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A Tale of Two Federal Student Data Privacy Bills

By Amelia Vance

Two ambitious proposals on student data privacy are advancing in the US House of Representatives. On April 29 Congressmen Polis (D-CO) and Messer (R-IN) introduced the Student Digital Privacy and Parental Rights Act, which regulates online service providers in a way designed to balance the need for data security with the need to use data to improve instruction.

Also in April, Congressmen Kline (R-MN) and Scott (D-VA) circulated draft legislation that seeks to rewrite the Family Educational Rights and Privacy Act (FERPA), signed into law in 1974. The Kline-Scott draft proposes to maintain FERPA's focus on promoting student privacy through state and local education agencies while expanding the law's existing prohibitions and requirements.

Created to give parents access to their child's education records, FERPA over the years accumulated a patchwork of complex related laws, rules, and guidance. New technologies have further muddied the waters, as FERPA is not fully equipped to regulate 21st century technology. Both Polis-Messer and Kline-Scott attempt to fix these problems. Their bills overlap in several areas, including regulation of online services providers, parental access and review rights, and prohibitions on using student data for targeted marketing.

WHO DO THE BILLS TARGET?

Polis and Messer's bill targets online service providers that serve state and local education agencies. It does not apply to companies whose operations are not primarily online, so, for example, a bus company or food services company that keeps their data about students in online databases would not be covered. It also does not apply to online companies that are not primarily aimed at K-12 students, so social media companies, whose websites could be used in a classroom, are not covered.

By contrast, Kline-Scott's draft is aimed more broadly at local education agencies (LEAs), state education agencies (SEAs), and contractors that serve LEAs and SEAs, including offline service providers (like the school lunch caterer), and online service providers that do not market services specifically to schools but that schools might use. In trying to regulate so many stakeholders, this draft bill might be overinclusive.

EASE OF IMPLEMENTATION

Congressmen Polis and Messer worked with education groups, industry organizations, privacy organizations, and parents to make major improvements to current federal law and avoid unwanted consequences as much as possible. Because Polis-Messer focuses on just one aspect of student data privacy—regulating online service providers—it is fairly simple.

The bill's definition of "covered information" includes metadata (or, data about data, such as information about where a child's computer is located), which FERPA does not explicitly cover. However, this definition could be perceived by some LEAs as too broad, and most schools may choose to assume that all data must be protected instead of undertaking cumbersome legal analyses to find the few data elements that are not covered.

Representatives Polis and Messer appear to be trying to craft a bill that will stand the test of time. Its broad terms encompass both today's technology and potential technologies that might infringe on student privacy down the road. For example, the bill defines "online contact information" as not only email addresses or screen names but also "any other substantially similar identifier that permits direct contact with the student online."

Kline-Scott also clarifies many existing sections of the old FERPA to incorporate current technology. For instance, the draft's definition of "school record" is expanded to include data collected or maintained by online service providers. However, some of the new sections in their draft bill are vague. For example, the draft could be read to mandate that LEAs and SEAs have to send a notification to parents every time they sign a new contract with third parties—not only technology companies but other types of vendors as well—which could add up to hundreds or thousands of notices per year. It is also not clear that the "school record" definition encompasses metadata.

One particularly commendable element of the Kline-Scott draft is its requirement that LEAs and SEAs have a contract with every online service provider they work with, and the bill spells out what must be included in these agreements. However, by taking a one-size-fits-all approach, these contracts may be unworkable in the real world. For example, many education technology companies are too small to contract separately with all 14,000 US school districts. Today, small companies can send out a uniform contract that allows a district to click "yes" in order to use their products. While "click yes" contracts may not sufficiently protect privacy, requiring individually negotiated contracts between each company and district—and, in some cases, each school that wants to use the product—gives an edge to the largest technology companies, which have sufficient resources to manage such negotiations.

TRANSPARENCY

Under the Polis-Messer bill, companies must publicly list what type of personal information they collect or generate, how it is used, and whether it is shared with anyone else (and, if so, with whom it is shared and how it is used). The bill also mandates that this information be clear and easy to understand.

