Comments from

to

Federal Trade Commission and U.S. Department of Education

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Notice of Workshop and Opportunity for Comment
FTC, Department of Education Announce Workshop to Explore Privacy Issues Related to Education Technology

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On behalf of the Future of Privacy Forum (FPF), we are pleased to submit these comments in response to the Federal Trade Commission (FTC) and U.S. Department of Education's (USED) Request for Comment in advance of the December 1, 2017 workshop to explore privacy issues related to education technology ("Ed Tech"). FPF is a Washington, DC based non-profit organization that serves as a catalyst for privacy leadership and scholarship, advancing principled data practices in support of emerging technologies.

FPF has been working on student privacy for some time. Among other accomplishments, we jointly created the Student Privacy Pledge with the Software and Information Industry Association (a voluntary and legally binding promise by more than 300 Ed Tech companies as of November 2017 regarding the handling of student data); have read or provided comments on the more than 600 student privacy bills introduced in 49 states since 2014 and the eight federal bills introduced in 2015; released numerous resources on student privacy, including a guide for de-identifying student information under FERPA; and created FERPA|Sherpa, a website compiling education privacy resources and tools with sections aimed at parents, schools, service providers, and policymakers. We work frequently with all of the relevant stakeholders in the student privacy realm, from districts and Ed Tech providers to parents and policymakers.

We thank the FTC and USED for requesting comments on the broad range of legal and policy issues related to applying COPPA in schools and how it intersects with FERPA. Our comments focus on two areas where we think additional clarity is needed on the intersection between COPPA and FERPA: when schools can give consent to Ed Tech providers without parental approval under COPPA; and whether the rights and safeguards provided to parents under COPPA accrue to schools when they are providing that consent.

For clarity, our comments use the term "schools" to refer to any school, such as a district, regional agency, or state education agency that are contracting with an Ed Tech provider.

FERPA Imposes Requirements on Schools and their Relationships with Ed Tech Providers

Under FERPA, the "school official" exception allows schools to share student data with entities – called "service providers" – designated as school officials. These service providers can only receive student personally identifiable information if they:

- perform institutional functions for which the school would otherwise use its own employees;
- function under the direct control of the school or district with respect to the use and maintenance of education records;
- use any student information only for purposes authorized by the school; and
- have a legitimate educational interest – as determined by the school – in the information they are receiving.

These restrictions are generally confirmed in contractual agreements between schools and service providers, which can be either a written contract or "click-through" terms of service if those terms allow the school to maintain direct control. While there is no formal definition of "direct control," the U.S. Department of Education has provided guidance indicating that a lack of direct control could be found if the service provider says in their contract or terms of service that they:

- May modify the terms of agreement at any time without notice or consent from the school or district;
- May use student data to market or advertise to students or their parents or mine or scan data and user content for the purpose of advertising or marketing to students or their parents;
- May use data for any purpose other than the purpose for which the data was originally provided to the service provider without notice to users;
- May use student personally identifiable information after it is no longer needed or after the school or district requires that that information be deleted;
- May not require their subcontractors to adhere to the service provider's terms of service;
- May collect data about the student from a third-party source if the student logs into the service through a third-party website, such as a social networking site;
- May share student personal information that the user is not knowingly providing to the service, such as metadata that may be personally identifiable;
- May share de-identified information, but define de-identification too narrowly;
- Are claiming ownership over the student data or copyright or a license to use student data or uploaded school or student user content;
- May in any way limit the school or district's access to student information when requested; and
- May not mention security protections.[1]

Greater Clarity is Needed on the Intersection of COPPA and FERPA Requirements

While FERPA's requirements for school relationships with Ed Tech providers are fairly clear as described above, the requirements of COPPA when Ed Tech providers collect student personal information from schools are not sufficiently clear for many stakeholders including Ed Tech providers, parents, schools and districts, or state education agencies.

