



Education Technology and Children's Privacy

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Agenda

1. Overview of Children's Privacy During COVID-19
2. Key Legal Considerations
 - a) Family Educational Rights and Privacy Act (**FERPA**)
 - b) California Consumer Privacy Act (**CCPA**)
 - c) Children's Online Privacy Protection Act (**COPPA**)
3. Enforcement Risks



Children's Privacy During COVID-19

Learning to Adjust to Virtual Learning



- Millions of students in the United States (U.S.) will experience virtual learning this fall
 - 56.4 million students in the U.S. expected to attend K-12 schools
 - 19.7 million students in the U.S. expected to attend college
- In response, ed tech companies are expanding efforts and non-education focused companies continue to enter the digital learning ecosystem
- With more students learning virtually, entities must address compliance with laws impacting the collection and use of children's information

Children's Privacy Under Scrutiny

FTC Seeks Comments on Children's Online Privacy Protection Act Rule

July 25, 2019

FTC to host workshop on COPPA in October as part of initiative

- Should the Commission consider a specific exception to parental consent for the use of education technology in schools?

MARKET 24, ZUZU

**SENATORS MARKEY, DURBIN, AND BLUMENTHAL
REQUEST STUDENT PRIVACY GUIDANCE FROM
FTC, EDUCATION DEPT. AS CORONAVIRUS LEADS
TO INCREASED EDUCATION TECHNOLOGY USE**

Family Educational Rights and Privacy Act

FERPA: Overview

- **Key terms:** Education Record v. Directory Information
 - *Education record:* records maintained by a school (or party acting for a school) that are directly related to student
 - *Directory information:* information in an education record that is not harmful if disclosed
 - Includes student's name, address, phone, email, photo, date and place of birth, field of study, grade level, enrollment status, dates of attendance, participation in activities/sports, weight/height (athletes), degrees, honors and awards, and the most recent school attended
- Applies to all schools that receive funds under an applicable program of the U.S. Department of Education (DOE)
- A school that fails to comply with FERPA may forfeit its federal funding
- FERPA is enforced by the DOE which investigates complaints

FERPA: Key Requirements

- Protects the privacy of education records
 - Gives parents the right to inspect and review education records, to correct inaccurate records, and to prevent disclosure without written release from the parent
 - Many exceptions allow for disclosure without parental permission including to school officials with a legitimate educational interest, accrediting organization, law enforcement, etc.
 - Rights transfer to the student at the age of 18 or once attending postsecondary school (“eligible students”)
- Requires schools to annually notify parents and eligible students of their rights under FERPA
 - DOE provides model notices
- Schools have flexibility in how to present notice and obtain consent

FERPA: Consent Exceptions

- FERPA allows schools to disclose records, without consent, to certain parties or under certain circumstances
- Schools may disclose directory information without consent
 - However, schools must tell parents and eligible students about directory information and allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about them
 - Students have limited rights to opt-out of schools' sharing of directory information

FERPA: Service Providers

- Disclosure to school officials with legitimate educational interest permitted
 - Contractor or other party to whom a school outsources educational services may be considered a school official, provided that it:
 1. Performs an institutional service or function for which the school would otherwise use an employee;
 2. Is under the direct control of the school with respect to the use and maintenance of education records; and
 3. Is subject to FERPA limitations governing the use and redisclosure of PII from education records.
- Bottom line: Schools must address FERPA via contract with their service providers to allow for data disclosures



California Consumer Privacy Act

CCPA: Overview

Any company that does business in California and meets one or more of these standards:

Annual gross revenue over \$25 million

Collects or shares personal information annually from 50,000 consumers, households, or devices

Derives at least 50% of annual revenue from sale of personal information

Obligations and limitations extend to all **personal information** maintained about **consumers**.

Consumer = any natural person who is a California resident (e.g., employees, business contacts)

Personal Information = broad, functional definition with non-exhaustive examples

CCPA: Personal Information

Definition of Personal Information

- Information that:
 - Identifies, relates to, describes,
 - Is capable of being associated with, or
 - Could reasonably be linked, directly or indirectly,
 - **With a particular consumer or household.**

Selected Examples (that are personal information if they meet the functional definition)

- **Identifiers** including name, postal address, online identifiers
- **Unique, persistent identifier used to recognize a device**
- **Geolocation** data
- Internet and other **network activity information**
- **Inferences** drawn from personal information to create a consumer profile

CCPA: Key Requirements for Businesses

- **Notice:** Business may need to provide several types of notices, as applicable
- **Access:** Consumer right to request certain information
- **Deletion:** Consumer right to request deletion of personal information, with some exceptions
- **Opt-out:** Consumer right to opt out of “sales” of personal information
 - Sale = any disclosure of personal information for “consideration”
 - “Do Not Sell My Personal Information” links on webpages
 - Opt-in for “sales” for children under 16
- **Non-discrimination:** General prohibition on discriminating against consumers that exercise their CCPA rights.

