Working with Online Educational Service Providers and Apps

Vermont

Ross Lemke

Privacy Technical Assistance Center

Summary of Today's Discussion

Background and Regulatory Requirements

- The changing landscape of education technology in schools
- Legal protections for students' information used in online educational services
  - How FERPA and PPRA protect student information used in online educational services

"Musts"

Best Practices

- Beyond compliance: best practices for protecting student privacy
- Resources for developing your own policy on third party applications

"Shoulds"

Online Educational Services

Today's guidance relates to the subset of education services that are:

- Computer software, mobile applications (apps) or web-based tools;
- Provided by a third-party to a school or district;
- Accessed via the Internet by students and/or parents; AND
- Used as part of a school activity.

**This guidance does not cover online services or social media used in a personal capacity, nor does it apply to services used by a school or district that are not accessed by parents or students.*

The Challenge of Online Educational Services

- Schools and districts are increasingly contracting out school functions.
- We have new types of data, and much more of it!
- Many online services do not utilize the traditional 2-party written contractual business model.
- Increasing concern about the commercialization of personal information and behavioral marketing.
- We need to use that data effectively and appropriately, and still protect students' privacy.

PTAC's Favorite Line from EDTech Vendors

- "Our Software is FERPA Compliant. We're School Officials."

Things that don't Exist

- Unicorns
- Dragons
- Official Department

of Education FERPA

seal of approval

How does the vendor get the data?

- Under FERPA, to share data with a vendor it has to happen under two ways:
  - Consent
    - Consent must be signed and dated and must:
      - Specify the records that may be disclosed
      - State purpose of disclosure; and
      - Identify party or class of parties to whom disclosure may be made
  - One of the exceptions under FERPA:
    - Directory Information Exception
    - School Official Exception

Directory Information

- Information in a student's education records that would not generally be considered harmful or an invasion of privacy if disclosed.
- This may include: Name, address, phone number, grade, photograph….
- Each district determines their own directory policy which includes an opt out provision.
- Some districts use a limited directory information policy that restricts who can receive directory data.

Problems with Directory Information and Consent

- Getting 100 percent is hard
- The Directory Information exception has an opt-out provision reducing the likelihood you would receive a complete data set
- Which leads us to…

School Official Exception

- Schools may disclose PII from education records without consent if the disclosure is to other school officials within the school, including teachers, whom the school has determined to have legitimate educational interest.
- Schools may outsource institutional services or functions that involve the disclosure of education records to contractors, consultants, volunteers, or other third parties provided certain conditions are met.

Conditions for Outsourcing

- Performs an institutional service or function for which the agency or institution would otherwise use its employees;
- Is under the direct control of the agency or institution with respect to the use and maintenance of education records;
- PII from education records may be used only for the purposes for which the disclosure was made, and may not be redisclosed without the authorization of the educational agency or institution and in compliance with FERPA;
- Meets the criteria specified in the school, LEA, or institution's annual notification of FERPA rights for being a school official with a legitimate educational interest in the education records.

Annual Notice

- Each school or district has an annual notification of FERPA rights which includes criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.
- The definition of a school official may vary from one district to another.

Question

Under FERPA, are providers limited in what they can do with the student information they collect or receive?

It Depends!

Are providers limited in what they can do with the student information they collect or receive?

If PII is disclosed under the Directory Information exception:

- No limitations other than what the school/district includes in their agreement with the provider.

If PII is disclosed under the School Official exception:

- PII from education records may only be used for the specific purpose for which it was disclosed.
- TPPs may not sell or share the PII, or use it for any other purpose except as directed by the school/district and as permitted by FERPA.

When personal information is collected from a student, the PPRA may also apply!

- *PPRA places some limitations on the use of personal information collected from students for marketing.*

What about metadata?

"Metadata" are pieces of information that provide meaning and context to other data being collected, for example:

- Activity date and time
- Number of attempts
- How long the mouse hovered before clicking an answer

Metadata that have been stripped of all direct and indirect identifiers are not protected under FERPA (note: school name and other geographic information are often indirect identifying information in student data).

Properly de-identified metadata may be used by providers for other purposes (unless prohibited by their agreement with the school/district).

