

Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580

In the Matter of)
)
Focus Education, LLC – Consent Agreement) File No. 122 3153
)

COMMENTS OF CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD

Campaign for a Commercial-Free Childhood (“CCFC”), through its counsel the Institute for Public Representation, comments on the proposed *Agreement and Consent Order* between the Federal Trade Commission (“FTC” or “Commission”) and Focus Education, LLC (“Focus Education”).¹ CCFC supports the FTC’s enforcement action against Focus Education, but would like to see it strengthened by providing for consumer redress or disgorgement. In addition, this case illustrates the need for the Commission to enact guidelines that address the growing trend of deceptive marketing techniques used by developers in the children’s educational technology (“ed-tech”) and educational entertainment (“edutainment”) industries.

I. The proposed consent order is appropriate, but should be strengthened by also requiring consumer redress or disgorgement.

CCFC appreciates and supports the FTC’s decision to take enforcement action against Focus Education. As the Commission’s complaint demonstrated, Focus Education made false and/or unsubstantiated claims about the ability of its software to permanently improve “children’s focus, memory, attention, behavior, and/or school performance, including children with ADHD.”² The proposed consent order would prohibit Focus Education and its principles from making representations that its products improve children’s cognitive abilities, brain structure, behavior or academic performance, unless such representations are non-misleading and

¹ 80 Fed. Reg. 4575-01 (Jan. 28, 2015).

² Complaint, Focus Education, LLC *et al* (2015), at 9. (“FTC Complaint”).

are supported by competent and reliable scientific evidence.³ CCFC also appreciates that the FTC has posted a blog highlighting the significance of its action in stating that “[t]he FTC’s message is clear: Companies need sound science to support cognition claims. For savvy marketers, that should be a no-brainer.”⁴

While CCFC supports the provisions of the proposed consent decree, the FTC should also provide for consumer redress and/or disgorgement of the profits. Focus Education sold its “ifocus System” at the hefty price of \$214.75. Thus, consumers who purchased this product in reliance on the false claims were substantially injured. In addition, Focus Education made \$4.5 million in sales from 2012 through May 31, 2013.⁵ For these reasons, consumer redress and/or disgorgement of the profits is warranted.

II. The Commission should issue industry guidelines to address deceptive marketing practices in the growing ed–tech and edutainment industries.

The FTC should also initiate a process to develop guidelines to promote truthful and substantiated advertising in the ed-tech and edutainment marketplace generally. FTC precedent demonstrates that such a guide would benefit industry and consumers alike by providing certainty for both consumers and advertisers. In the case of environmental claims made in advertising, for example, the FTC’s Green Guides⁶ provide consumers with accurate information regarding the environmental benefits of advertised products and its packaging, while providing clear guidance for advertising making the environmental claims.⁷

³ Agreement Containing Consent Order, Focus Education, LLC *et al.*, (Oct. 28, 2014), at 3-6.

⁴ Lesley Fair, *A videogame scientifically proven to boost kids’ school performance - and other fairy tales*, FTC (Jan. 20, 2015), <http://www.ftc.gov/news-events/blogs/business-blog/2015/01/videogame-scientifically-proven-boost-kids-school>.

⁵ FTC Complaint, at 3.

⁶ See 16 C.F.R. § 260 (2012).

⁷ FTC, *Environmentally Friendly Products: FTC’s Green Guides*, <http://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides> (last visited Feb. 19, 2015).

The ed-tech and edutainment markets are rapidly growing and highly profitable industries. According to a report produced by market research firm Ambient Insight, mobile learning games earned an estimated \$1.5 billion in 2013, and are projected to earn \$2.3 billion in revenue by 2017.⁸ In a recent survey conducted by the Software & Information Association, roughly \$8.4 billion in digital educational products were sold in to the pre-K-12 marketplace in 2012-13, which represents an estimated five percent increase in revenue over the course of a year.⁹

Moreover, the number of developers marketing products that make educational claims continues to increase. Apple carries over 80,000 education apps designed to accommodate a wide range of grade levels and learning abilities.¹⁰ Similarly, Amazon carries approximately 20,374, education apps of which 1,798 were added in the past 90 days.¹¹ A 2014 industry generated survey reported that 314,674 of the 1,236,698 apps on Google play appeared to be designed for children.¹² These figures illustrate that although there are already thousands of products in the marketplace, it continues to grow at a rapid rate. It has also been reported that

⁸ Helen A.S. Popkin, *Do Education Apps Keep Kids Sharp or Just Plugged In?*, NBC News (June 4, 2014), <http://www.nbcnews.com/tech/gadgets/do-education-apps-keep-kids-sharp-or-just-plugged-n122581> citing Ambient Insight, *Global Mobile Marketing Research*, <http://www.ambientinsight.com/Reports/MobileLearning.aspx> (last visited Feb. 20, 2015).