CCPA: Opt-In Requirements to “Sell” Children’s Information

- Sales of personal information about children actually known to be under 16 require “affirmative authorization”
 - For consumers under 13, the consumer’s parent or guardian authorizes
 - For consumers aged 13-15, the consumer authorizes
- Businesses will be held liable as having actual knowledge of a child’s age if the business willfully disregards the consumer’s age

State Student Privacy Laws



- Approximately 40 states have student privacy laws
- States traditionally control education issues
- Great variation in laws, which address:
 - Transparency
 - Parental and student rights
 - Limitations on commercial use of student data
 - Data security/breach requirements
 - Limits on data use by vendors



Children's Online Privacy Protection Act

COPPA: Overview

- Governs the collection of personal information online from children under 13 and the use and disclosure of such information
- With some exceptions, requires entities to provide specific notices and obtain “verifiable” parental consent to collect personal information from children under 13
- Civil penalties for violating COPPA depend on a range of factors but can be up to \$43,280 per violation

COPPA: Application and Scope

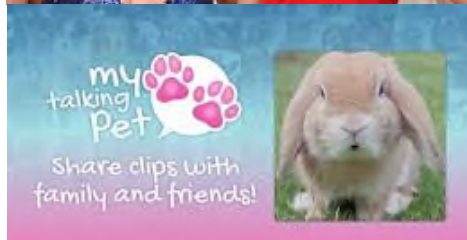
- COPPA applies in two scenarios:
 - Operators of a website or online service that is directed to children, including third parties that knowingly collect personal information directly from users of such a site or service
 - Operators of any website or online service with actual knowledge that a specific user is under 13
- Does not apply to information collected from teens or adults (13 and older) about children
- Generally does not apply to nonprofit entities

COPPA: Child-Directed Definition



- A website or online service that is targeted to children
- A “mixed audience” site or service that is targeted to an older audience as well as children is still child-directed
- The FTC considers certain features of the property to determine if it is child-directed
 - The FTC also considers “competent and reliable empirical evidence” about audience composition and the intended audience

COPPA: Child-Directed Features



- Subject matter (meaning any content) that is targeted at children
- Visual content (such as pictures or videos) that is targeted at children
- Animated (cartoon) characters
- Child-oriented activities and incentives (such as games for children)
- Music or other audio content that is targeted at children
- Child models, child celebrities, or celebrities who appeal to children
- Language and other characteristics
- Child-directed advertising that promotes or appears on the service

COPPA: “Personal Information”

- Full name
- Physical address including street name and city
- Telephone number
- Social Security number
- Online contact information, and screen names if they allow direct online contact
- Geolocation data sufficient to identify street and city
- Photo / video / audio file with child’s image or voice
- “Persistent identifiers” used to recognize user over time and across properties
 - Limited exception to consent requirement for certain uses of identifiers
- **Not personal information:** *First names, age information, demographics, screen names that do not allow online contact*

COPPA: Key Requirements

- Online notice to parents – i.e. privacy policy
- Direct notice to parents, generally by email
- “Verifiable” parental consent
 - “Email plus” a confirmation step if personal information is not disclosed
 - Other examples – signed form, telephone line with trained operators
- Allow parents to review or delete personal information from children, and to revoke consent
- Reasonable procedures to collect security, confidentiality, integrity of data
- Do not condition children’s participation on their disclosure of more personal information than reasonably necessary

COPPA: Online Services for Schools

- Schools generally are not “operators” under COPPA, but third-party ed tech services that a school uses are likely to be subject to COPPA
- Under longstanding guidance, schools can consent to collection of personal information under COPPA on behalf of parents
 - Personal information can be used only for the school’s benefit, not for commercial purposes
 - Companies must provide COPPA-required notices to schools

COPPA: Online Services for Schools

- FTC issued additional guidance for schools in April 2020
 - Reiterates that schools generally are not subject to COPPA
 - Affirms that schools can provide consent in place of parents for ed tech
 - Suggested best practices for schools:
 - Share ed tech COPPA notices with parents
 - Allow parents to review children's personal information
- Market practices
 - Some ed tech providers ask schools to agree, by contract, to obtain parental consent
 - Options: post links to ed tech privacy policies; obtain consent via parent handbook or other existing processes

