



The Devil is in the Details

Evaluating Privacy and Security Provisions in Ed Tech Terms of Service Agreements

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Online Educational Services

This guidance relates to the subset of educational 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!
- The move away from the traditional 2-party written contractual business model
- Increasing concern about the commercialization of personal information and behavioral marketing
- The communications barrier – explaining data and technology to parents, teachers, and administrators

We need to use data effectively and appropriately, and still protect students' privacy!



Family Educational Rights and Privacy Act (FERPA)

- Gives parents (and eligible students) the right to access and seek to amend their children's education records
- Protects personally identifiable information (PII) from education records from unauthorized disclosure
- Requirement for written consent before sharing PII – unless an exception applies

Personally Identifiable Information (PII) under FERPA

▪ Direct Identifiers

- Name
- Name of parents or other family members
- Address
- Identifying Number (e.g., SSN, Student ID#)
- etc.

▪ Indirect Identifiers (e.g., date or place of birth)

- “Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.”
(§ 99.3)

Education Records under FERPA

“Education Records” are records:

- Directly related to the student; and
- Maintained by (or on behalf of) an educational agency or institution.

But wait! There are exceptions!

Two of FERPA's exceptions to the parental consent requirement are most relevant when using education technology:

- Directory information exception
- School official exception

See §99.31 for information on other FERPA exceptions and their requirements.

Directory Information Exception

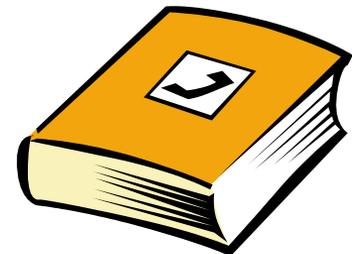
- Students don't attend school anonymously.
- Allows schools to release certain information without consent. A few examples:
 - Name, address, telephone listing, electronic mail address;
 - Date and place of birth;
 - Photographs;
 - Weight and height of athletes;
 - Degrees & awards received, etc.



Directory Information Exception

- Schools/Districts must designate the data elements they consider to be Directory Information.
- Common uses:
 - Yearbooks
 - Concert programs
 - Telephone directories

Parents have a right to opt-out
of disclosures under the
Directory Information exception!



School Official Exception

Schools or LEAs can use the School Official exception to disclose education records without consent to a third party (TP) if the TP:

- Performs a service/function for the school/district for which it would otherwise use its own employees
- Is under the direct control of the school/district with regard to the use/maintenance of the education records
- Uses education data in a manner consistent with the definition of the “school official with a legitimate educational interest,” specified in the school/LEA’s annual notification of rights under FERPA
- Does not re-disclose or use education data for unauthorized purposes



Question 1:

Is student information used in online educational services protected by FERPA?



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It depends!

Some data used in online educational services are protected by FERPA.

Other data may not be.

Schools and Districts will typically need to evaluate the use of online educational services on a case by case basis to determine if FERPA-protected information is implicated.

3 Ways to Provide Student Information to Service Providers

- Consent
- Directory Information
- School Official Exception

There are definite advantages to each...

...but each has its own limitations and requirements!

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Question 2:

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

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If PII is disclosed using Written Consent:

- Limited by the provisions of the consent statement

If PII is disclosed under the Directory Information exception:

- No limitations

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
- Providers 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!

Protection of Pupil Rights Amendment (PPRA)

- Amended in 2001 with No Child Left Behind Act
- Mostly known for provisions dealing with surveys in K-12
- Includes limitations on using personal information collected from students for marketing
- Parental notification and opportunity to opt out may be required
- May require development of policies in conjunction with parents
- However ... there is a significant exception for “educational products or services”

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

REMEMBER: Schools and districts have an important role in protecting student privacy.

Additional limitations and restrictions (beyond what FERPA, PPRA, and other laws require) may be written into the agreement between the school/district and the provider!

Question 3:

What about metadata? Are there restrictions on what providers can do with metadata about students' interactions with their services?

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 can be indirect identifiers in student data.

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

Other Laws to Consider

- 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
 - Schools may exercise consent on behalf of parents in certain, limited circumstances (e.g., when it is for the use/benefit of the school and there is no other commercial purpose)
 - Administered by the Federal Trade Commission
 - See <http://www.business.ftc.gov/privacy-and-security/childrens-privacy> for more information
- State, Tribal, or Local Laws

Question 4:

What provisions do we recommend schools and districts look for in contracts for online educational services?

