

Department of Legislative Services
Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE
Revised

House Bill 298
Ways and Means

(Delegate Kaiser, *et al.*)

Education, Health, and Environmental Affairs

Education - Student Data Privacy Act of 2015

This bill requires an operator of specified websites, online services, online applications, and mobile applications designed primarily for a preK-12 public school purpose operating in accordance with a contract to (1) protect covered information from unauthorized access, destruction, use, modification, or disclosure; (2) implement and maintain reasonable security procedures and practices to protect covered information; and (3) delete covered information upon request of the public school or local school system. In addition, an operator may not knowingly (1) engage in targeted advertising based on the data collected through the website, online service, or application; (2) except in furtherance of a preK-12 school purpose, use information to make a profile about a student; (3) sell a student's information, except as provided; or (4) disclose covered information, except as detailed in the bill. Operators may use aggregated or de-identified information under certain circumstances. The bill does not apply to general audience websites, online services, online applications, or mobile applications, even if a login is created.

The bill takes effect July 1, 2015.

Fiscal Summary

State Effect: None. The bill is directed at operators of specified preK-12 websites, online services, online applications, and mobile applications.

Local Effect: None. However, the bill may limit the websites, online services, online applications, and mobile applications that a local school system, school, or teacher can use.

Small Business Effect: Specified operators of websites, online services, online applications, and mobile applications *may* need to change their business practices or they will not be able to conduct business with local school systems, schools, or teachers.

Analysis

Bill Summary:

Definitions

“Covered information” is defined as a material that (1) personally identifies an individual student in this State or that is linked to information or material that personally identifies an individual student in this State and (2) is gathered by an operator through the operation of a site, a service, or an application. Among other things, it includes first and last name, test results, grades, student evaluations, socioeconomic information, food purchases, student identifiers, search activity, texts, and photos.

“Operator” is defined as a person who is operating in accordance with a contract or an agreement with a public school or local school system in the State to provide an Internet website, an online service, an online application, or a mobile application that (1) is used primarily for a preK-12 school purpose; (2) is issued at the direction of a public school, a teacher, or any other employee of a public school, local school system, or the Maryland State Department of Education (MSDE); and (3) was designed and marketed primarily for a preK-12 school purpose.

“PreK-12 school purpose” is defined as an activity that customarily (1) takes place at the direction of a public school, a teacher, an administrator, or a local school system or (2) aids in the administration of public school activities. It includes instruction in the classroom; home instruction; administrative activities; collaboration among students, school employees, and parents; maintaining, developing, supporting, improving, or diagnosing the operator’s site, service, or application; and an activity that is for the use and benefit of the public school.

“Targeted advertising” is defined as presenting advertisements to an individual student that are selected based on information obtained or inferred from the student’s online behavior, usage of applications, or covered information. It does not include advertisements presented to an individual student at an online location based on the student’s current visit to the online location without collection or retention of the student’s online activities over time, or in response to a single search query without collection or retention of the student’s online activities over time.

Conditions of the Requirements

If an operator of a site, a service, or an application used for a preK-12 school purpose is merged with or acquired by another entity, the successor entity is subject to the requirements of the bill for previously collected covered information.

As specified in the bill, making a profile of a student does not include the collection and retention of account information by an operator that remains under the authority of a student, a student's parent or guardian, a public school, or a local school system.

Except as explicitly stated in the bill, specified provisions of the bill may not be construed to prohibit the use or disclosure of a student's covered information by an operator.

The bill may not be construed to limit the authority of a law enforcement agency to obtain content or information from an operator as authorized by federal or State law or in accordance with an order of a court of competent jurisdiction.

The bill does not limit the ability of an operator to (1) use a student's covered information for adaptive learning or customized student learning purposes; (2) use recommendation engines for students if a third party is not paying or providing other consideration for a recommendation; (3) respond to a student's search query if the response is not being paid for or other consideration provided by a third party; or (4) use or retain covered information to ensure legal or regulatory compliance or take precautions against liability.

The bill may not be construed to prohibit an operator of a website, an online service, an online application, or a mobile application from marketing education products directly to parents if the marketing was not a result of the use of covered information obtained by the operator through the provision of services covered by the bill.

The bill may not be construed to impose a duty on a provider of an electronic store, a gateway, marketplace, or any other means of purchasing or downloading software or applications to review or enforce compliance.

The bill also may not be construed to impose a duty on a provider of an interactive computer service, as defined in Chapter 5, Title 47 of the United States Code, to review or enforce compliance with the bill by third-party content providers.

The bill does not impede the ability of students to download, export, or otherwise save or maintain their own student-created data or documents.

Current Law: At the federal level, the Family Educational Rights and Privacy Act (FERPA) and the Children’s Online Privacy Protection Act (COPPA) govern the privacy of student data when educational institutions engage cloud service providers.

FERPA generally prohibits the disclosure by schools that receive federal education funding of personally identifiable information from a student’s education records, unless the educational institution has obtained signed and dated written consent from a parent or eligible student or one of FERPA’s exceptions applies.

COPPA governs operators of websites and online services that are directed to children younger than age 13 and operators of general audience websites or online services that have actual knowledge that a user is younger than age 13. Notably, the Federal Trade Commission has clarified that if an educational institution contracts with a cloud service provider that uses the students’ data for advertising or marketing purposes, then COPPA is triggered.

According to the Code of Maryland Regulations, individual student records maintained by teachers or other school personnel under certain provisions are to be confidential in nature, and access to these records may be granted only for the purpose of serving legitimate and recognized educational ends. Individual student records, with the exception of records that are designated as permanent, and with other exceptions provided by law, must be destroyed when they are no longer able to serve legitimate and recognized educational ends.

Specified websites, online services, online applications, and mobile applications are not specifically addressed in statute; however, educational institutions are bound by FERPA to protect the privacy of student and family information. In addition, MSDE follows guidelines specified by the Maryland Department of Information Technology’s Information Security Policy.

The Maryland Longitudinal Data System does not currently collect data from operators as defined by the bill.

Background: Quick growth in the personalized learning market, data analytics, and the development of new funding models to pay for educational software has led to privacy concerns regarding student data. Products in the personalized learning market collect student data to create individualized learning pathways for students. What data is collected and how it is stored depends on the particular product. Due to the rapid growth of the market, parameters on the acceptable collection and use of student data have not yet been set.

InBloom, a data analytics company that offered personalized learning software, quickly went from being a leading company in the emerging market in 2013 to shutting down in

April 2014 due to parents' privacy concerns. According to Bloomberg News, in 2014 some schools in all 50 states had school work evaluated by data analytics software that tracks their progress. Companies such as McGraw-Hill Education, Pearson, and News Corps have introduced student databases or school work-tracking software for computers and mobile devices. One company that was using a new funding model to partially subsidize an educational resource, Google, announced on April 30, 2014, that it had stopped automatically scanning student emails to collect data for advertising purposes.

In 2014, at least eight states passed legislation limiting or banning the sharing of student data, including California, Kentucky, New York, and Virginia.

Small Business Effect: Specified operators of websites, online services, online applications, and mobile applications may need to change their business practices or they will not be able to conduct business with local school systems, public schools, or public school teachers. It is unknown if any existing small businesses are affected.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Maryland State Department of Education; Anne Arundel, Charles, Frederick, and Montgomery counties; *Bloomberg News*; Department of Legislative Services

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