The Software & Information Industry Association (SIIA) writes to provide testimony on H. 127, "An Act relative to student and educator data privacy," which will be subject to hearing on October 18, 2021. SIIA is the principal trade association for the software information and digital content industry representing more than 450 technology companies. Many of our members work with schools in Massachusetts and across the country to develop and deliver software applications, digital instructional content, online learning services, and related technologies to enhance learning outcomes of all students. Many of these technologies use student information to help educators improve student outcomes.

We appreciate the Committee's leadership on student and educator privacy. Technology companies recognize the important role they have when it comes to safeguarding student data and applaud your dedication to this important issue.

We have concerns about specific provisions of H. 127 that deviate from frameworks for student and educator privacy that have been adopted successfully in other states.

First, Section 34J(f), which includes a private right of action for any violation of the Act and proposes $10,000 in damages for each violation as well as the possibility to obtain punitive damages, among other things. We strongly recommend that Massachusetts follow the lead of other states that have rejected private rights of action in their student privacy legislation. For example, California's Student Online Privacy Information Protection Act (SOPIPA) is widely considered as a model for student privacy legislation and does not include a private right to action. We recommend following SOPIPA's guidance and removing this provision.

Second, if a private right of action is included, the damages authorized by the Act would have a significant impact on the ability of educational technology companies to deliver services. The framework for damages could result in virtually unlimited liability for operators. In the event of a class action, the potential liability, regardless of materiality or harm, could present an existential risk to smaller operators such that they cannot afford to remain doing business in Massachusetts.

Third is Section 34J(g), which would permit the commission to disbar any operator "that improperly discloses covered information" for a minimum of five years. The proposed bar is not limited to egregious or even willful conduct and has no materiality threshold. There is no discretion to impose a lesser bar if a bar is deemed warranted. The existence of a private right of action will incentivize litigation against educational technology companies, and inevitably involve cases of inadvertent disclosure and others where a disclosure may have occurred, but no harm resulted. The commission, in those cases, will be faced with disbarring operators for a period of five year or more and possibly deprive Massachusetts educators of critical services.

We believe there should be appropriate consequences for improper disclosure of covered student data and accountability for operators who do so. We recommend that if the commissioner is authorized to bar operators from the Commonwealth, however, that such authority be for "no less than one year" rather than "no less than five years" and that the commissioner be required to make a finding that the disclosure was either willful or egregious before imposing a bar.

Fourth, we would recommend striking Section 34K as there are existing, adequate enforcement avenues that govern these concerns. Educational entities already have contracts with operators that spell out the terms of those relationships, and we are not aware of any concern with the terms of those contracts. Indeed, a statutory scheme could lessen the protections that educational entities have already. For example, operators have binding measures such as the Student Privacy Pledge. Under that Pledge, operators have committed to responsibly safeguard student information and privacy. Any operator that breaches this pledge would be in violation of the unfair trade practice code in place in various states and subject to all penalties and fines under the code. This is on top of breach of contract provisions included in contracts. We recommend this section be stricken entirely and individual contracts be allowed to continue to spell out these requirements.

In addition, the voidability provision in section 34K(b) is particularly concerning because it would permit voiding any private contract even if the contract provides more rigorous terms than those laid out by the legislature - or alternative provisions that sophisticated counterparties may opt for inclusion. Even if the legislature were to dictate the terms of a contract, authorizing voidability of a contract for even a *de minimus* discrepancy between the terms of a private contract and the statutory requirements creates a risk of non-performance that will have an effect on the costs of educational technology and, possibly, the ability of some companies to do business in Massachusetts.

More specifically section 34K(a)(3) as written implies that parents, legal guardians, and eligible students may directly contact operators. The language here is confusing as agreements are between operators as providers of a service and educational entities as consumers, not individual students and parents. Thus, all communication should exist strictly between the operator and the contracted educational entity. Educational entities are best positioned to communicate with students and their families as operators cannot comply with requests made by individuals to modify records as they are not in a position to verify identities. Additionally, all guidance on request for modifications for parents and students should be issued by their respective education institutions.

We appreciate your willingness to accept written testimony in regard to this bill on student and educator privacy. If you have further questions, please contact Sara Kloek at skloek@siia.net, or Victoria Akosile at vakosile@siia.net.

Sincerely,

Victoria Akosile
Manager, Education Technology Policy