Best Practices for Contract Provisions for Online Educational Services

- Security and data stewardship provisions
- Data collection provisions
- Data use, retention, disclosure, and destruction provisions
- Data access provisions
- Modification, duration, and termination provisions
- Indemnification and warranty provisions



Question 5:

What about online educational services that use “click-wrap” agreements instead of traditional contracts?

What to look for in “click-wrap” agreements

Traditional, written, and signed 2-party contracts are ideal, but not always feasible.

When reviewing “click-wrap” agreements, schools and districts should also:

- Check amendment provisions
- Print (or save) the Terms of Service
- Specify authority within your school/district to accept Terms of Service agreements



Defining “Data” or “PII”

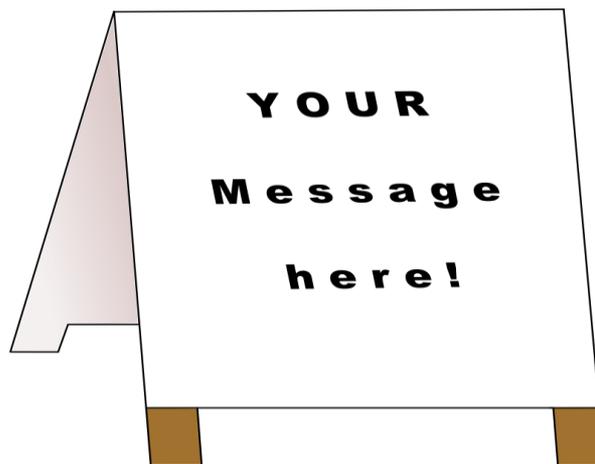


- Often TOS will begin by providing a definition of data or “PII” that will be used throughout the agreement
- A broadly written definition can help make certain more information is included and protected
- Be cautious of narrow definitions that may leave a lot of information not subject to the restrictions laid out in the agreement

Marketing and Advertising

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



Data De-Identification

Be wary when vendors talk about using “de-identified data” for other uses.

It can be difficult (and arguably impossible) to completely de-identify data.

That’s why it’s important for providers to not only properly de-identify student data, but also commit to not re-identify those data, and require any subsequent holders of those data to make the same commitment.

Modification of Terms of Service

A common provision in many TOS involves how the provider may modify the Terms of Service

It's not unusual for a TOS to allow for a material change to the TOS without providing notice or requiring consent from a school or district



Data Collection

A pro-privacy ToS will specify the types of data (or specific data elements) that the service may collect.

Beware: Providers may view access to their services through a 3rd party site as an exception to established rules limiting data collection



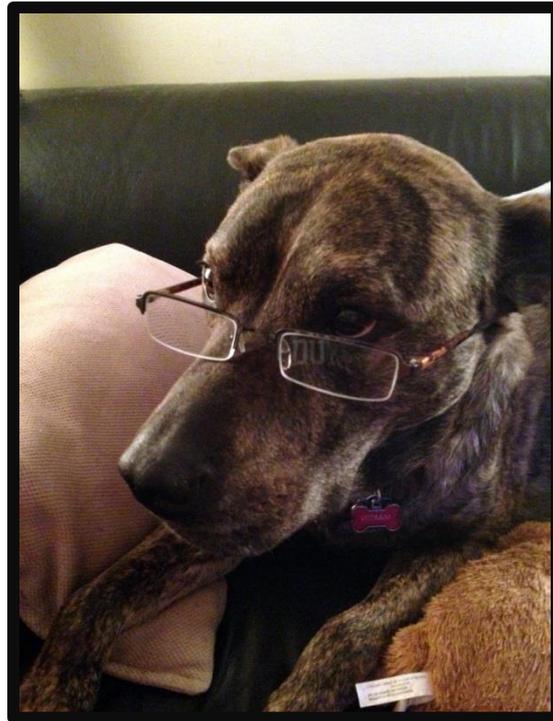
Evaluating a Click-Wrap Agreement

Disclaimer:

No actual Ed Tech Terms of Service Agreements were harmed in the making of this presentation!

(i.e., the following is a fictional ToS for a fictional company)

Meet Martin:



Martin's Unified Teaching and Testing Service (MUTTS)

MUTTS Terms of Service Agreement



These terms constitute an Agreement between you and Martin's Unified Teaching and Testing Service, Inc. (MUTTS). Access or use of the website and/or online service constitutes acceptance of the terms of this Agreement.

General Use of the MUTTS Services

MUTTS hereby grants you permission to access and use the MUTTS Services as set forth in these Terms provided that you agree not to use MUTTS Services for any commercial use, without the prior written authorization of MUTTS, and in your use of these Services you will otherwise comply with these Terms and all applicable local, state, national, and international laws and regulations

"Student Information" only includes user information knowingly provided in the course of using this service

Use of Student Information

After use of MUTTS services has begun and User has provided Student Information, MUTTS may use Student Information for the following purposes: operation of MUTTS Services in fulfillment of this Agreement, targeted advertising, and other business-related purposes.