⁹ Michele Molnar, *Ed-Tech Market Grows More Than 5 Percent*, *Industry Association Reports*, Education Week' Blog (Dec. 10, 2014), http://blogs.edweek.org/edweek/marketplacek12/2014/12/ed-tech_market_grows_more_than_5_percent_industry_association_reports.html. In 2011-12, educational software accounted for approximately \$7.97 billion of the pre-K-12 marketplace. *Id.*

¹⁰ Apple, *iPad in Education*, <https://www.apple.com/education/ipad/apps-books-and-more/> (last visited Feb. 17, 2015).

¹¹ The data is extracted from a natural language search of the Amazon App store for “education apps.” Amazon, *Education App Preview*, http://www.amazon.com/b/ref=sr_aj?node=2478842011&ajr=0 (last visited Feb. 18, 2015).

¹² Monique Zytnek, *School Report for Apple App Store and Google Play*, adjust (Sep. 29, 2014), <https://www.adjust.com/company/overview/2014/09/29/kids-apps-report-apple-itunes-google-play/>.

ed-tech companies are looking to shift from marketing exclusively to educational institutions to the consumers directly.¹³

As the consumer market for ed-tech and edutainment products continues to grow, the number of potentially deceptive and unsubstantiated claims made by developers is likely to increase as well. Marketing guidelines would help to reduce the number of false and unsubstantiated claims.

Moreover, the enforcement action against Focus Education illustrates that the FTC's case-by-case approach to deceptive claims has not been successful. In 2006, CCFC filed a request to investigate The Baby Einstein Company and The Brainy Baby Company, LLC, developers of the Baby Einstein and Brainy Baby videos designed for children under the age of two. Both companies marketed the videos using unsubstantiated educational and cognitive development claims and by appealing to parents' desire to give their children a learning and development advantage.¹⁴ After the companies agreed to changes, the FTC staff issued a letter clarifying that

advertisers must have adequate substantiation for educational and/or cognitive development claims that they make for their products . . . reliance on general theories of child development or on studies of products that are materially different from the advertised product will not be sufficient.¹⁵

Subsequently, also in response to CCFC's request for investigation, the FTC filed a complaint for false and unsubstantiated learning claims against the marketers of Your Baby Can

¹³ Sean Cavangh, *Amplify Jumps Into Consumer Market With Educational Games*, Education Week Blog (Sep. 10, 2014), http://blogs.edweek.org/edweek/marketplacek12/2014/09/amplify_jumps_into_consumer_market_with_educational_game.html.

¹⁴ Letter from Mary Engle, Assoc. Dir. FTC Bureau of Consumer Protection Div. of Advertising Practices, to Angela Campbell and Susan Linn (Dec. 5, 2007), at 1.

¹⁵ *Id.* at 2.

Read.¹⁶ The FTC eventually entered into settlements, including substantial monetary judgments, with the marketers. Despite these well-publicized actions against Baby Einstein, Brainy Baby and Your Baby Can Read, marketers continue to advertise misleading and unsubstantiated learning claims. An industry guide that provides examples of deceptive and unsubstantiated learning claims, in addition to the requirements needed for adequate substantiation, would educate developers and consumers about the importance of substantiating educational claims.

Conclusion

While CCFC supports the FTC’s decision to take enforcement action against Focus Education, CCFC believes that industry-wide guidance is necessary to further deter unsubstantiated educational claims.

Respectfully submitted

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¹⁶ FTC, *Defendants Settle FTC Charges Related to “Your Baby Can Read” Program* (Aug. 22, 2014), <http://www.ftc.gov/news-events/press-releases/2014/08/defendants-settle-ftc-charges-related-your-baby-can-read-program>.