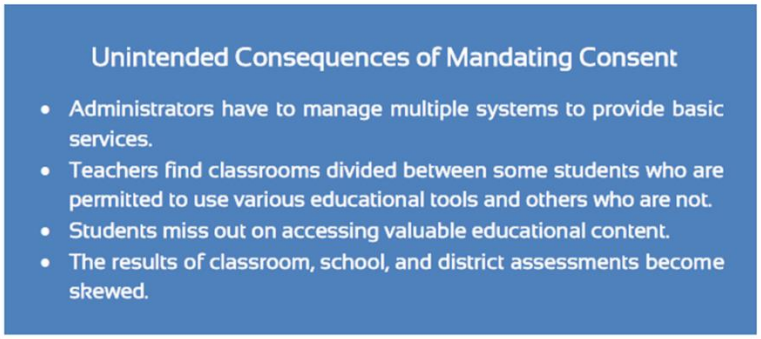

Image from FPF's publication "Student Data: Trust, Transparency, and the Role of Consent."

COPPA is not as clear about how schools may provide consent to the use of Ed Tech in schools for children under thirteen. While Section M of the FTC's FAQ on COPPA does say that "schools may act as the parent's agent and can consent to the collection of kids' information on the parent's behalf," this statement could be interpreted either as similar to FERPA's school official exception, or as requiring that, since schools are acting as "the parent's agent," they must actively seek out parental consent before they can consent to an Ed Tech tool that will be receiving student data from being used.

It is vital that this confusion be clarified, and that the FTC also provide clarity on whether the full panoply of COPPA rights and safeguards accrue to the school rather than the parent.

[1] https://studentprivacy.ed.gov/sites/default/files/resource_document/file/TOS_Guidance_Mar2016.pdf

Schools Should Be Able to Provide Consent for the Use of Ed Tech When It Will Be Used Exclusively for an Educational Purpose

The inference that schools must obtain parental consent is that parents would have the option to say no, which would create a massive burden on schools and shut down or inhibit many vital school functions. As FPF examines in our publication "Student Data: Trust, Transparency, and the Role of Consent,"

> *Like many other organizations, schools partner extensively with outside parties, including volunteers and contractors, to perform basic administrative tasks. Schools use outside parties to run cafeterias, administer electronic student information systems and provide digital learning resources, and these relationships often require sharing student information. Privacy laws generally recognize that these third parties who act on behalf of an organization should be treated as an integral part of the organization itself, so long as the organization remains in control of the data. Thus, efforts to encourage parents to opt-out of school systems simply because certain functions are outsourced could be especially disruptive… Taken to the extreme, individual students might be able to access one educational tool but not another, throwing a teacher's lesson plans into disarray. Teachers and administrators would have to constantly juggle classrooms and teaching instruction to account for which students are allowed to do what.*[2]

Allowing parents to opt out of essential school functions could also create equity and privacy issues, requiring parents to evaluate a technological tool that many of them have no experience in understanding. Joel Reidenberg, a widely acknowledged student privacy expert, notes that providing parental opt-outs does not solve student privacy problems, since the "complexity and sophistication of the data uses would make it difficult for the average parent to know what they're consenting to."[3] As FPF describes in our publication "Student Data: Trust, Transparency, and the Role of Consent,"

> *When concrete privacy concerns are identified, schools should protect all students' privacy, not just those students who might have opted-out of certain non-educational uses. For example, personalized learning tools raise concerns about the leakage of student data profiles into the non-education and employment environments, limiting students' options as they transition into the working world. Instead of allowing some students to opt-out of an otherwise promising development in education technology, such concerns are better addressed by restricting how data collected through personalized education technologies can be used. This way every student would receive the benefits and have his or her privacy protected.*[4]

However, there are some situations where parental consent is allowable and desirable. Under FERPA, for example, parents are given the right to opt out of sharing "directory information." This exception allows information to be shared as deemed appropriate by the school for things like announcing the names of the football team, the school yearbook, play programs, or a public honor role. Directory information is also often disclosed to companies that provide school pictures or class memorabilia like

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[2] Jules Polonetsky & Joseph Jerome, Student Data: Trust, Transparency and the Role of Consent (2014), https://fpf.org/wp-content/uploads/FPF_Education_Consent_StudentData_Oct2014.pdf.
[3] Ellis Booker, Education Data: Privacy Backlash Begins, Info. Week (Apr. 26, 2013), http://www.informationweek.com/education-data-privacy-backlash-begins/d/d-id/1109713?.
[4] Jules Polonetsky and Joseph Jerome, Student Data: Trust, Transparency and the Role of Consent (2014), https://fpf.org/wp-content/uploads/FPF_Education_Consent_StudentData_Oct2014.pdf.

class rings. Because the sharing of this information is not necessary to essential school functions, parents are provided an annual notice about directory information and an opportunity to opt out of its sharing.

