the student's, parents', or legal guardian's use of the operator's site, service, or application for the school's purposes.

- b) It is created or provided by an employee or agent of the preschool, prekindergarten, school district, LEA, or county office of education (COE), to an operator.
 - c) It is gathered by an operator through the operation of a site, service, or application, as defined in number 7, and is descriptive of a student or otherwise identifies a student, including, but not limited to, information in the student's educational record or email, first and last name, home address, telephone number, email address, or other information that allows physical or online contact, discipline records, test results, special education data, juvenile dependency records, grades, evaluations, criminal records, medical records, health records, social security number, biometric information, disabilities, socioeconomic information, food purchases, political affiliations, religious information, text messages, documents, student identifiers, search activity, photos, voice recordings, or geolocation information. (BPC 22584(i) and 22586(i))
- 9) Requires an operator of a commercial website or online service that collects personally identifiable information through the Internet about individual consumers residing in California who use or visit its website to conspicuously post its privacy policy. (BPC 22575)
- 10) Protects, pursuant to the federal Family Educational Rights and Privacy Act (FERPA), the confidentiality of educational records meaning those records, files, documents, and other materials which, (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution by prohibiting the funding of schools that permit the release of those records. FERPA applies to all schools that receive funds under an applicable program of the U.S. Department of Education. Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record. FERPA's prohibition only applies to the school itself and contains various exemptions allowing the data to be released without the written consent of the parents. (20 U.S.C. 1232g(b)(1))
- 11) Requires, pursuant to the federal Children's Online Privacy Protection Act (COPPA), that an operator of an internet website or online service directed to a child, as defined, or an operator of an internet website or online service that has actual knowledge that it is collecting personal information from a child, to provide notice of what information is being collected and how that information is being used, and to give the parents of the child the opportunity to refuse to permit the operator's further collection of information from the child. (15 U.S.C. 6502)
- 12) Defines "pupil record" to mean information relative to an individual pupil gathered within or without the school system and maintained within the school system, regardless of the physical form in which it is maintained. States that essential in this definition is the idea that any information which is maintained for the purpose of second party review is considered a pupil record. (5 California Code of Regulations (CCR) 430 and 432)
- 13) Defines "mandatory permanent pupil records" to mean those records which are maintained in perpetuity and which schools have been directed to compile by California statute, regulation, or authorized administrative directive. (5 CCR 430)
- 14) Authorizes an LEA, pursuant to a policy adopted by its governing board, to enter into a contract with third parties to provide services, including cloud-based services, for the digital storage, management, and retrieval of pupil records, and to provide digital educational

software, provided the contract includes specific provisions about the security, use, ownership, and control of the pupil records. (Education Code (EC) 49073.1)

- 15) Requires, pursuant to the Individuals with Disabilities Education Act (IDEA), public agencies to inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child. Requires this information to be destroyed at the request of the parents. However, permits a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed to be maintained without time limitation. (34 CFR 300.624)

FISCAL EFFECT: Unknown

COMMENTS:

Need for the bill. According to the author, “As a father with 4 young children, the protection of their privacy is of utmost importance. Most schools have multiple platforms that students need to download or use as part of their curriculum. The individual schools or districts have so many things on their plates and ultimately, this bill will alleviate some of the burden put on the school and district staff while managing student’s information. This bill will give control over student’s personal information to their parents and guardians where it belongs.

This bill is attempting to close any gaps in data privacy protection that may exist when it comes to information that is collected and stored by an operator of an online platform that is under contract with a school district. As stated by the Assembly Committee on Privacy and Consumer Protection, “The ambiguity arises when trying to determine whether a business that operates an online platform, under contract to a government entity, in this case a public school or school district, is exempt from the CCPA when it comes to personal information that is collected about students. If the business is exempt, under the SOPIPA and ELPIPA, the control of online personal information lies with schools and/or administrators and is not extended to the student, parent, or guardian. In the event that a student is no longer enrolled in a school or school district, this bill will allow those former students over the age of 16, or their parent or guardian if under the age of sixteen, to request that personal information be deleted from the platform.”

Status of personal data maintained by education technology vendors. According to the Assembly Committee on Privacy and Consumer Protection, “In general, state law in the form of SOPIPA mirrors FERPA and the control of online personal information lies within the hands of schools and/or administrators and they control how that data is used. This right to control personal information about students and their families is not extended by SOPIPA to the student, parent, or guardian. As a result, the student has limited control over their educational records stored by online service providers. In addition, information that is obtained directly from a student or teacher by the vendor is not protected, even if it is the same information that would otherwise be protected if it is obtained from school records. However, despite the gaps in FERPA and SOPIPA, California has some of the most robust privacy protection laws in the nation under the CCPA. Unfortunately, despite the cumulative protections in SOPIPA, FERPA and the CCPA, it remains unclear whether the personal data collected by educational technology vendors is covered when it comes to a consumer’s right to protect their private information.”

Schools contract with many technology vendors for different purposes. While no research could be identified which provides a current assessment of LEAs' technology vendor use, it is clear that LEAs use technology for many purposes, and often contract with multiple private vendors to do so. A few examples include:

- Student information systems to manage information about enrollment, attendance, course completion and transcripts, and compliance information, among many other functions;
- Systems for management of curriculum, and instruction, and assessment, such as course management, online course material and instructional programs, and formative and interim assessments;
- Systems for state reporting of student data to numerous state data systems which collect information on attendance, academic and other student outcomes, student demographics, and teacher assignment;
- Systems for administration of state assessments in various subjects;
- Systems for management of personnel, including course assignments;
- Systems for local data collection (i.e. school climate and parent surveys); and
- Teacher-initiated systems, for curriculum, instruction, assessment, and behavior.

