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Federal Trade Commission, Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex E)
Washington, DC 20580
Via <http://www.regulations.gov>

Re: COPPA Rule Review, Project No. P195404
Document Number: 2023-28569
RIN: 3084-AB20
Federal Register: 89 Fed. Reg. 2034, Jan. 11, 2024

Chair Lina M. Khan and Commissioners:

The National School Boards Association (NSBA) is pleased to offer comments on the Federal Trade Commission (Commission)'s proposal to amend the Children's Online Privacy Protection Rule (Proposed Rule). Through its member state associations that represent locally elected school board officials serving millions of public school students, NSBA advocates for equity and excellence in public education through school board leadership. We believe that public education is a civil right necessary to the dignity and freedom of the American people and that each child deserves equitable access to an education that maximizes their individual potential. NSBA recognizes that in today's world, students need access to technology tools that make learning more accessible, effective, and flexible. Schools, too, need flexibility to use digital learning and other technology tools throughout the curriculum to provide all students with learning experiences relevant to a global, knowledge-based economy. NSBA is dedicated to assisting school districts in these efforts as they work toward maximizing each child's learning experience.¹

¹ Among many belief statements expressing its commitment to empowering local school districts to prepare students for the future through innovative programs and effective employment of technology tools, NSBA's Delegate Assembly has adopted the following:

Article IV. The Education Program

Section 1—Desired Learning Outcomes

1.1 Public Education

NSBA supports locally elected school boards in expanding public school programs to meet the needs of students in a rapidly changing world. Local school boards should be encouraged to implement

The leading advocate for public education

NSBA thanks the Commission for remaining committed to the administrative process and obtaining stakeholder input through the public comment process. NSBA is particularly pleased to present insights on the Proposed Rule’s newly codified provision allowing operators to obtain school authorization for student use of online tools in certain limited situations. Proposed 16 C.F.R. §312.5(c)(10). The “school-authorized education purpose” exception 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.

NSBA shares the Commission’s dedication to ensuring that the promise of edtech can be realized while protecting student data privacy. The Proposed Rule presents a foundation on which to build 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. We congratulate the Commission for its attention to the concerns of all stakeholders and developing a thoughtful set of proposed rules that seeks that balance.

innovative strategies and means of delivery within their publicly funded and publicly accountable school systems to better prepare students for the future.

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1.5 Student Achievement

NSBA believes that all students should successfully complete a challenging K-12 curriculum in literacy, social studies, science, technology, arts, physical education, and mathematics.

Section 3 ~ Curriculum, Instruction, and Assessment

3.9 Distance Learning and Online Courses

NSBA supports the authority of local school boards to determine credit for courses taken online through the creation of distance learning policies, guidelines, and teacher certification rules that allow maximum flexibility to schools to use technology for student instruction, training of educators and others, distance learning, and data transmission. NSBA supports local school board authority to establish online courses and schools.

3.16 Digital Learning and Technology Education

NSBA recognizes that students who have little or no exposure to technology will be at an educational and economic disadvantage in comparison to their more technologically literate peers. Furthermore, NSBA believes that effective use of digital learning and other technology tools throughout the curriculum is critical to provide all students with learning experiences relevant to a global, knowledge-based economy. Digital learning and other technology tools can help meet today’s education challenges by strengthening student learning and making content, instruction, professional development, and assessments more accessible, effective, and flexible, to meet student and school district needs. School districts should consider digital learning as a part of a comprehensive technology strategy to achieve equity and excellence in education.

School Authorization Exception – a Beneficial Framework

NSBA urges the Commission to retain the new language it proposes to codify a school authorization exception to the parent consent requirement. Under the Commission’s long-standing guidance, a school may consent to a website or app’s collection, use, or disclosure of personal information from students under the Children’s Online Privacy Protection Act (COPPA) 15 U.S.C. 6501 *et seq.*, “[w]here 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.”² The guidance states that the operator “must provide the school with full notice of its collection, use, and disclosure practices, in the same way that it is otherwise required to do for a parent.”³

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 crucial to schools’ efforts to 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 edtech operators contractually required school districts to get actual parent consent for each child’s use of such tools, many districts would be unable to deliver the curriculum to students whose parents have not responded, creating inequities in addition to administrative burdens. In many places, school districts do obtain parent signoff on data sharing at the start of the school year, and districts are obligated under some state laws to post on their websites the list of apps and certain details about software packages schools employ.

