



www.nsba.org
Phone: 703.838.NSBA Fax: 703.683.7590
1680 Duke Street Alexandria, Virginia 22314 -3493

Via Online Submission November 17, 2017:

<https://ftcpublic.commentworks.com/ftc/studentprivacyedtechworkshop>

Federal Trade Commission
Office of Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex A)
Washington, DC 20580

Re: Student Privacy and Ed Tech and P175412

The National School Boards Association (NSBA) thanks the Federal Trade Commission (FTC) and Department of Education (ED) for the opportunity to provide comment prior to the December 1, 2017, Student Privacy and Ed Tech workshop. NSBA shares your dedication to ensuring that the promise of ed tech can be realized while protecting student data privacy. As the voice of our nation's public schools, NSBA seeks a federal framework that protects student data privacy, while providing flexibility to local school districts to fashion policy consistent with local priorities and existing data systems.¹ With these goals in mind, NSBA urges FTC and ED to consider working with stakeholders to address areas of overlap between the Family Educational Rights and Privacy Act (FERPA) and the Children's Online Privacy Protection Act (COPPA) so that schools have clear and objective criteria, as well as a safe harbor when such criteria are followed.

1. NSBA asks both FTC and ED to assist school districts in understanding their obligations under FERPA when they provide consent in lieu of parents for students under age thirteen to access online applications used for educational purposes.

FERPA allows school districts to disclose student information without parent consent to a "school official" – a "contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions...."² The district must include in its

¹ See NSBA Letter to House Education Committee regarding Family Educational Rights and Privacy Act, June 3, 2015, available at <http://www.nsba.org/nsba-letter-house-education-committee-regarding-family-education-rights-and-privacy-act-ferpa-0>.

² The designated "school official" must perform a function that the school or district would otherwise have used its own employees to perform; and the school district must set up reasonable methods to ensure that the service provider/school official accesses only student records in which it has a legitimate educational interest; that the service provider is under the direct control of the district with regard to the use and maintenance of the records; and that the provider uses FERPA-protected information "only for the purposes for which the disclosure was made," and refrains from disclosure to other parties without authorization. 34 C.F.R. §§ 99.31(a) and 99.33(a).

annual FERPA notice to parents its criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.³ ED has interpreted the exception to cover online service providers, presuming the exception's requirements are met.⁴

COPPA requires operators of websites and online services that collect, use, or disclose personal information from children under 13 to provide direct notice to parents and obtain verifiable parental consent before collecting that information. The FTC "Complying with COPPA: Frequently Asked Questions" guidance indicates that a school can consent to a website or app's collection, use, or disclosure of personal information from students for purposes of COPPA.⁵ "Where a school has contracted with an operator to collect personal information from students for the use and benefit of the school, and for no other commercial purpose," the guidance explains, "the operator is not required to obtain consent directly from parents, *and can presume that the school's authorization for the collection of students' personal information is based upon the school having obtained the parents' consent.* However, the operator must provide the school with full notice of its collection, use, and disclosure practices, so that the school may make an informed decision."⁶

This presumption that a school district has obtained parent consent for the collection of student data creates an arguably more stringent requirement than FERPA imposes upon school districts – one that can be problematic for schools. Online services, including learning management systems that deliver curriculum by collecting student input and providing an individualized level of instruction depending on student individual response, are ubiquitous in schools. Some school districts serve tens of thousands of students and operate multiple educational software programs and applications. Few districts receive 100% return on requests for parent consent. If school districts are required to get actual parent consent, many districts would be unable to deliver the curriculum to students whose parents have not responded, creating inequities in addition to the administrative burden.

NSBA uses "online service provider," "provider," and "operator" interchangeably throughout this document.

³ 34 CFR § 99.7(a)(3)(iii).

⁴ U.S. Dep't of Educ. Privacy Technical Assistance Ctr., *Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices* (Feb. 25, 2014), available at <https://tech.ed.gov/wp-content/uploads/2014/09/Student-Privacy-and-Online-Educational-Services-February-2014.pdf>; see also National School Boards Association, "Data in the Cloud: A Legal and Policy Guide for School Boards on Student Data Privacy in the Cloud Computing Era" (2014), available at https://cdn-files.nsba.org/s3fs-public/Data_In_The_Cloud_Guide_NSBA_COSA_02-09-15.pdf?RQkKRotGvL6gD6tmH_jHZTHelMfxdlUA.

⁵ Federal Trade Commission, "Complying with COPPA: Frequently Asked Questions," available at <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions#Schools> (hereinafter "FAQ"), M.1.

⁶ FAQ M.2. (emphasis added).

Additionally, online service providers should not be able to transfer responsibility for any misuse of student information they collect by relying on the school district obtaining consent. The online service provider should be responsible for ensuring that student data is collected and maintained in a safe and responsible manner.

For these reasons, urges FTC to reconsider the presumption of parental consent in the COPPA FAQs, and to consider a presumption of parental notification. The language in the FAQ would better serve the educational community if online service providers were able to presume that the school districts provided notice to parents of the online educational applications it allows students to use, and if such presumed notice sufficed for purposes of FERPA and COPPA. A presumption of parental notice, consistent with the “school official” exception with which schools are familiar, would provide schools needed flexibility to adopt policies based on local priorities and state law.

2. NSBA urges FTC to consider acting as a convener to clarify online educational service providers’ communication responsibilities to school district personnel, not only by providing notice to providers of their responsibilities under COPPA, but also by requiring that they notify educators that state and local policy may affect their authority to permit student access to, and use of, online applications.

As online applications have become more available, it is not uncommon for many diligent, well-intentioned teachers unilaterally to introduce online applications into their classrooms. The ease of access to these resources thus complicates the processes that local school districts strive to follow.

A simple notice, appearing prominently before terms of service can be accepted, would remind educators that state and local law and policy will affect their authority to use online educational services, and that accepting terms of service may have legal consequences.

3. ED PTAC has indicated that, as a best practice, parent access to student records information held by providers on behalf of a school or district should be “seamless, with providers giving the requested records to the school or district, who can confirm the parents’ identity and provide them access to the records.”⁷ It would be helpful to schools if FTC provided operators similar guidance so that parents can be assured that both the school and the operator understand their obligation to provide parent access to student education records.

NSBA urges ED and FTC to work with school boards, their attorneys, and other stakeholders to develop resources for schools and operators specifically with respect to COPPA consent procedures, especially with respect to curriculum acquisition. Ideally, this process would yield a FERPA/COPPA checklist of objective criteria that, if followed, would provide schools with safe harbor from a finding

⁷ U.S. Dep’t of Educ. Privacy Technical Assistance Ctr., Responsibilities of Third-Party Service Providers under FERPA (August 2015), available at <http://ptac.ed.gov/sites/default/files/Vendor%20FAQ.pdf>.

of FERPA violation when they consent for parents as described above. This checklist could include example notices to parents of apps and websites to which the school allows student access, and a uniform FERPA “rider” to providers’ terms of service when an application or web site is used.

By clarifying the interplay between these two important statutes – FERPA, designed to protect student education records, and COPPA, designed to provide parent control over what information is collected from their young children online – ED and FTC have an opportunity to smooth the way for more efficient and effective use of ed tech tools to help students learn. NSBA is pleased to bring the voice of public schools to the conversation. Please reach out to us with any questions. We look forward to further discussion of student data privacy concerns.

Sincerely,



Thomas J. Gentzel
Executive Director & CEO