



**Texas Association of School Boards**

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## **Student Data Privacy: Laws Governing Third-Party Online Service Providers**

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Alexa in the classroom. Apps to alert parents of extracurricular activities and deadlines. Online behavior management systems. What do all these have in common? Each use of technology in a K-12 school setting may implicate federal and state privacy laws designed to protect children and students. This article summarizes the Children’s Online Privacy Protection Act (COPPA) and the Texas Student Privacy Act (TSPA), two laws intended to protect the privacy of children and students whose information is used by online companies, including educational technology (ed-tech) vendors.

### **1. What is COPPA?**

COPPA is a federal law that outlines what certain online companies must do to protect children’s online privacy and safety. Primarily, COPPA requires covered operators to provide privacy notices and obtain parental consent prior to collecting, using, or disclosing personal information obtained from children under 13 years old. COPPA also requires reasonable data security practice standards. 15 U.S.C. §§ 6501-6505; 16 CFR §§ 312.1-.13.

The Federal Trade Commission, or the FTC, is the federal agency that enforces COPPA and its implementing rules. For more information about the FTC’s view on COPPA, see FTC’s [Tidying Up: Decluttering the COPPA FAQs](#) website.

### **2. Does COPPA apply directly to a school district?**

No. Generally speaking, COPPA applies to operators of commercial websites or online services who have actual knowledge that they are collecting, using, or disclosing personal information obtained from children under 13. COPPA also covers service providers who work on behalf of an operator. Texas school districts do not operate for commercial services; thus, a school district is not considered an *operator* under COPPA.

### **3. What is considered a covered service under COPPA?**

COPPA covers a broad array of online services, including various devices, mobile applications, gaming platforms, toys, virtual assistants, and any service connected to the Internet. In a modern classroom, COPPA-covered operators might include online service providers for smart speakers, voice assistants, student tracking tools, learning

management software, and interactive tools considered to be “smart” technology because of the Internet connection required to provide customized services. The plethora of possibilities in the cloud-connected world of technology is referred to as the Internet of Things, or IoT.

#### **4. How does COPPA regulate covered operators?**

With limited exceptions, COPPA prohibits operators from collecting personal information from children under age 13 unless parents are notified and give consent. Operators must also: post on their websites clear and comprehensive online privacy policies; give parents the option to consent to the operator’s collection and internal use of a child’s information; and provide parents access to their children’s personal information for review and/or to have the information deleted. Additionally, operators must keep confidential and secure the information collected from children and may only retain children’s personal information for as long as necessary to fulfill the purpose for which it was collected. Operators may not condition a child’s participation in an online activity on the child’s providing more information than is reasonably necessary. Federal Trade Commission, [Complying with COPPA: Frequently Asked Questions](#).

#### **5. How can COPPA affect school districts?**

COPPA may become relevant to school districts when a COPPA-covered transaction takes place as part of school operations.

When COPPA-covered operators transact directly with parents and children, the operator must communicate directly with the children or the children’s parents. For instance, if a parent starts an account for a child under the age of 13 on an online social media platform, COPPA requires the platform to obtain “verifiable parental consent” prior to collecting, using, disclosing, or re-disclosing the child’s personal information.

However, when COPPA-covered operators transact indirectly with parents through a school district, this operator responsibility can be shifted to the district. For example, if a campus uses a particular website or app for students to submit their homework or interact with peers, the district may be facilitating a transaction between parents and an operator subject to COPPA. To the extent that the technology collects or uses the personal information of a child under the age of 13, this can trigger legal obligations.

When district technology triggers COPPA by collecting or using a child’s personal information, the district effectively becomes a conduit to students and parents for operators. Not surprisingly, in this situation operators are happy to shift the legal burden to districts by relying on them to act as the parent’s agent in accepting parental notices and providing consent on behalf of parents. The FTC encourages this practice, but there is no formal rule yet. Thus, many school attorneys caution districts against

becoming a parental agent. By acting in the place of a parent, the district intercepts the relationship between a COPPA-covered operator and the parent. This can burden the district with additional responsibilities when a parent is unhappy with how an operator is using their children's information. Instead, districts should seek to establish parental consent under FERPA exceptions or, if appropriate, provide parent notification and opt-out options.

Recently, the FTC has solicited public comments on its COPPA rules to explore potential changes. More information is available on the FTC's [The Future of the COPPA Rule: An FTC Workshop](#) website.

**6. What are the legal risks for districts who consent on behalf of parents to allow COPPA-covered operators to use, collect, and disclose personal information from a child?**

School districts must meet their legal obligations to protect student information under the Family Educational Rights and Privacy Act (FERPA) and applicable state laws, such as the Texas Public Information Act. Under an exception to FERPA, districts may disclose student information without parent consent to a contractor to whom the district has outsourced institutional services or functions, as long as certain requirements are met. Some would argue that this exception protects districts that contract with COPPA-covered operators. Another FERPA exception allows districts to disclose student information to designated school officials with legitimate educational interest, which the U.S. Department of Education has interpreted to include online service providers if the district also complies with FERPA's requirements.