As written, the Proposed Rule allows schools, state educational agencies, and local educational agencies to authorize the collection of personal information from students under the COPPA threshold age when the data is used for a school-authorized education purpose, and no other purpose. Proposed 16 C.F.R. § 312.5(c)(10). This welcome change explicitly authorizes schools to share student data for education related purposes so that students have access to online learning tools. The proposed language is consistent with the Family Educational Rights and Privacy Act (FERPA)’s “school official” exception, with which schools are familiar, and under which many schools currently operate.

By allowing schools to authorize collection of student data for limited educational purposes, students and teachers will be able to enjoy the benefits of edtech for curricular and other legitimate school

² Federal Trade Commission, “Complying with COPPA: Frequently Asked Questions,” available at <https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions#Schools> (hereinafter “FAQ”) N.2.

³ FAQ N.2.

purposes. This framework should facilitate greater and more equitable access to students and service to those students placed at a disadvantage by any lack of responsiveness by their parents.

NSBA encourages the Commission to keep the proposed language, and to clarify specific aspects as explained below.

A. School-Authorized Education Purpose

In Question 16, the Commission requests comment on what types of services should be covered under the “school-authorized education purpose” for which schools, state educational agencies, and local educational agencies may authorize the collection, use, and disclosure of personal information from students using online platforms. Specifically, the Commission asks whether the term “school-authorized education purpose” should include services used to conduct activities not directly related to teaching, such as services used to ensure the safety of students or schools.

NSBA urges the Commission to clarify that a “school-authorized education purpose” may include ensuring student safety, providing special education and related services such as transportation, supplementing the curriculum for a child with additional work, supporting students with tutoring services provided by a third party, and other services not directly arising in the classroom context but necessary and important to the education of a particular child. Schools provide tutoring services, for example, often through online platforms that handle student data including academic testing results. It would make little sense if a school could authorize the use of an online tool for math problems but not for the tutoring program that strengthens accompanying math skills.

NSBA also asks the Commission to explain the extent to which schools and researchers may share data for education research purposes without parental consent. As written, the proposed rule does not explicitly include research in the definition of “school authorized education purpose.” FERPA’s audit and evaluation and studies exception allows schools to release non-directory student records or information to “organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted.”⁴ If the purpose for disclosing the data is not directly related to education or the services listed as examples above, it may be difficult for school officials to determine how to share information for other FERPA-permitted purposes and may face hurdles if sharing data under COPPA is more limited than it is under FERPA.

⁴ 20 U.S.C. §1232g(b)(1)(F); 34 C.F.R. § 99.31(a)(6).

B. Student Data Security and Retention Requirements

NSBA commends the Commission for providing more guidance on the “reasonable procedures” operators must establish and maintain to protect the “confidentiality, security, and integrity of” children’s personal information, especially given the data breaches taking place in the education sector. Proposed 16 C.F.R. § 312.8. Online service providers should not be able to transfer their own responsibility for any misuse or breach of student information they collect by relying on the school district’s authorization for access to student information. The online service provider should be responsible for ensuring that student data is collected and maintained in a safe and responsible manner.

We ask that the Commission consider a minor adjustment the language in the Proposed Rule’s requirement that an operator retain “personal information collected online from a child for only as long as is reasonably necessary to fulfill the specific purpose(s) for which the information was collected and not for a secondary purpose. When such information is no longer reasonably necessary for the purpose for which it was collected, the operator must delete the information using reasonable measures to protect against unauthorized access to, or use of, the information in connection with its deletion. Personal information collected online from a child may not be retained indefinitely.” Proposed 16 C.F.R. § 312.10. Because many states require schools to retain education records for a set period, it would assist schools’ compliance efforts if operators were required to keep data as indicated by the school so that it is able to comply with such laws. We suggest adding the italicized phrase as indicated:

- When such information is no longer reasonably necessary for the purpose for which it was collected, *and in accordance with any written agreement with a school, state education agency, or local education agency*, the operator must delete the information using reasonable measures to protect against unauthorized access”

C. Notice Requirement

Because local school districts must be responsive and accountable to their communities, including families who are concerned about unnecessary sharing of their students’ data with online service providers, it would be helpful for schools if operators provided conspicuous notice that the school has the authority to share student data for education purposes. NSBA commends the Commission for including a requirement in the Proposed Rule requiring operators to include an additional notice on the website or online service where an operator has collected personal information under the school authorization exception. As written the Proposed Rule would require that notice to “state that the operator has obtained authorization from a school to collect a child’s personal information; that the operator will use and disclose the information for a school-authorized education purpose and no other purpose; that the school may review the information; and that the school may request deletion of the child’s personal information, and the procedures for doing so.” Proposed 16 C.F.R.