The Kline-Scott draft is more specific. Parents must be notified when LEAs or SEAs are sharing their child's data with any third party and about "policies, procedures, and means" the third parties are using to protect the security of student data. Parents must also have access to the written agreements between the LEA/SEA and third party. While these provisions sound a strong note of transparency, without more specificity they could be read to require schools to send notices to parents every time the school contracts with a new third party. Sharing the "policies, procedures, and means" similarly lacks necessary details: The bill does not specify an exception for sharing security information with the public. Without it, hackers could use posted security information as a road map to hacking into security systems.

THIRD PARTIES

Both proposals ban advertising and marketing to students based on the private information that companies collect on those students. However, each takes a different approach.

Polis-Messer bans online service providers from creating profiles (including profiles created using metadata) of students that will be used for advertising to students or their parents. It also ensures introduces deletion requirements so that providers cannot keep student data indefinitely. The bill also allows companies to hire another company to do some of their work for the school—for example, if a testing company needs to hire a security expert to make sure that its firewalls are secure enough. But the bill requires that every company handling the data must have the same security standards and be subject to the law's provisions, meaning that the company can use the information only for purposes the school designates. It allows companies to use data to improve their products or do studies to improve the science of learning, but companies are allowed to use only aggregated and de-identified data for these purposes.

Kline-Scott also bans advertising and marketing but goes further by prohibiting LEAs or SEAs from contracting with online service providers that use data "for the development of commercial products or services"—something all service providers do, since they are constantly developing products. While it is important to ensure that service providers do not use sensitive, personalized student data to advertise to students, it is also important to let education technology providers create products to enhance student learning.

PENALTIES

Polis-Messer includes high penalties for violations. Companies—including nonprofit organizations—are put under the jurisdiction of the Federal Trade Commission (FTC). The FTC has broad enforcement powers: they can impose fines and other punishments.

Kline-Scott retains the existing FERPA penalty—a cutoff of all federal funding to LEAs or SEAs that violate the law—and adds new ones. The bill introduces fines for LEAs and SEAs: $2,000 per student harmed up to a maximum of $500,000. However, the bill does not specify what "harm" means, and it doesn't discuss what LEAs or SEAs have to do to come into "voluntary compliance" and thus avoid being fined. The one-size-fits-all fine fails to distinguish among districts that have 100 students and districts with 100,000 students. Such a penalty could lead small districts or schools to forgo adopting new technology in order to avoid liability.

BALANCE

Polis-Messer balances the dual imperatives of protecting data about students and enabling technology use that helps them succeed. The bill clearly states that its provisions do not limit the ability of online service providers to use information (on behalf of LEAs and SEAs) for personalized or adaptive learning.

The Kline-Scott draft would benefit from greater efforts to promote a similar balance. For example, their draft bill would allow parents to opt their child out of research conducted by LEAs or SEAs, or by organizations on behalf of LEAs or SEAs. This opt-out could undermine the ability of teachers, LEAs, and SEAs to verify whether educational policies or programs are working and would make it difficult for state policymakers to make informed decisions.

TRAINING

Neither bill addresses the vital role that training and capacity building plays in protecting the privacy and security of student data. Security experts estimate that almost 75 percent of data breaches are caused by someone who works at the place where the breach occurred. This suggests that Congress cannot effectively protect student data without investing in building the capacity of teachers, principals, and other stakeholders to use that data safely.

CONCLUSION

Both bills have a ways to travel before they become law. In particular, the Kline-Scott draft was released mainly to solicit input from stakeholders before they introduce a final bill, so there is still time for state board members to weigh in. However, it is possible at least one federal student data privacy bill will pass this year: In a recent Whiteboard Advisors survey, 54 percent of Washington, DC, insiders said that legislation will be enacted on student data privacy while President Obama is in office. While neither bill would infringe on states' or districts' abilities to pass laws that set a higher bar, a federal law would provide the necessary floor in every state to ensure an adequate protection of student data. It is in states' interests to express their views as these bills progress, and state boards of education should add their voices to this important debate.

Amelia Vance is NASBE's director of education data and technology, amelia.vance@nasbe.org. Contact her for more information on these bills or to provide input.

RESOURCES

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