

CLOUD COMPUTING IN THE EDUCATION SETTING

During the 2014 Regular Session, the Senate Committee on Education and Health referred SB 599 to the Joint Commission on Technology and Science for study.¹ SB 599 requires each cloud computing service provider that enters into a contract with a local school board to provide services to only process and monitor student data according to the terms of its contract with the local school board. The bill prohibits the providers from using cloud computing services for any secondary purpose, such as developing online behavioral advertising, creating or correcting an individual household profile, selling student data for any commercial purpose, or other similar for-profit activities.

Relevant to the issues addressed in SB 599 is a currently-pending federal case in Northern California involving cloud computing privacy standards. The plaintiffs in that case, styled *In Re: Google Inc. Gmail Litigation*, challenge Google's operation of its advertising-supported electronic messaging service (Gmail) under state and federal anti-wiretapping laws and seek damages and injunctive relief related to Google's interception and data-mining of email over a period of several years. This case directly relates to SB 599 because two of the plaintiffs, college students Robert Fread and Rafael Carrillo, used Google Apps for Education cloud productivity tools suite. Google Apps for Education is a tool that Google touts as "[f]ree Web-based email, calendar & documents for collaborative study anytime, anywhere."² According to Google, as of October 2012, over 20 million students were relying on Apps for Education for email, calendaring, cloud-based storage, and document creation. In addition, approximately 22 percent of U.S. school districts rely on Chromebooks, personal computers that run on Google's Chrome operating system and use Google's Web-based apps and cloud-based services.

Google's various terms of service disclose that the company's software scans user-created content stored on its servers in order to filter out explicit content and also improve services. The company also discloses that such information is used to display customized content in advertising. The complaint in the case currently pending alleges that Google's Gmail data-mining practices violated federal and state wiretap and privacy laws because the company intentionally intercepted the content of emails to create profiles of Gmail users and to provide targeted advertising.

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For more information,
contact:

Aaron Campbell
Staff Attorney,
Joint Commission on
Technology and Science

804.786.3591 ext. 224
acampbell@dls.virginia.gov

In addition to wiretapping and general privacy concerns, in the education setting questions arise regarding whether Google's practices violate the federal Family Educational Rights and Privacy Act (FERPA), enacted to protect the privacy of children's educational records and to prevent unwarranted disclosure. Central to the debate is whether email messages and the metadata associated with Google services make up "educational records" under FERPA. Fordham University law professor Joel R. Reidenberg is quoted in March 13, 2014, article in *Education Week* as stating that "the 40-year-old FERPA does not adequately define what constitutes an educational record in an era in which a previously unthinkable amount of digital data proliferates." According to the same article in *Education Week*, a Google spokesperson confirmed that Google "scans and indexes" the emails of all Apps for Education users for a variety of purposes, including potential advertising, via automated processes that cannot be turned off—even for Apps for Education customers who elect not to receive ads." However, recent guidance issued by the Privacy Technical Assistance Center, a resource established by the U.S. Department of Education, advises that, under FERPA, a provider should not use data about individual student preferences gleaned from scanning student content in order to target ads to individual students because using data for such purposes does not constitute a legitimate educational interest.³ In addition to privacy concerns and possible FERPA violations, opponents of Google's practices also assert that such conduct violates the principle that student data should not be put to commercial use.

A key factor in the Google litigation is that the educational institutions that use Google Apps for Education services agree, in their contracts with Google, to obtain the necessary authorization from end users to enable Google to provide the services. The contracts further required Google to comply with Google's Privacy Policies. The plaintiffs allege that in some instances Google went beyond its own policies and used information gleaned from the scans to build secret profiles of Apps for Education users that could then be used in targeted advertising and other for-profit purposes.

A ruling in favor of the plaintiffs in *In Re: Google Inc. Gmail Litigation* may render SB 599 unnecessary if the practice is found to violate wiretapping laws or FERPA. However, such a ruling would likely be appealed by Google. In the meantime, the policy issues presented in the bill for consideration concern whether or not the educational benefits of free services such as Apps for Education outweigh the privacy concerns. Questions also arise as to whether a parent or student should be able to opt out of using such services, and what educational disadvantages this might place on such students.

The policy issues presented in the bill concern whether or not the educational benefit of the free services outweigh privacy concerns.

¹ HB 1114 (2014), patroned by Delegate Yancey, is identical to SB 599. It was not continued to 2015 in the House Committee on Science and Technology.

²<http://www.google.com/enterprise/apps/education/>

³ "Protecting Student Privacy While Using Education Services: Requirements and Best Practices," Privacy Technical Assistance Center. [http://ptac.ed.gov/sites/default/files/Student%20Privacy%20and%20Online%20Educational%20Services%20\(Feb%202014\).pdf](http://ptac.ed.gov/sites/default/files/Student%20Privacy%20and%20Online%20Educational%20Services%20(Feb%202014).pdf)