§312.4(e). We urge the Commission to consider adding a requirement that the operator’s notice appear in a conspicuous location on the site or application.

NSBA urges the Commission 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. 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 of Education’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.”⁵ It would be helpful to schools if the Commission 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.

D. Written Agreement

The Proposed Rule’s school authorization exception requires that the edtech provider and the school have in place a written agreement that “(i) Indicates the name and title of the person providing authorization and attests that the person has the authority to do so; (ii) Limits the operator’s use and disclosure of the personal information to a school-authorized education purpose only and no other purpose; (iii) Provides that the operator is under the school’s direct control with regard to the use, disclosure, and maintenance of the personal information collected from the child pursuant to school authorization; and (iv) Sets forth the operator’s data retention policy with respect to such information” Proposed 16 C.F.R. §312.5(c)(10).

NSBA agrees that the written agreement requirement is necessary to protect both operators and schools and ensure student data privacy requirements are documented. NSBA also appreciates the Commission’s recognition of “the need for measures to prevent the situation in which a school is

⁵ 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.

unaware of the edtech services their teachers have consented to on an ad hoc basis.” 89 Fed. Reg. 2057.

But we caution against maintaining the requirement that the written agreement between the edtech provider and required by new § 312.5(c)(10) identify the “name” of the person providing consent and specify that the school has authorized the person to provide authorization. In one school district, it is possible that one person provides the authorization for student data to be shared with edtech applications throughout the term of the written agreement. If that person changes positions, leaves the district, etc., the written agreement will have to be amended or remain inaccurate. In another district, an entire privacy or technology department may have that authority and responsibility. We ask that the Commission replace the requirement for the “name and title of the person providing authorization” with language providing more flexibility for schools, such as “school official(s) designated by the Superintendent to provide authorization” to reflect the reality schools face regarding staff turnover and personnel shifts.

E. Right to Review Personal Information Provided by a Child

NSBA urges the Commission to retain its proposal to require operators using the school authorization exception “to provide schools with the rights operators currently provide parents under § 312.6(a), namely the right to review personal information collected from a child, refuse to permit operators' further use or future online collection of personal information, and to direct operators to delete such information.” 89 Fed. Reg. 2059. NSBA agrees with the Commission’s determination that “Requiring operators to fulfill requests, such as deletion requests, from each parent could result in schools having to provide different services to different children or forego particular services for the entire class based on the request of an individual parent.” *Id.*

The Commission also proposes deleting the reference to “parent” in the § 312.6 heading to account for this modification. “Operators utilizing the school authorization exception would not be required to provide parents the rights afforded under § 312.6(a) for information collected under that exception.” 89 Fed. Reg. 2050, n. 191.

Student information disclosed under the proposed school authorization exception will almost always constitute education records under FERPA, and schools will treat that data as required by FERPA, including granting 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:

- 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

NSBA urges the Commission to retain the framework proposed in Proposed 16 C.F.R § 312.6(b). As they do now, school districts, through designated employees authorized to have access to and to oversee student data privacy, will be able to shepherd the process of parent access to data similarly to the FERPA structure. This model will protect against individual data-related requests by parents or students and the commensurate confusion and administrative challenges that would result.

F. Guidance for School Districts

NSBA again urges the Commission, in cooperation with the Department of Education (Department), 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 schools provide authorization for student data collection in the education context. This checklist could include sample notices to parents of district-approved apps and websites and a checklist for the written agreement contemplated by Proposed 16 C.F.R. §312.5(c)(10). There should be specific language that clarifies that schools cannot be held responsible for failures of operators to adhere to the requirements of COPPA.

NSBA suggests guidance document jointly issued by the Department and the Commission addressing:

- 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;
- c) How school districts can operationalize the data privacy function for purposes of school authorization at the district level;
- d) How the COPPA Rule restricts operators' collection, use, and disclosure of the personal information of children under the COPPA age threshold when the school authorizes use of edtech platforms. If schools had a statement of COPPA requirements from the Commission that explains in plain language the COPPA Rule's requirements, it would be an authoritative and useful tool for informing school officials and families how the law protects student data.

⁶ 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>.

Conclusion

NSBA appreciates this opportunity through regulatory Notice and Comment to commend the Commission for its thoughtful work on the proposed Children’s Online Privacy Protection Rule, and to offer suggestions for the final version. By coordinating 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 Commission has 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,

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