Preservation of Student Information

MUTTS maintains the right to preserve and use Student Information after termination of this Agreement

Information Sharing

MUTTS may share information with our subcontractors and business partners. Where feasible, MUTTS will require third-parties to comply with this Agreement

License to Student Information

Providing information or user content grants MUTTS an irrevocable right to license, distribute, transmit, or publicly display Student Information or user content.

Access to MUTTS services through a third-party website

If a user gains access through a third-party website (such as a social networking site), or interfaces with a third-party website while using this service, personal information associated with that site may be collected. Any information collected in association with that third-party site will not be subject to the terms of this Agreement.

Modification of this Agreement

MUTTS reserves the right to modify this agreement at any time. Notice will be posted to the service website if the changes are deemed by MUTTS to be major.

[Click Here to Accept](#)

MUTTS – Definition of Data

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BAD DOG!

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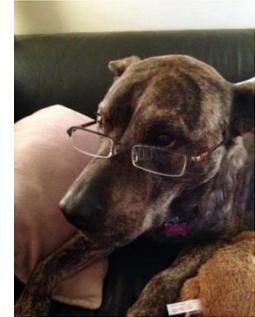
“Student Information” includes all Personally Identifiable Information (PII) and other non-public information. Student information includes, but is not limited to, information provided by or about students, metadata, and user content.



MUTTS – Data Use

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BAD DOG!

MUTTS – Data Use

Use of Student Information

After use of MUTTS services has begun and User has provided Student Information, MUTTS may only use Student Information for educational purposes in fulfillment of this Agreement



MUTTS – Data Retention

Preservation of Student Information



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BAD DOG!

MUTTS – Data Retention

Preservation of Student Information

When Student Information is no longer needed for its specified purpose or upon the termination of this agreement, all Student Information in the possession of MUTTS and any of its subcontractors will be destroyed or returned to the District under the District’s direction. Within thirty (30) days of termination of an account, all student information associated with that account will be purged from MUTTS systems, using NIST-approved data destruction and media sanitation methods for sensitive data.



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Information Sharing

You understand that MUTTS will rely on one or more subcontractors to perform services under this Agreement. MUTTS agrees to share the names of these subcontractors with you upon request. All subcontractors and successor entities will be subject to the terms of this Agreement



MUTTS – License to Information

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BAD DOG!

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License to Student Information

MUTTS has a limited license to Student Information solely for the purpose of performing its obligations as outlined in this Agreement. This Agreement does not give MUTTS any rights, implied or otherwise, to Student Information, content, or intellectual property except as expressly stated in this Agreement



MUTTS – Data Collection



MUTTS – Data Collection



BAD DOG!

MUTTS – Data Collection

Collection of Student Information

MUTTS will only collect Student Information necessary to fulfill its duties as outlined in this Agreement.



MUTTS – Data Security



MUTTS – Data Security



BAD DOG!

MUTTS – Data Security

Security

To prevent unauthorized access, maintain data accuracy, and ensure the proper use of information, MUTTS utilizes appropriate administrative, physical, and technical safeguards in accordance with industry best practices. MUTTS also uses Secure Sockets Layer (SSL) protocol on your account information to protect Student Information.



MUTTS – Modification of ToS

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MUTTS will provide sixty (60) days advance notice of any proposed changes to this agreement. Notice will be provided prominently on the MUTTS service website, and notification will be sent to the electronic mail (email) address on file for all users registered with the service. Users who do not wish to consent to the new terms of service may terminate their MUTTS accounts at any time by contacting MUTTS.



How do your ToS compare with Martin's?





PTAC Resources

<http://ptac.ed.gov>

- Guidance and Best Practice Documents
 - Model Terms of Service
 - Data Security
 - Data Governance
 - Data Sharing under FERPA
 - ...and much, much more.

- Videos
 - FERPA for Parents and Students
 - Protecting Student Privacy while Using Online Educational Services





PTAC Service Offerings

<http://ptac.ed.gov>

- Help Desk (privacyTA@ed.gov)
- Training (CBT, webinar, or onsite)
 - FERPA 101
 - Data Sharing under FERPA
 - Data Security Best Practices
- Data Governance, Policy, and Architecture Reviews (online or onsite)
 - Data Governance
 - Data Security Architecture
 - Breach Response Preparation
- MOU Assistance