FERPA is not the only game in town when it comes to student privacy

- Other Federal Laws
  - PPRA
  - COPPA
- State and Local Laws

Protection of Pupil Rights Amendment (PPRA)

- Amended in 2001 with No Child Left Behind Act
- Mostly known for its provisions dealing with surveys in K-12
- Includes limitations on using personal information collected from students for marketing
- May require parental notification and opportunity to opt out
- May require the Development of policies in conjunction with parents
- However … a significant exception for "educational products or services"

COPPA

- Children's Online Privacy and Protection Act (COPPA)
  - Applies to commercial Web sites and online services directed to children under age 13, and those Web sites and services with actual knowledge that they have collected personal information from children
  - Administered by the Federal Trade Commission
  - See http://www.business.ftc.gov/privacy-and-security/childrens-privacy for more information

COPPA

- Statute enacted in 1998, Rule revised in 2012
- Goals are to:
  - Allow parents to make informed choices about when and how children's personal information is collected, used, and disclosed online.
  - Enable parents to monitor their children's interactions and help protect them from the risks of inappropriate online disclosures.

- Operators of commercial websites, apps, and online services must provide NOTICE and obtain parental CONSENT before collecting personal information from children under age 13.

COPPA Applies To:

- Child-directed sites and services.
- General audience sites with actual knowledge they're collecting personal information from kids under 13.
- Third parties with actual knowledge they're collecting personal information directly from users of a service directed to children.

"Collects or collection"

- Requesting, prompting, or encouraging that children submit personal information online, even when optional.
- Enabling children to make the information public, *e.g.,* in a chat room or profile.
- Passive tracking linked to personal information.

Under COPPA, operators must:

- Notice
  - Post a privacy policy and links to the policy wherever personal information is collected.
  - Give parents direct notice of its information practices.

- Consent
  - With certain exceptions, obtain verifiable parental consent before collecting information.

COPPA and Schools

- Can operators get consent from schools instead of parents to collect personal information from students?
  - Yes if for the use and benefit of the school and no other commercial purpose.
  - Teacher, school, district? Best practice is go through school or district.

FTC Act Enforcement

- Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."
- Deception: a material representation or omission that is likely to mislead consumers acting reasonably under the circumstances.
- Unfairness: practices that cause or are likely to cause substantial injury to consumers that are not outweighed by countervailing benefits to consumers or competition and are not reasonably avoidable by consumers.

STUDENT PRIVACY PLEDGE

- More than 300 companies have signed on to the student privacy pledge, which makes clear that the school service providers will:
    - Not sell student information;
    - Not behaviorally target advertising
    - Use data for authorized education purposes only
    - Not change privacy policies without notice and choice
    - Enforce limits on data retention
    - Support parental access to, and correction of errors in, their children's information
    - Provide comprehensive security standards
    - Be transparent about collection and use of data

About the Student Privacy Pledge

- The pledge is not administered by the Department of Education.
- It is **not** a FERPA seal of approval.
- It **is** an example of the EDTech industry trying to regulate itself.
- For companies signing on, failure to do so may be a deceptive trade practice under the FTC Act.

- If so, you may leave
- If not, you may want to stay

Can individual teachers sign up for free (or "freemium") education services?

Here's a better question: Should individual teachers sign up for Free or "Freemium" services?

Using free or "freemium" educational services

Remember the FERPA's requirements for schools and districts disclosing PII under the school official exception.

- Direct control
- Consistency with annual FERPA notice provisions
- Authorized use
- limits on re-disclosure

These services may also introduce security vulnerabilities into your school networks.

It is a best practice to establish district/school level policies governing use of free/freemium services, and to train teachers and staff accordingly.

Question:

Should school or district staff be concerned if a TPP uses a “Click-Wrap” or Terms of Service agreement instead of a traditional contract?

Answer: It Depends

- Click-wrap or Terms of Service (TOS) agreements are not prohibited.
- Nothing in FERPA says that staff cannot click that "Accept" button.
- However, there are some considerations… (like everything else we've discussed today)

Click-Wrap Agreements

- These agreements are referred to as "click-wrap" agreements, and can operate as a provider's legally-binding contract.
- Once a user at your school or district clicks "I agree," the terms of this agreement will likely govern what information the provider may collect from or about students and with whom they may share it.

Click-Wrap Agreements (cont'd)

- Click-Wrap agreements could potentially lead to a violation of the Family Educational Rights and Privacy Act (FERPA), the Protection of Pupil Rights Amendment (PPRA), or other laws, as well as privacy best practices.
- The onus is on the school or district to review the TOS to see if it is acceptable and complies with Federal and State law.
- The TPP has a click-wrap agreement to protect them, not necessarily you.

