

Date of Hearing: March 21, 2023

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Jesse Gabriel, Chair

AB 801 (Joe Patterson) – As Introduced February 13, 2023

As Proposed to be Amended

SUBJECT: Student privacy: online personal information

SYNOPSIS

This author-sponsored bill is intended 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.

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 California Consumer Protection Act when it comes to personal information that is collected about students. If the business is exempt, under the Student Online Privacy Protection Act and Early Learning Personal Information Protection Act, 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.

There is no registered support or opposition to the bill.

If passed by this Committee, this bill will next be heard by the Assembly Education Committee.

SUMMARY: Requires an operator of an internet website, online service, online application, or mobile application used primarily for school purposes to delete any personally identifiable information or materials related to a student, that is not otherwise covered under the California Consumer Privacy Act (CCPA), at the request of a student, parent, or guardian if the child is no longer attending the school or district.

Specifically, **this bill:**

- 1) Requires an operator of an online platform, at the request of the student, parent or legal guardian, to delete a K-12 student's covered information under the operator's control if the student is no longer attending the school or district.
- 2) Requires an operator of an online platform, at the request of a former pupil, parent or legal guardian, to delete a preschool or prekindergarten pupils' covered information under the operator's control if the student is no longer attending the school or district.
- 3) Requires the operator to obtain documentation that the student or pupil no longer attends the school or district.

- 4) Defines “California Consumer Privacy Act excluded covered information” means “covered information” that is not subject to the California Consumer Privacy Act, Title 1.18.5, Civ. Code §§ 1798.100 et seq.

EXISTING LAW:

- 1) Establishes the California Consumer Privacy Act of 2018 (CCPA) and provides various rights to consumers pursuant to the Act. Subject to various general exemptions, a consumer has, among other things:
 - a) The right to know what personal information a business collects about consumers, as specified, including the categories of third parties with whom the business shares personal information.
 - b) The right to know what personal information a business sells about consumers, as specified, including the categories of personal information that the business sold about the consumer and the categories of third parties to whom the personal information was sold, by category or categories of personal information for each third party to whom the personal information was sold.
 - c) The right to access the specific pieces of information a business has collected about the consumer.
 - d) The right to delete information that a business has collected from the consumer.
 - e) The right to opt-out of the sale of the consumer’s personal information if over 16 years of age, and the right to opt-in if the consumer is a minor (as exercised by the parent if the minor is under 13, or as exercised by the minor if the minor is between ages 13 and 16).
 - f) The right to equal service and price, despite exercising any of these rights. (Civ. Code § 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:
 - a) A name, alias, postal address, unique personal identifier, online identifier, Internet Protocol address, email address, account name, social security number, driver’s license number, passport number, or other identifier.
 - b) Commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.
 - c) Biometric information.
 - d) Internet activity information, including browsing history and search history.

- e) Geolocation data.
 - f) Professional or employment-related information.
 - g) Education information, defined as information that is not publicly available personally identifiable information as defined in the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g; 34 C.F.R. Part 99). (Civ. Code § 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. (Civ. Code § 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 consumers 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. (Civ. Code § 1798.120.)
 - 5) Establishes the Student Online Personal Information Protection Act (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. (Bus. & Prof. Code §§ 22584-85.)
 - 6) Establishes the Early Learning Personal Information Protection Act (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. (Bus. & Prof. Code §§ 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.(Bus & Prof. Code § 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 pupil, or the pupil's parent or legal guardian, to an operator in the course of the pupil'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, local educational agency, or county office of education, 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 pupil or otherwise identifies a pupil, including, but not limited to, information in the pupil'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. (Bus. & Prof. Code §§ 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. (Bus. & Prof. Code § 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.)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: This bill is intended to ensure that students, parents and guardians have the ability to require that third-party vendors delete identifying information related to the student if they are no longer enrolled in the school.

1) **Author's statement.** The author notes:

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.