Given the many systems each LEA uses, ***the Committee may wish to consider*** that, should this bill be enacted, each LEA would need to assess which information, maintained by each vendor, would be subject to a parent request for deletion of student data.

Privacy of student records under FERPA and state education law. FERPA is a federal law which protects "education records," which are generally defined as records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution.

FERPA grants parents the right to view their children's educational records, seek amendment or correction of their child's education records, and prohibits schools from disclosing personal information from a student's education records to a third party unless the student's parent has provided prior written consent. LEAs must annually notify parents of these rights, and parents who believe that their FERPA rights may have been violated may file a complaint with USDOE.

Additionally, state education law authorizes an LEA, pursuant to a policy adopted by its governing board, to enter into a contract with third parties to provide services, including cloud-based services, for the digital storage, management, and retrieval of pupil records, and to provide digital educational software, provided the contract includes specific provisions about the security, use, ownership, and control of the pupil records.

State regulations establish maintenance and disposal requirements for three types of student records, including some which must be maintained indefinitely. Current law requires student records for public schools be kept on file for each student enrolled in school, and requires school districts to maintain all mandatory permanent records, or an exact copy of the records, for every student enrolled in the district.

State regulations define "pupil record" to mean information relative to an individual pupil gathered within or without the school system and maintained within the school system, regardless of the physical form in which it is maintained. The regulations state that "essential in

this definition is the idea that any information which is maintained for the purpose of second party review is considered a pupil record.”

These regulations establish three types of student records:

- "Mandatory Permanent Pupil Records" are those records which are maintained in perpetuity and which schools have been directed to compile by California statute, regulation, or authorized administrative directive.
- "Mandatory Interim Pupil Records" are those records which schools are directed to compile and maintain for stipulated periods of time and are then destroyed as per California statute, regulation, or authorized administrative directive.
- "Permitted Pupil Records" are those records having clear importance only to the current educational process of the student.

Additionally, the IDEA specifies requirements for the maintenance and disposal of records for students with IEPs. This law requires public agencies to inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child. Requires this information to be destroyed at the request of the parents. However, permits a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed to be maintained without time limitation.

This bill conflicts with the requirements schools maintain records, which schools must and should maintain, such as transcripts and records of graduation, if they are maintained by operators. Accordingly, *staff recommends that the bill be amended* to exempt any mandatory records, as defined in these regulations, from the requirements of the bill.

Authority to make a request should rest with holder of educational rights. This bill authorizes a student 16 years of age or older to request that an operator delete specified information about that student. Under current law, only parents, guardians, and other individuals holding educational rights for the student may act on behalf of the student, until a student turns 18 years of age. Accordingly, *staff recommends that the bill be amended* to make the age at which a current or former student (in both K-12 and prekindergarten sections) may make such a request 18, instead of 16, and include education rights holders.

Records for students transferring between schools in a district should be maintained. This bill authorizes specified individuals to request that an operator delete specified information about a student when the student is no longer attending a school or district. This could result in the deletion of a student's records when they are leaving one elementary school to attend another school in the same district. *Staff recommends that the bill be amended* to authorize a request only when a student ceases to be enrolled in an LEA, defined as a school district, county office of education (COE), a charter school, or the State Special Schools for the Deaf and the Blind;

Additional recommended Committee amendments. In addition to the amendments noted above, staff recommends that the bill be amended as follows:

- 1) Define LEA, for purposes of the requirements of this bill, to mean a school district, COE, a charter school, or the State Special Schools for the Deaf and the Blind;

- 2) Clarify that retention and disposal of records related to IEPs and Section 504 plans is governed by applicable federal law; and
- 3) Change references to students to pupils, and remove reference to 16 year old students enrolled in preschool.
- 4) Technical, re-ordering, and conforming changes.

Arguments in support. Protection of the Educational Rights of Kids writes, “We support AB 801 because Protection of the Educational Rights of Kids, PERK, cares about protecting students and their personal and covered information. The state has made it possible to provide technology to all students, and it is important that the state take steps to ensure protections for these children, especially pertaining to student privacy. Cybersecurity cannot be overlooked, and this bill will make sure students’ covered information is protected from unauthorized use, disclosure, and will be appropriately deleted.”

Related Legislation. AB 375 (Chau) Chapter 55, Statutes of 2018, establishes the CCPA, which provides consumers the right to access their personal information that is collected by a business, the right to delete it, the right to know what personal information is collected, the right to know whether and what personal information is being sold or disclosed, the right to stop a business from selling their information, and the right to equal service and price.

SB 2799 (Chau) Chapter 620, Statutes of 2016, establishes the Early Learning Personal Information Protection Act which prohibits operators of websites, online services, and mobile apps that are designed, marketed and used primarily for prekindergarten and preschool students, from using data about those students for targeting, marketing or profiling, and prohibits selling or disclosing a student’s information with limited exceptions.

SB 1177 (Steinberg) Chapter 839, Statutes of 2014, establishes the SOPIPA to restrict the use and disclosure of information about K-12 students.

AB 1584 (Buchanan) Chapter 800, Statutes of 2014 authorizes a local education agency (LEA), pursuant to a policy adopted by its governing board, to enter into a contract with third parties to provide services, including cloud-based services, for the digital storage, management, and retrieval of pupil records, and to provide digital educational software, provided the contract includes specific provisions about the security, use, ownership, and control of the pupil records.

REGISTERED SUPPORT / OPPOSITION:

Support

Protection of the Educational Rights of Kids

Opposition

None on file

Analysis Prepared by: Tanya Lieberman / ED. / (916) 319-2087