Privacy-Related TOS Provisions

- The example provisions are intended to give you a general idea of what to expect when reviewing a TOS.
  - Please keep in mind that specific language will vary from TOS to TOS.
  - Language matters and just because the TOS says that the vendor can do something does not mean that FERPA permits it.

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Challenge Reading!
An Application for the Connected Classroom

Found on the App Store
Website: https://www.cr_app.com

The Terms of Service!

Terms and Conditions ("Terms")

Last updated: (add date)

Please read these Terms and Conditions ("Terms", "Terms and Conditions") carefully before using the http://www.mywebsite.com (change this) website and the My Mobile App (change this) mobile application (the "Service") operated by My Company (change this) ("us", "we", or "our").

Your access to and use of the Service is conditioned on your acceptance of and compliance with these Terms. These Terms apply to all visitors, users and others who access or use the Service.

By accessing or using the Service you agree to be bound by these Terms. If you disagree with any part of the terms then you may not access the Service.

Purchases

If you wish to purchase any product or service made available through the Service ("Purchase"), you may be asked to supply certain information relevant to your Purchase including, without limitation, your …

Subscriptions

Some parts of the Service are billed on a subscription basis ("Subscription(s)"). You will be billed in advance on a recurring ...

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Links To Other Web Sites

Our Service may contain links to third-party web sites or services that are not owned or controlled by My Company (change this).

My Company (change this) has no control over, and assumes no responsibility for, the content, privacy policies, or practices of any third party web sites or services. You further acknowledge and agree that My Company (change this) shall not be responsible or liable, directly or indirectly, for any damage or loss caused or alleged to be caused by or in connection with use of or reliance on any such content, goods or services available on or through any such web sites or services.

Changes

We reserve the right, at our sole discretion, to modify or replace these Terms at any time. If a revision is material we will try to provide at least 30 (change this) days' notice prior to any new terms taking effect. What constitutes a material change will be determined at our sole discretion.

Contact Us

If you have any questions about these Terms, please contact us.

I Agree | **I want my kids to be illiterate**

What is Data?

"The Challenge Reading! Application (hereafter referred to as 'CR App') considers data collected by the application to be all personally identifiable information (PII) and other non-public information that are directly related to the students in the system. Data include, but are not limited to, student data, and user content."

"The Challenge Reading! Application (hereafter referred to as 'CR App') considers data collected by the application to include only that information provided by the user in the course of using this service.

Data Collection

"CR App is not responsible for any data collected by third party services included on the CR App platform."

"CR App will collect only that data necessary to fulfill the purposes specified in this agreement"

Common Thread Among the Data Provisions

- Narrow Focus
- Limited Scope
- Strong, simple definitions

Data De-Identification

"CR App may use de-identified data for product development, research, or other purposes. De-identified data will have all indirect personal identifiers removed. This includes, but is not limited to, name, ID numbers, date of birth and location information."

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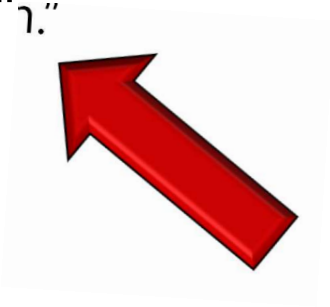


Data De-Identification

- There is a significant amount of data available to providers of educational services.
  - Metadata on students' interaction with the service or app is often collected and analyzed to help improve the product and enable a provider to create more effective educational services.

Data De-Identification (cont'd)

- Even stripped of identifiers, student data could still be identifiable (through demographic or contextual information collected by the app, or through information available elsewhere).

Rights and Licensing Provisions

"By using CR App, you grant CR App a non-exclusive, fully paid and royalty-free, worldwide, sublicensable, transferable, limited license to use, modify, delete, add to, reproduce in any media format through any media channels for any purpose any data or work submitted the app during the course of use."

"You agree to grant the provider (CR App), a limited, nonexclusive license solely for the purpose of performing its obligations as outlined in this Agreement. This agreement does not give provider any rights implied or otherwise, to data, content or intellectual property except as expressly stated in this agreement."