2) **Growth in use of electronic learning creates privacy challenges.** In the spring of 2020 when the COVID-19 pandemic struck, schools around the world were forced to abruptly shut down, quickly moving over one billion students out of their classrooms. As result, education has changed dramatically with the increased use of e-learning, whereby teaching is done remotely and on digital platforms. As children have returned to the classroom, it is assumed that the expansion in the use of technology in education will largely remain.

Prior to the pandemic and since the enactment of FERPA in 1974, educational institutions were already undergoing dramatic changes in the way that students are taught, including the increased use of technology. With respect to the use of technology and learning, according to information provided by the author, the Department of Education observes that:

Schools can use digital resources in a variety of ways to support teaching and learning. Electronic grade books, digital portfolios, learning games, and real-time feedback on teacher and student performance, are a few ways that technology can be utilized to power learning.

3) **The California Consumer Protection Act (CCPA).** In 2018, the Legislature enacted the California Consumer Protection Act (CCPA) (AB 375 (Chau, Chap. 55, Stats. 2018)), which gives consumers certain rights regarding their personal information, such as: (1) the right to know what personal information that is collected and sold about them; (2) the right to request the categories and specific pieces of personal information the business collects about them; and (3) the right to opt-out of the sale of their personal information, or opt-in, in the case of minors under 16 years of age. The CCPA was the byproduct of compromises made between business interests on one side, and consumer and privacy interests on the other, to provide a legislative alternative to a ballot initiative on the same subject.

Subsequently, in 2020, California voters passed Proposition 24, the California Privacy Rights Act (CPRA), which established additional privacy rights for Californians. With the passage of the CCPA and the CPRA, California now has the most comprehensive laws in the country when it comes to protecting consumers' rights to privacy.

In addition, Proposition 24 created the California Privacy Protection Agency (CPPA) in California, vested with full administrative power, authority, and jurisdiction to implement and enforce the CCPA and the CPRA. The Agency's responsibilities include updating existing regulations, and adopting new regulations.

The California Attorney General's Office published an initial set of regulations implementing the CCPA. The CPRA directed the new Agency to engage in further rulemaking on a variety of topics. Since this bill amends SOPIPA and states that the requirements only apply to businesses and data that is not currently covered by the CCPA, it ensures that the requirements of this bill will not contradict the CCPA or any regulations adopted during the CPPA's rulemaking process.

To protect Californians from any future legislative efforts to weaken statutory protections in the CPRA, Proposition 24 provided that the CPRA's contents may be amended by a majority vote of the Legislature only if the amendments are consistent with and further the purpose and intent of the CPRA, which is to further protect consumers' rights, including the constitutional right of

privacy. (Ballot Pamphlet., Primary Elec. (Nov. 3, 2020) text of Prop. 24, p. 74.) While this bill does not amend the contents of the CPRA, it is consistent with the intent by insuring that the constitutional right to privacy for students and their parents is protected, in the event it is ultimately determined that these educational technology companies are not subject to the restrictions outlined in the CPPA.

4) **The Family Educational Rights and Privacy Act (FERPA)** (20 U.S.C. § 1232g; 34 CFR Part 99) is the primary law that protects the privacy of pupil records. It applies to all educational institutions that receive federal funds. FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are deemed “eligible students.”

- Parents or eligible students have the right to inspect and review the student's education records maintained by the school. Schools are not required to provide copies of records unless, for reasons such as great distance, it is impossible for parents or eligible students to review the records. Schools may charge a fee for copies.
- Parents or eligible students have the right to request that a school correct records which they believe to be inaccurate or misleading. If the school decides not to amend the record, the parent or eligible student then has the right to a formal hearing. After the hearing, if the school still decides not to amend the record, the parent or eligible student has the right to place a statement with the record setting forth his or her view about the contested information.
- Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record.

5) **Need for the bill.** 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.

