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

Re: COPPA Rule Review, 16 CFR part 312, Project No. P195404

The National School Boards Association (NSBA) represents through our state association members approximately 13,800 school boards nationwide.

NSBA is pleased to comment on this rule review, which has the potential to affect significantly K-12 public schools' interactions with educational technology (EdTech) providers and families of students who use online educational products and platforms. Given the broad applicability of this rule, NSBA urges the Federal Trade Commission (FTC) to remain committed to the administrative process to obtain stakeholder input prior to the publication of the final regulations.

NSBA shares the FTC's dedication to ensuring that the promise of EdTech can be realized while protecting student data privacy. To this end, NSBA seeks a federal framework that not only vigorously protects student data privacy, but also provides flexibility to local school districts to fashion policy consistent with local priorities and existing data systems. By working with all stakeholders, the FTC can address areas of overlap between the Family Educational Rights and Privacy Act (FERPA) and the Children's Online Privacy Protection Act (COPPA), outline clear and objective criteria for schools, create language extending a safe harbor when such criteria are followed, and institute a workable rule regarding parent consent for the use of EdTech in schools.

As the national voice for school boards, NSBA offers the following comments to the COPPA Rule Review, 16 CFR part 312, Project No. P195404.

A. General Questions for Comment, Question 5.

NSBA urges the FTC to simplify the COPPA framework as it overlaps with FERPA and to provide a regulatory structure that is readily understood by school districts, parents, and providers. It is important to establish a clear framework given the confusion under the current rule about what constitutes "verifiable parent consent." See FTC "Complying with COPPA: Frequently Asked


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Questions” (FAQs). In its FAQs, the FTC essentially authorizes schools to provide verifiable parental consent to a website or app’s collection, use, or disclosure of personal information from students for purposes of COPPA. Notwithstanding this notice to school districts, there is no basis in the statute or regulations permitting such an authorization. Thus, the burden of obtaining consent is effectively transferred to schools. While this process may facilitate consent issues for operators and schools, it creates potential liability for districts.

To address this issue, NSBA suggests that both the FTC and the Department of Education (Department) assist school districts in understanding their obligations under FERPA when they provide consent in lieu of parents for students under the age of 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....”¹ The district must include in its annual FERPA notice to parents its criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.² The Department has interpreted the exception to cover online service providers, presuming the exception’s requirements are met.³

COPPA requires operators of websites and online services that collect, use, or disclose personal information from children under thirteen to provide direct notice to parents and obtain verifiable parental consent before collecting that information. The FTC’s FAQ guidance indicates that a

¹The 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)(1) and 99.33(a).

² 34 CFR § 99.7(a)(3)(iii).

³ 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 COA 02-09-15.pdf?RQkKRtGvL6gD6tmHjHZTHelMfxdlUA](https://cdn-files.nsba.org/s3fs-public/Data%20In%20The%20Cloud%20Guide%20NSBA%20COA%2002-09-15.pdf?RQkKRtGvL6gD6tmHjHZTHelMfxdlUA).

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school can consent to a website or app’s collection, use, or disclosure of personal information from students for purposes of COPPA.⁴ “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.”⁵

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. These modern learning systems are going to become even more important as schools expand ways to offer personalized learning and other innovative instruction options that are enhanced through digital technology. 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 administrative burdens.

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. Operators who market their general audience services to schools should have greater responsibility under COPPA to ensure appropriate parental consent is obtained, and should be liable for any breach or misuse of student data. Schools should not be liable when they provide student access to useful platforms that are not targeted at children.

⁴ 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.

⁵ FAQ M.2. (emphasis added).

For these reasons, NSBA urges the 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.

E. Exceptions to Verifiable Parental Consent, Question 23. a. – f.

As noted above, NSBA urges the FTC to consider an exception to parental consent for the use of EdTech in schools. More specifically, we urge the FTC to consider an exception for use by school districts of EdTech when a district contracts with a platform or service for use by students. Rather than schools acting as agents for parents, and providing “verifiable consent,” the operator would be viewed as a “school official” under the FERPA exception, and the district would provide notice to parents that the site/operator has been so designated in its FERPA yearly notice. Schools would, as now, need FERPA-compliant parent notices. Such an exception would give schools a greater bargaining advantage with operators or sites to negotiate FERPA-compliant additions to terms of service.

By eliminating “verifiable” parent consent requirements, school districts should be able to enjoy the benefits of EdTech for curricular and other legitimate school purposes. So, too, this feature would facilitate greater and more equitable access to students and service to those students who are placed at a disadvantage by a lack of responsiveness by their parents.

NSBA urges the FTC to consider acting as a mediator between online educational service providers and school district personnel, not only by providing notice to the former of their responsibilities under COPPA, but also by requiring providers to 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.



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

The Department’s Privacy Technical Assistance Center 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.”⁶ It would be helpful to schools if the 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.

F. Right of a Parent to Review or Have Personal Information Deleted, Question 26. g.

Parents should not be able to request operators to delete, access or change data that is being used by school districts in educational applications. Allowing parents to do so could create confusion regarding the interplay of COPPA and FERPA. The FTC should implement an amendment process similarly to the one outlined in FERPA. FERPA grants parents the right to seek to amend student records that are inaccurate, misleading, or otherwise violate student privacy. Schools must follow a fair amendment process by:⁷

- 1) Responding to requests to amend within a reasonable time;
- 2) If denying the request, notifying the parents of their right to a hearing; and
- 3) Allowing the parents to insert into the record a statement explaining their views, if, after the hearing, a school decides not to amend the records. Schools must keep this statement with the record for as long as they maintain the record.

⁶ U.S. Dep’t of Educ. Privacy Technical Assistance Ctr., Responsibilities of Third-Party Service Providers under FERPA (August 2015), available at https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Vendor%20FAQ.pdf.

⁷ 34 CFR § 99.20-99.22; U.S. Dep’t of Educ. Protecting Student Privacy, Model Notification of Rights under FERPA for Elementary and Secondary Schools (March 2017), available at <https://studentprivacy.ed.gov/node/490>.

NSBA urges the FTC to consider a model by which school districts, through designated employees authorized to have access to and to oversee student data privacy, shepherd the process of parent access to data similarly to the FERPA structure. This model would militate against individual data-related requests by parents or students and the commensurate confusion and administrative challenges that would result.

Safe Harbor for School Districts

Additionally, NSBA urges the Department and FTC to work with school boards, their attorneys, and other stakeholders to develop a safe harbor provision for school districts, as well as resources for schools and operators regarding 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 of FERPA violations when districts consent for, or notify, parents as described above. This checklist could include sample notices to parents of district-approved apps and websites and include a uniform FERPA “rider” to providers’ terms of service when an application or web site is used.

There should be specific language that clarifies that schools cannot be held responsible for failures of operators to adhere to the requirements of COPPA, or for data breach risks. NSBA believes schools should only receive consent requests from operators who are compliant with COPPA’s “educational use” requirements. Failure on the part of the operators to obtain consent where required, or failure on the part of the operators to adhere to the requirements, should not be in any way attributable to the schools.

A best practice guidance document jointly issued by the Department and the FTC would be helpful. NSBA suggests that such a guidance address:

- a) School district procedures for the selection and onboarding of apps, including the duties of designated staff to handle student data privacy and parent notice and consent;
- b) How the notice/consent process can be purposeful and informative through clear annual notice/authorizations; and



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- c) How school districts can operationalize the data privacy function for purposes of COPPA consent at the district level.

By simplifying the framework of 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 – the Department and the FTC have an opportunity to smooth the way for more efficient and effective use of EdTech 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



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