



Student Privacy and Ed Tech and P175412

Comments of Common Sense Media

Nov. 17, 2017

Common Sense Media, along with its policy arm Common Sense Kids Action (together, “Common Sense”), respectfully submits these comments in advance of the joint December 1 workshop put on by the Federal Trade Commission (FTC) and the Department of Education (ED), “Student Privacy and Ed Tech.” We are pleased that the agencies are working together to address children’s educational privacy in a coherent and consistent manner.

We believe that schools and vendors need more clarity on joint and overlapping requirements of the Children’s Online Privacy Protection Act (COPPA) and the Family Education Rights and Privacy Act (FERPA), including Congressional updates, at least with respect to FERPA. In addition, we believe that one of the trickiest issues – school consent – can be resolved by requiring ed tech vendors to use student information only for educational purposes. Vendors receive student information solely because of their role in educating students, so there is no real justification for using it for commercial purposes. Furthermore, this will increase parental trust in educational technology and enable innovative educational technology that advances student learning.

I. Common Sense Works Closely with Educators and Parents to Protect Students’ Privacy and Enable Smart, Safe, and Effective Use of Educational Technology

Common Sense is the nation’s leading independent nonprofit organization dedicated to helping kids thrive in a world of media and technology. We empower parents, teachers, and policymakers by providing unbiased information, trusted advice, and innovative tools to help them harness the power of media and technology as a positive force in all kids’ lives. Common Sense has an uncommon reach among parents and teachers, with more than 68 million users and half a million educators across its network.

Common Sense has worked directly with schools and teachers for almost a decade. We are also longtime defenders of student and child privacy. We have seen technology transform learning and the classroom, and have made it our mission to enable kids and teachers to benefit from technology while at the same time being cognizant of its risks. We have supported rules and legislation to strengthen COPPA, FERPA, and federal student privacy rules, and spearheaded strong student privacy laws at the state level, including California’s groundbreaking Student Online Personal Information Protection Act (SOPIPA). And we are deeply committed to ensuring that parents, educators, and students know how to be safe, ethical, responsible, and effective online. Last year, we trained over 25,000 educators as they shift to using digital technology in the classroom. And, working with district partners across the country, we have developed one-of-a-kind privacy evaluations of ed tech products that enable educators to make smart, informed choices about what to use in their classrooms.



II. Schools and Vendors Need More Clarity on COPPA and FERPA’s Requirements, Including Congressional Updates to FERPA

Well-intentioned ed tech vendors and educators still have difficulty understanding how best to comply with COPPA in the educational context and FERPA in the digital context. In our discussions with educators and vendors, we hear of what appears to be both under and over compliance. Additional guidance from the FTC and ED can help resolve many of these issues, though we believe that, at least with respect to FERPA, Congressional action is also required.

On the under compliance side, some vendors mistakenly believe that COPPA does not apply to them if they are targeting products to schools and districts. And some vendors mistakenly believe that school consent is sufficient for any use of information—including commercial, such as allowing third party ad trackers on their sites. Additionally, schools may not understand all the uses a vendor intends to make with students’ information and mistakenly believe they can give permission.

With respect to potential over compliance, it is unclear if schools are required to get a written contract with a vendor in order to consent (assuming student information is only used for educational purposes). COPPA does not require written contracts in order to obtain parental consent. Rather, providing a written consent form with signature is only one of a number of enumerated ways in which parents can consent.¹ Yet the COPPA FAQs state that schools can consent only when they have “contracted” with a vendor.² A written contract may not be an actual requirement, but given the lack of clarity most school attorneys seem to advise their clients to get one to be safe. Contracts can be a very good way to ensure student information is better protected, but it would be helpful for all if this could be clarified, especially when also considering operators acting as school officials under FERPA.³ Further, overly cautious schools may sometimes ask parents for COPPA consent even when products use student information only for educational purposes. This is unnecessary and can lead to parents disregarding consent forms when they do deserve attention.

¹ See Children’s Online Privacy Protection Rule, 16 C.F.R. § 312.5(b) (2013).

² See Complying with COPPA: Frequently Asked Questions: M1 (“Many school districts contract with third-party websites...”) and M2 (“Where a school has contracted with an operator...”), available at <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions>.

³ Under FERPA guidance from the Privacy Technical Assistance Center, a contract is not required. “While FERPA regulations do not require a written agreement for use in disclosures under the school official exception, in practice, schools and districts wishing to outsource services will usually be able to establish direct control through a contract signed by both the school or district and the provider. Privacy Technical Assistance Center, Department of Education, Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices (2014), available at <https://tech.ed.gov/wp-content/uploads/2014/09/Student-Privacy-and-Online-Educational-Services-February-2014.pdf>.



