

NetChoice *Promoting Convenience, Choice, and Commerce on the Net*

Carl Szabo, Policy Counsel
NetChoice
1401 K St NW, Suite 502
Washington, DC 20005
202-420-7485
www.netchoice.org



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Senator Richard Blumenthal
Ranking Member
Senate Commerce Committee
Subcommittee on Consumer Protection, Product
Safety, Insurance, and Data Security

Senator Steve Daines
Senate Commerce Committee
Subcommittee on Consumer Protection,
Product Safety, Insurance, and Data Security

RE: Comments on the “SAFE KIDS Act”

Dear Senators Blumenthal and Daines:

NetChoice is a trade association of leading online and e-commerce businesses all of whom share the goal of promoting convenience, choice, and commerce on the net.¹ NetChoice has been actively involved in the issue of student privacy and met with dozens of legislators from across the country to discuss thoughtful and intelligent approaches to protecting student information.

We appreciate and support efforts to address the privacy issues of 21st century students. However, we worry that some of the components of the “Safeguarding American Families from Exposure by Keeping Information and Data Secure Act” (SAFE KIDS Act) could actually inhibit educational technology innovation and discourage businesses from making services available to students. We have many concerns with the Act but wanted to highlight a couple.

Some of our concerns are that the SAFE KIDS Act:

- **Restricts Student & Parent Choice** – Any new law should preserve the right of parents and students to control what happens to data about them, including the right to transfer it.
- **Misses Opportunity to Create a National Standard** – A new federal law is an important opportunity to create a national standard to protect students and provide companies with clear guidance allowing them operate efficiently and encourage new entrants into the ed-tech space. A failure to create this national standard would contribute to a patchwork of inconsistent student privacy laws and discourage investment and innovation in educational technology.

¹ More information at NetChoice.org

- **Contains Overly Broad Definitions** – The definitions in the SAFE KIDS Act are overly broad and may have the effect of unintentionally restricting products that are unrelated to the technology used to provide education in schools – in particular the definitions of “School Service,” “Operator,” “Targeted Advertising,” “Covered Information,” and “Personally Identifiable Information.”
- **Discourages development by giving the FTC expansive rulemaking powers** – Giving the FTC expansive rulemaking powers over critical educational definitions leads to uncertainty, trepidation, and a decrease in development of new educational tools.

Parent & Student Choice

Parents and students should have the right to choose how data about them is used. Parents often need to access to and control of educational information for uses outside the school such as working with tutors, moving to a new school, or using other educational services. Giving them the ability to access and view their child’s student information is one of the guiding principles and purposes behind the creation of FERPA.² And the success of innovative educational products will depend upon parents and students feeling in control.

The SAFE KIDS Act contains many limitations on the use of data. But it should clearly enshrine parents’ right to make choices that are right for their children – including the right to change schools or to use their student’s work product or information outside of school. While we recognize this effort in § 4(a)(7), we recommend further enshrining this right by adding the following to Section 3:

(f) PARENTAL RIGHTS - Nothing in this Act, including subsection e, shall be construed to prohibit the use or disclosure of covered information with the affirmative consent of the school, student or the student’s parent or guardian given in response to clear and conspicuous notice of the use or disclosure.

Moreover, parental choice must override the prohibitions for disclosure under §3(a) – otherwise the right will be meaningless. To that end, we recommend adding the following to Section 3:

(a) Prohibited Practices.—An operator may not knowingly— ...

(5) disclose covered information, unless the disclosure is made— ...

(F) pursuant to a request from the student or the student’s parent.

National Standard

Dozens of states have regulated or are considering regulating the use of student information in ways that will cripple innovation. Instead of maintaining a patchwork of potentially inconsistent state laws, Congress should create a national standard that simplifies regulations in this national market to create consistency for school, parents, students, and businesses.

² See, e.g. Dep’t of Ed., *FERPA for Parents and Eligible Students*, available at <http://familypolicy.ed.gov/ferpa-parents-students?src=ferpa-s>

For national legislation to have a meaningful impact in the student privacy space, it must preempt inconsistent state laws. Failure to preempt would simply add more inconsistency to the existing laws in the area and further discourage organizations from innovating or investing in technology that can improve educational outcomes for all of our nation's children.

Overly Broad Terms

The broad definitions of terms like "School Service," "Operator," "Targeted Advertising," "Covered Information," and "Personally Identifiable Information" will discourage businesses from entering the market.

Definition of "School Service" incorporates unrelated business activities

Under the current definitions, once businesses become School Services, their other non-school service related activities become governed by the SAFE KIDS Act. As written, the definition of "School Service"³ could be interpreted to mean that every component of a business becomes regulated by SAFE KIDS Act, even if just a small offshoot offers an education technology product or service.