Rights and License to the Data

- Schools/Districts should maintain ownership of student data.
  - Some TOS include provisions that would grant providers an exclusive and irrevocable license to student data.
    - This can be a cause for concern.
    - If a license is granted, it should be limited and only allow student data to be used for educational purposes as outlined in the agreement.

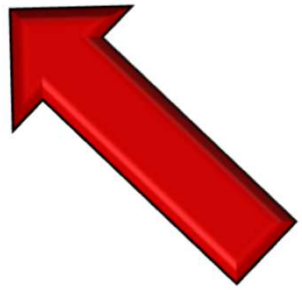
Access

- FERPA requires schools and districts to make education records accessible to parents.
- To fulfill FERPA requirements, providers need to make student data available upon request.
- As a best practice, data should be passed from the provider to the school/district.

Data Use

"CR App will use data only for the purpose of fulfilling its duties and providing services under this agreement, and for improving services under this agreement."

"CR App uses data to operate its website and deliver services. CR App may also use or transfer data to third parties to inform you of products and services available from CR App and its affiliates.



Data Use

"Data use" by a provider should be limited to the purposes outlined in the agreement with the school or district.

Always be on the lookout for any provision that contains the phrase "without providing notice to users".

And remember, If the data is being disclosed under the School Officials Exception, look for the Legitimate Educational Interest!

Marketing and Advertising

- Information gathered in an online educational service or mobile application could be used to create a profile on a student.

- That profile could then be used to direct advertising/marketing materials to students.

Marketing and Advertising (cont'd)

- The language in a TOS should be clear that the data collected cannot be used to advertise or market to students.
  - Targeted advertising/marketing could violate privacy laws.

Security Controls

"You agree to not hold CR App responsible for any unauthorized data breaches."

"CR App stores and processes data in accordance with industry best practices. A summary of our security controls is described here: https://www.cr_app.com/Security"

Security Controls

- Student data need to be protected, and a provider's TOS should include provisions outlining strong policies safeguarding those data.

- Failure to provide adequate security could lead to a FERPA violation.

Modification of the Terms of Service

"CR App may modify the terms of this agreement at any time. Notice of these changes will be available on our website. Please visit the website periodically to become aware of these changes."

"CR App will provide notice and obtain consent from the school prior to any change in the way data is collected used or shared under the terms of this agreement."

What Now?

"This session makes you not want to use any third party programs."

Technology is here to stay

- Education Technology can do some great things.
- As education professionals it is our responsibility to ensure that these tools are used appropriately.
- The first step in this is to develop a policy on the use of apps in the classroom.

Don’t be the “No” Person

- Educators want to use this technology.
- If they are told no, odds are they will do it anyways.
- By coming up with a policy and procedure you are able to ensure that the technology is used on your terms.

Developing District Policy

- Every school or district should have a policy in place for reviewing agreements before the service or application is used in the classroom.
  - Schools/Districts should establish a review process and/or have a designated individual review TOS before its adoption.
  - The service or application should be inventoried, evaluated, and support the school's and district's broader mission and goals.
- Get leadership buy-in and support for the new policy.

Policies and Procedures to Approve Educational Services

- Test and evaluate popular services to see if they are right for your district.
- Evaluate terms of service to ensure they are satisfactory.
- Consider developing a repository of "approved" apps.
- Training, Training, Training!

- PTAC Training Video

Leverage the Work of your Peers

Many districts publish the list of apps that are acceptable in their districts

Other districts band together in consortiums to vet applications or negotiate TOS

Leverage the Work of your Peers

- Student Data Privacy Consortium: Searchable database of vetted applications

- California Education Technologies Professionals Association : Searchable database of vetted applications and vetted terms of service

  - *Note: The U.S. Department of Education cannot endorse these or any other organizations' resources. Districts should consult with their legal counsel to ensure compliance of classroom applications with federal, state, and local laws.*

Best Practices for Protecting Student Privacy

- Maintain awareness of other relevant laws.
- Be aware of which online educational services are currently being used in your district.
- Have policies and procedures to evaluate and approve proposed educational services.
- When possible, use a written contract or legal agreement.
- Be transparent with parents and students.
- Consider that parental consent may be appropriate.

CONTACT INFORMATION

United States Department of Education,
Privacy Technical Assistance Center

(855) 249-3072
(202) 260-3887

privacyTA@ed.gov

https://studentprivacy.ed.gov

(855) 249-3073