Furthermore, it can be difficult for schools to comply with FERPA because it was written in an era of paper punchcards. Whether FERPA protects metadata and other information that can be collected from students' use of ed tech, such as web browsing, searching, and other online activity, is questionable. Directory information is opt-out under FERPA, but much of that information is protected as opt-in under COPPA. In general, obligations with respect to PII need to be improved, as PII is an increasingly outdated concept. These are changes that need to be addressed, and while some can be updated through guidance, Congress should also move to ensure our nation's major federal student privacy law is still meaningful in our mobile, modern world.⁴

III. The Thorny Issue of School Consent Can Be Resolved By Requiring that Ed Tech Vendors Use Student Information Only for Educational Purposes

The question of when a school can consent and when a parent needs to consent would be easily resolved by limiting use of student information collected by ed tech vendors to educational purposes—and nothing else. This is entirely consistent with the purpose of the collection in the first place, and it seems unfair to force students to turn themselves over to commercial profiling and ad targeting simply because they are trying to get the best education possible with the most advanced technological tools.

If student information was used for educating students, and nothing else, the consent process would be significantly smoother. Schools could know that they are always able to consent. Vendors would not be required to allow parents to revoke consent, which could be a complex undertaking mid-semester. Additionally, this brings to even closer alignment COPPA's school consent and FERPA's "School Official Exception." While it may not be necessary to formally align the two, in practice they should overlap—schools educate children, and an ed tech vendor acting as a school official under FERPA has no business doing anything with student information other than that. Indeed, it is difficult to imagine that a school would "otherwise use employees" to target children with advertisements or commercially profile them.⁵ In addition, under COPPA or FERPA, a school giving consent or enabling the collection of student information should have control over any such information residing with an ed tech vendor.

Moreover, if ed tech vendors were committed to using student information only for educational purposes, schools could feel comfortable that they are in compliance with varied and various state student privacy laws, as multiple states across the country prohibit use of student information for targeted advertising or commercial profiling.⁶

⁴ See also Common Sense Kids Action's recent recommendations to update the federal Family Education Rights and Privacy Act, *available at* <https://www.common sense media.org/kids-action/about-us/our-issues/digital-life/school-privacy-zone>.

⁵ See Family Educational Rights and Privacy Act Regulations, 24 CFR Part § 99.31(b) (2012).

⁶ See California's Student Online Personal Information Protection Act (SOPIPA) (SB 1177 (Calif. 2014)); Delaware's student educational privacy act (SB 79 (Del. 2015)); New Hampshire's privacy for student's online personal information act (HB 520 (N.H. 2015)).



IV. If Ed Tech Vendors Use Student Information Only for Educational Purposes, Parental Trust in Classroom Technology Will Increase

Parents can be overwhelmed by the amount of technology in their kids' lives, and may have limited understanding of what information is collected on apps they download for their kids at home, let alone what a teacher directs at school. We have spoken with parents who are frustrated about their children's use of technology in school, including the information collected from their children by ed tech vendors. While parents may trust schools, they have less trust for outside companies operating within them. And parents are deeply concerned about commercial use of their children's educational information⁷; indeed, this was an original impetus for student privacy laws restricting commercial use of students' information. As ed tech vendors are surely aware, lack of trust can lead to a backlash.⁸

Requiring that ed tech vendors use information for educational purposes, such that schools can always consent under COPPA, would increase trust among parents. It would also help to alleviate parental concerns about form inundation, as required notices could be streamlined through schools.

V. Working Together, the FTC and ED Can Improve the Educational Technology Landscape

Educational technology, used wisely, has the power to enhance education and personalize learning, fundamentally changing the classroom experience and preparing our kids for the jobs of the future. We look forward to working with you and other policymakers to ensure COPPA and FERPA enable such learning.

Respectfully submitted,

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⁷ See, e.g., Common Sense Media poll finding that "90% of adults are concerned about how non-educational interests are able to access and use students' personal information"; available at <https://www.commonsensemedia.org/about-us/news/press-releases/national-poll-commissioned-by-common-sense-media-reveals-deep-concern>.

⁸ See Singer, N. (2014, April 21). Inbloom student data repository to close. *The New York Times*, available at <https://bits.blogs.nytimes.com/2014/04/21/inbloom-student-data-repository-to-close/>.