Similarly, if COPPA is interpreted to allow for schools to provide consent to share student personal information with Ed Tech providers without express parental consent, this should be, as described in Section M, "limited to the educational context," and defined as "where an operator collects personal information from students for the use and benefit of the school, and for no other commercial purpose."

It would be useful for the FTC to provide greater clarity on what is meant by "educational context" versus "commercial purpose." This clarity does not have to be in the form of an exhaustive list, but simply describe some characteristics that clearly place the use or action of an Ed Tech company product into either the educational or the commercial context.

A big challenge to districts is figuring out when explicit permission is needed from parents for COPPA compliance. Most situations are fairly clear: for example, an application that is used by students to play math games or that takes attendance and allows teachers to note how students are behaving clearly are applications being used for an educational purpose. However, most Ed Tech providers also use student data to fix and improve the product as well as create new products. This is common practice in other sectors, including for offline educational products like textbooks that go through extensive vetting and improvement in response to feedback. Improving a product should be considered an educational purpose because additional and improved versions are better at performing the function that the product is meant for, which increases student success when using the product. It would be helpful if the FTC clarified that product improvement and development are acceptable uses under the educational purpose requirement.

Similarly, most state student privacy laws aimed at Ed Tech providers allow for "recommendation engines." For example, if a student is playing a math game in an application consented to by the school, this allows them to see a recommendation at the end of the game that tells them they should play a geometry or algebra game next. State laws that allow for this also require that recommendations only be provided if the Ed Tech provider will not be receiving any form of payment in return for providing the recommendation. A clarification by the FTC that this type of use would be considered an "educational purpose" – perhaps only when the school itself consents to these recommendations – for the purpose of schools providing COPPA consent would be very useful to both schools and Ed Tech providers.

One other area of confusion that it would be useful for the FTC to clarify is how it works when parental consent should be obtained because the application will be used for a non-educational purpose. Unfortunately, while overseeing applications from companies to become signatories to the Student Privacy Pledge, FPF has occasionally seen clauses in contracts where Ed Tech providers attempt to fully shift the burden of their COPPA responsibilities onto schools, essentially making schools their agents and requiring that the school certify that they will ensure COPPA compliance on behalf of the company. While it may, in some situations, be appropriate for schools to serve as the intermediary between parents and the company to facilitate and maintain a record of parental consent, making that the default regime when non-educational services are being used in schools likely imposes more of a burden on schools than is appropriate for a law aimed at regulating Ed Tech providers. It is also essential that, even if schools are facilitating getting parental consent, Ed Tech providers are still subject to and responsible for COPPA's security, advertising, and other restrictions. FPF believes it would be useful for the FTC and USED to offer joint guidance on the responsibilities of schools versus Ed Tech providers in this context.

When Schools Provide Consent for the Use of Ed Tech and It Will Be Used Exclusively for an Educational Purpose, the Rights and Safeguards of COPPA Should Accrue to the School

When a school is allowed under COPPA to consent to an Ed Tech product being used without receiving explicit parental consent, it is important that it is the school that also receives the COPPA rights that allow them to ensure control and access to that information. This includes the right to review and request deletion of that student data. While some groups may argue that parents should be given these rights instead, the practical effect of applying COPPA in that way would allow parents to delete their child's test results or homework if they did not like the result, undermining the educational system's ability to manage and assess students on a day-to-day basis. Ensuring these parental rights as described under COPPA carries over to the school would firmly align the statute with FERPA.

However, the transferring of these COPPA rights to schools means that they must be conscious of their responsibilities – most of which already existed under FERPA, so this will not be a new burden on schools – and put in place policies or ensure practices where student information will not be retained indefinitely. Especially for the children who COPPA covers, inaccurate or no-longer-accurate information should be deleted once it is no longer needed for its original purpose.

In order to aid schools in this, Ed Tech providers should provide them with clear and easy-to-understand information about what data they have collected, how it will be used, and how it will be protected. As a best practice, schools should have this information available to parents (already required under many state laws) in a public place such as the district's website.

FPF staff welcome the opportunity to further discuss these issues at the workshop on December 1 and are happy to provide additional details or action steps on any of these recommendations.