COPPA: Rule Review

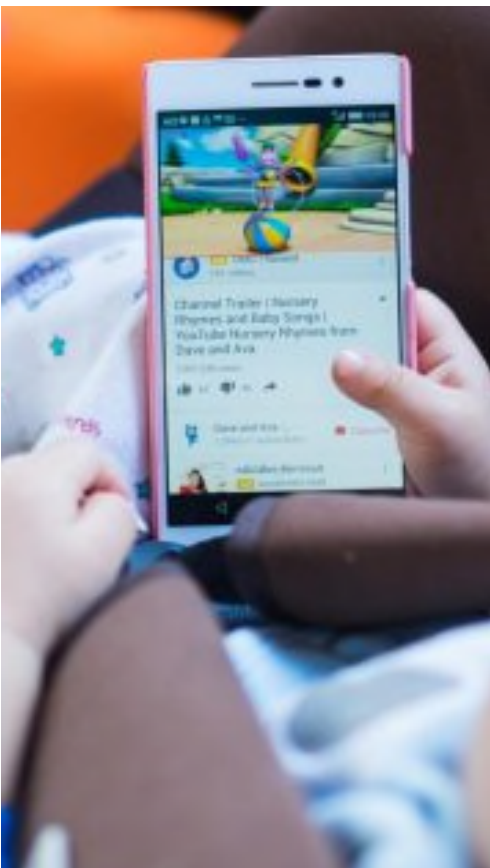
- FTC significantly updated the COPPA Rule in 2013
- Announced a new review in July 2019, ahead of schedule
- Topics for comment included:
 - Application to ed tech
 - Voice-enabled devices
 - General audience platforms with child-directed content
 - *And many others...*
- FTC accepted comments and held public workshop in October 2019
- Next steps: FTC may issue a proposed rule revision for comment

Enforcement Risks

FTC v. YouTube

- Alleged that YouTube violated COPPA by collecting personal information—persistent identifiers—from viewers of child-directed channels, without first notifying parents and getting their consent
- Alleged that YouTube had actual knowledge that it was collecting personal information from channels directed to children
 - Although enforcement not directed to channel operators, complaint stated such operators are subject to COPPA
- \$170 million settlement requires Google and YouTube to develop, implement, and maintain a system that permits channel owners to identify their child-directed content on YouTube

FTC v. HyperBeard



- Alleged that HyperBeard, Inc. violated COPPA by allowing third-party ad networks to collect personal information—persistent identifiers—to track users of the company’s child-directed apps, without notifying parents and getting their consent
- Settlement includes a \$4 million penalty, which will be suspended upon payment of \$150,000 by HyperBeard

New York Attorney General Zoom Investigation



Attorney General James opened an investigation into Zoom's privacy and security practices in March, following surge in use of the platform

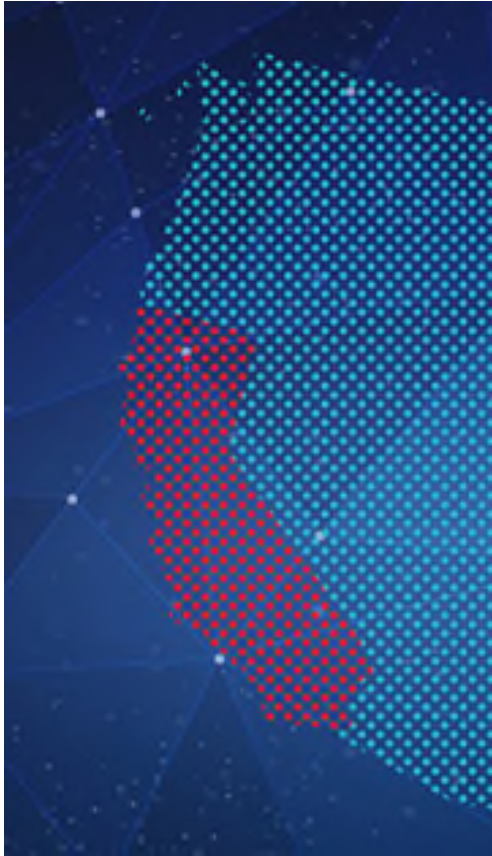


According to investigation, increase in users exposed security flaws and vulnerabilities in Zoom's platform and software and a lack of privacy protections



Among other requirements, the May 2020 agreement requires Zoom to implement a comprehensive security program and other security safeguards, and specifies that Zoom will comply with COPPA and New York education laws

California Attorney General CCPA Enforcement



- Attorney General Becerra began enforcing the CCPA on July 1, 2020
- “If you’re going to see real enforcement — aggressive, early, decisive enforcement action — early on, it will deal with kids.”
-- California Attorney General Xavier Becerra

Questions?

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