The growing use of online educational programs and mobile applications has led to an increasing flow of personal information directly from students and teachers to developers of educational programs and applications, and there are no restrictions on how this information may be used, other than restrictions that developers may impose on themselves in their privacy policies and Terms of Service (TOS). A review of several privacy policies revealed the following common features:

- The company reserves the right to disclose or forward student information to other companies.

- The company assumes no responsibility for the mishandling of information.
- The company reserves the right to unilaterally change its privacy policy at any time.

An article in Politico from 2014 warned that “Students shed streams of data about their academic progress, work habits, learning styles and personal interests as they navigate educational websites. All that data has potential commercial value: It could be used to target ads to the kids and their families, or to build profiles on them that might be of interest to employers, military recruiters or college admissions officers.” The article pointed out that “Kathleen Styles, the [U.S.] Education Department's chief privacy officer [at the time], acknowledged in an interview that much of [student information] is likely not protected by FERPA—and thus can be commercialized by the companies that hold it.” (Simon. *Data Mining Your Children* (May 15, 2014) Politico, available at <https://subscriber.politicopro.com/article/2014/05/data-mining-your-children-033883>)

In short, the use of online education programs and mobile applications has opened a back door through which student information—even information that is otherwise protected by FERPA—can be freely accessed and used by the company collecting it. In addition, it is unclear whether an educational technology business operating under a contract with a school district is bound by the CCPA because even though it may meet the definition of a “business” under the CCPA, it is under contract to a government entity that is not bound by the CCPA. This bill addresses this problem by clarifying that in the event the business and the data it is collecting is not covered by the CCPA, then privacy protections similar to those under the CCPA would apply under SOPIPA.

6) **Author’s Amendments.** Author’s amendments to the bill, reflected in the analysis above, are set forth below:

SECTION 1. Section 22584

(d)(3) Delete a student’s *California Consumer Privacy Act excluded* covered information if ~~the student, or the student’s parent or legal guardian~~ *a student over 16 years of age or the student’s parent or guardian, in the case of students who are less than 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.

The intent of this amendment is to mirror the CCPA in establishing the age at which a person can make independent decisions regarding their private information.

(d)(4) The operator ~~may~~ **shall** require documentation that the student no longer attends the school or district.

This amendment is intended to insure that, prior to deleting data, an operator receives confirmation that the student is no longer enrolled.

(g)(4) *Does not include those official records, files, and data directly related to a student and maintained by the school or local education agency, including, but not limited to, records encompassing all the material kept in the student’s cumulative folder such as 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.

This amendment is intended to clarify that information that is part of a student's permanent education record is not inadvertently deleted.

(j) ***“California Consumer Privacy Act excluded covered information” means “covered information” that is not subject to the California Consumer Privacy Act Title 1.18.5. §§ 1798.100. et seq of the California Civil Code.***

This amendment clarifies that in the event the business is not covered by the CCPA and/or the personal information is not covered because it belongs to the government entity, rather than the business, then a student, parent or guardian has the right to request that it be deleted under SOPIPA.

SECTION 2. Section 22586.

The same amendments outline above are repeated in this section of the bill so that they also apply under the ELPIPA.

7) **Related Legislation.** AB 375 (Chau, Chap. 55, Stats. 2018) established the California Consumer Privacy Act of 2018 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, Chap. 620, Stats. 2016) establishes the Early Learning Personal Information Protection Act which prohibits operators of Internet Web sites, online services, and mobile apps that are designed, marketed and used primarily for prekindergarten and preschool pupils, from using data about those pupils for targeting, marketing or profiling, and prohibits selling or disclosing a pupil's information with limited exceptions.

SB 1177 (Steinberg, Chap. 839, Stats. 2014) established the Student Online Personal Information Protection Act to restrict the use and disclosure of information about K-12 students.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

None on file.

Analysis Prepared by: Julie Salley / P. & C.P. / (916) 319-2200