We suggest amending the term "School Service" so it only covers an "operator" to the extent it is *actively engaged* in providing educational services to schools pursuant to a contract or agreement with the school.

Below is a proposed amendment similar to those adopted in states like Maryland and Nevada:⁴

SCHOOL SERVICE.—The term "school service" means an Internet website, online service (including a cloud computing service), online application, or mobile application that was designed and marketed for PreK- 12 purposes and is used for PreK-12 purposes pursuant to a contract or agreement with an educational agency or institution, or State educational authority, to the extent the operator or individual is operating in that capacity.

Definition of "Operator" should be similarly limited

Like the limitation of "School Service," the term "operator" should also be limited so a business is only an operator "to the extent it is operating a school service." So we recommend amending the term operator:

OPERATOR.—The term "operator" means an entity that operates a school service, to the extent it is operating a school service, except that such term does not include an educational agency, institution, or program.

Definition of "Targeted Advertising" would encompass non-school activities

We understand the efforts to avoid using student information collected by school services for purposes of targeted advertising. However, the definition of "Targeted Advertising" is so broad that it would capture covered information from non-school services. Much like the need to

³ SAFE KIDS Act p. 6 lines 5-10.

⁴ See, e.g. Maryland HB 298 (2015), Oregon SB 187 (2015).

limit the definition of School Service, we suggest adding similar language to the definition of Targeted Advertising so that it only covers information collected or inferred through the School Service.

Below is a proposed amendment similar to those adopted in states like Maryland and Nevada:⁵

(A) IN GENERAL.—The term “targeted advertising” means presenting advertisements to a student or the student’s parent, where the advertisements are selected based on information obtained or inferred from the student’s online behavior or use of online applications or mobile applications to the extent they are being used as a school service or from covered information about the student maintained by the operator of a school service and obtained through a school service. The use of student data, including covered information, for adaptive learning or customized student learning purposes is not targeted advertising.

Definitions of “Covered Information” and “Personal Information” should have clear scope

Terms and definitions, especially those on which compliance with a law turn, must avoid ambiguities. The injection of the words “linked or linkable” into the definition of “Covered Information” turns an understandable term into one that is open to interpretation. Likewise, using the word “includes” in the definition of “Personally Identifiable Information” has the same effect.

For example, most people would not consider a school’s address “Covered Information.” However, since that information is “linkable” to the students who attend that school the school’s address can become “covered information.” We understand that this is not the intention of the bill. To that end, we recommend removing the words “or linkable” from the definition of Covered Information and to remove the word “includes” from the definition of “Personally Identifiable Information.”

We also recommend removing section (j) from the definition of Personally Identifiable Information as it runs afoul of a similar problem. Finally, we recommend adding an exception for public information.

Below is a proposed amendment similar to those adopted in states like Maryland and Nevada:⁶

(a)(2) COVERED INFORMATION.—The term “covered information” means personally identifiable information, and information that is linked ~~or linkable~~ to personally identifiable information, that—

(a)(10) PERSONALLY IDENTIFIABLE INFORMATION.—The term “personally identifiable information” includes, with respect to a student— ...

~~(j) other information that, alone or in combination, would allow an operator or a reasonable person in the school community, who does not have personal knowledge of~~

⁵ See, e.g. Maryland HB 298 (2015), Oregon SB 187 (2015).

⁶ See, e.g. Maryland HB 298 (2015), Oregon SB 187 (2015).

~~the relevant circumstances, to identify a specific student with reasonable certainty; and~~
...
(L) is not publicly available information.

Discourages development by giving the FTC expansive rulemaking powers

In giving the Federal Trade Commission (FTC) sprawling rulemaking authority over education, the SAFE KIDS Act expands the FTC powers in ways that create regulatory uncertainty and a detriment to innovation within the education industry.⁷ The definitions found in the SAFE KIDS Act could be warped through rulemakings to expand the scope and powers of the FTC to begin regulating new aspects of education.

For example, small changes to the definition of “targeted advertising” could give the FTC sprawling regulatory authority over non-educational apps. Likewise, FTC transformations to the definition of “research, development, and improvement of educational sites, services, and applications” could force scientists to abandon research mid-stream.

Clearly this new FTC power could lead to diminished investment, development, and research of educational services.

To avoid these consequences, we suggest the SAFE KIDS Act not give the FTC such sweeping powers of education and remove this rulemaking power.

* * *

Thank you for considering our views. Please let us know if we can provide further information.

Sincerely,



Carl Szabo
Policy Counsel, NetChoice

⁷ SAFE KIDS Act p. 17-18 lines 21-4.