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FERPA VIOLATIONS BY ONLINE CHARTER SCHOOL

The issue of having appropriate contracts for cloud providers has been around for a while and is growing in scope and complexity in direct proportion to the influx of online providers and use of software and online applications (apps) in the classroom. Now the U.S. Department of Education, Family Policy Compliance Office (FPCO), has found a FERPA violation in the complex arrangements between an online charter school and one of its providers. The school could just as well have been any public school providing educational software in the cloud; the importance of a firm contract is reinforced. The problems are greater in California and other states where local rules and regulations add to the requirements of FERPA.

In a November 2017 letter to the charter school, the FPCO found the online provider's Terms of Use (same as Terms of Service, hereinafter "TOS") were in violation of FERPA. The FERPA violation rested in the FPCO's interpretation of the multitude of complex online provisions as requiring the parents/student to waive their FERPA protections to participate in the online program. The online provider required all users to agree to their TOS if they wanted to use the program; the program was the primary, if not only, online programming being used by the charter school and the parents/student had to agree to the TOS or they couldn't meaningfully participate in the charter school's program. The charter school's defense was that the parents/student were not being forced to waive their rights since the charter school was a school of choice and nobody forced the parents/student to choose the charter program. The FPCO found the only available choice was to either waive your rights or look elsewhere, and ruled this was an illegally compelled waiver.

While admitting they did not own the rights to "Member Content" posted on their site, the online vendor included the following in the TOS:

With respect to Member Content you submit or make available for inclusion on Member accessible areas of the Service . . . **you grant [vendor] the following world-wide, perpetual, royalty free and non-exclusive license(s) By posting or**

submitting Member Content to this Site, you grant [vendor] and its affiliates and licensees the right to use, reproduce, display, perform, adapt, modify, distribute, have distributed, and promote the content in any form, anywhere and for any purpose

Unfortunately, similar provisions are far too common in vendor website/software TOS. The charter school was unable to convince the FPCO that other contract provisions rendered this term invalid or unenforceable.

The TOS defined "Member Content" in broad terms, to the detriment of the online vendor. The definition included the following:

. . . all information, data, text, software, music, sound, photographs, graphics, video, messages, tags or other materials . . . [and] could include, for example, personally identifiable information [PII] from student education records that is posted to [vendor's] Online School

The FPCO determined this to be an inappropriate use and disclosure of PII, one that gave the vendor and its affiliates unfettered discretion to:

. . . have, for instance, distributed, posted, and submitted "Registration Data" or other "Member Content" that constituted PII from education records to any third party to be used for any purpose and further redisclosed without limitation, published the PII from education records online with identifying information about the student, and, provided the PII to future employers of the student without consent.

A separate allegation against the school involved its lack of control over the vendor. The allegation was that in entering into the arrangement with the vendor, the school permitted the vendor to use PII for non-educational purposes and to redisclose PII without limitation.

The FPCO found the charter school did not violate that rule because the complaints dated from 2012, before the Department of Education had released guidance on the subject of control and redisclosure. Under those circumstances, the charter school was found to have acted reasonably and not violated FERPA on this issue. This likely would not happen today.

That being said, the FPCO cited to various portions of the 2015 guidance as if they were rules, the violation of which would constitute FERPA violations. Of particular interest are the guidance provisions on "Data Use" and "Rights and License in and to Data," all of which were updated in 2016.

The "best practice" for data use is:

Provider will use Data only for the purpose of fulfilling its duties and providing services under this Agreement, and for improving services under this Agreement.

The FPCO follows up the best practice with the following explanation:

Schools/districts should restrict data use to only the purposes outlined in the agreement.

The problem with this of course is the fairly standard practice of vendors including their own uses in the agreement. Having agreed to those uses, the district is not complying with the "best practice" because the vendor's use is not limited to the educational use only. This continues to be a problem and the FPCO letter is an indication the district may be found to have violated FERPA by following this fairly standard practice.

The Model Terms recommended by the Department of Education are found at the following link:

https://studentprivacy.ed.gov/sites/default/files/resource_document/file/TOS_Guidance_Jan%202015_0%20%281%29.pdf

Addressing the issue of inappropriate licensing, the question is one of control over the ownership and use of the student data. The use rights granted in the vendor's TOS were exactly the kinds schools are supposed to avoid. In the eyes of the FPCO, failure to maintain control meant a violation of FERPA, citing 34 CFR Section 99.31(a)(2)(i)(B)(2)-(3). Under those subsections, an outside vendor may qualify as a "school official" if the school has outsourced institutional services/functions, and the vendor is under the direct control of the school as to use of the records, and uses the information only for the purpose for which it was disclosed (meaning the educational purpose, not the vendor's own purposes). Any other vendor use requires student/parent consent.

As always, if you have questions, please contact us for answers.

— William A. Hornback

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