Nonetheless, a district assumes a higher level of legal risk by acting as a parent's agent when interacting with a COPPA-covered operator. COPPA requires operators to obtain "verifiable parental consent" before collecting and using certain student data. Thus, when districts agree to act as the parent when engaging with COPPA-covered operators, the district may inadvertently bind itself under a legal agreement to take on more costs and responsibilities that should apply to operators themselves under COPPA. Furthermore, disputes may arise when parents do not actually consent for the district to use certain services in the education of their child.

**7. May a district act in the place of a parent and agree to waive parental rights under FERPA?**

Probably not. In at least one instance, the federal Student Privacy Protection Office (SPPO) found that a charter school violated FERPA by denying enrollment to a student whose parent did not consent to the terms of use required by the school's contracted online services provider. U.S. Dep't of Educ., Student Privacy Policy Office, [Letter to Agora Cyber Charter School](#) (Nov. 2, 2017). In that case, the school required a parent to agree to an online service provider's terms and conditions that would have allowed the provider to

use her child's information for purposes beyond the educational purpose and services for which the provider had contracted with the school. Because the parent refused to provide consent, the school refused to enroll the student, thereby denying educational services.

This case illustrates how a COPPA-covered operator may use student information beyond the scope of a school district's authority under FERPA, leaving the legal responsibility for compliance with FERPA to the district.

**8. What is the Texas Student Privacy Act?**

The 2017 Texas Student Privacy Act (TSPA) added Subchapter D to Chapter 32 of the Texas Education Code. The TSPA restricts how student information in Texas may or may not be used by operators of websites and online services that are used, designed, and marketed primarily for school purposes. Essentially, the TSPA is a state law intended to further protect student privacy where the federal law may be lacking.

**9. What restrictions does the TSPA impose on an operator?**

Under the TSPA, an operator is anyone who operates a website, online service, online application, or mobile application, with actual knowledge that such services are used, designed, and marketed for a school purpose. Tex. Educ. Code § 32.151(3). An operator may not knowingly engage in targeted advertising based on personally identifiable student information; create a student profile unless for a school purpose; or sell or rent student information. Tex. Educ. Code § 32.152(a).

**10. What is considered a school purpose or targeted advertising as defined by the TSPA?**

In Texas, a *school purpose* is generally any purpose that takes place at the direction of a school district, school campus, or teacher, or that assists in the administration of school activities. A school purpose must be for the use and benefit of the school, such as instruction in the classroom or at home, administrative activities, and collaboration between students, school personnel, or parents. *Targeted advertising* is any advertisement selected for and presented to a student based on information obtained or inferred over time from the student's online behavior, usage of applications, or personally identifiable information. Tex. Educ. Code § 32.151(5), (6).

**11. What uses of student information are allowed?**

An operator may use or disclose a student's covered information only as allowed by law, such as improving operability or functionality of the website, service, or application; ensuring legal and regulatory compliance; protecting the operator against liability; protecting security of online services or user safety or integrity; for research; or for

requests from TEA or the district. Tex. Educ. Code § 32.153(a). The TSPA also provides various procedures for securing and deleting information. Tex. Educ. Code §§ 32.155-.156. The state law does not alter the rights or duties of the operator, school, parent, or student under FERPA or other federal law. Tex. Educ. Code § 32.157(9).

**12. Who enforces the TSPA?**

As the TSPA provisions are part of the Texas Education Code, the Texas Education Agency is normally the state agency with authority to enforce violations. See Tex. Educ. Code § 39.003(a)(17) (broadly authorizing investigation as the commissioner of education determines necessary). The TSPA appears to only apply to third-party vendors and does not allow a private individual to sue the district for prohibited uses by a third-party vendor, and it is unclear whether TEA has any authority over third-party vendors under the Texas Education Code. TEA can, however, exercise its jurisdiction over school districts to investigate as determined necessary. Educ. Code § 39.003(a)(17).

**13. What should districts do to reduce indirect burdens from COPPA?**

To avoid unnecessary legal responsibility, administrative cost, and complaints, a district should proceed with caution when allowing use or disclosure of student information to COPPA-covered operators. Seek legal review of service contracts or other legal agreements before entering contractual relationships for ed-tech. Contracts should require operators to comply with their legal obligations under all applicable laws, including COPPA and other Texas state laws protecting student data privacy or agree to share the cost of time and labor required by school staff to secure the operator's compliance under law, and agree to share the costs and burdens of dispute resolution. District officials should also strive to communicate in advance to parents all the tools and services that may use students' personal information. To the extent that existing laws do not protect student data or enable districts to fully control the privacy of their students' data, parental consent is the ultimate solution.

**14. How may a school district ensure that contracted vendors comply with COPPA, TSPA, and other legal obligations to protect student information?**

Because COPPA's federal preemption language expressly prohibits any state or local government from imposing liability for commercial activities or actions by operators in interstate or foreign commerce in connection with COPPA-covered activities or actions, some believe the best way for districts to ensure that student data is protected is to ensure a legally binding, written agreement is properly executed to include provisions that require student data privacy protections. One data privacy advocacy group, the Student Data Privacy Consortium (SDPC), has released a [sample National Data Privacy Agreement \(NDPA\)](#) to streamline contracting language between school districts and marketplace providers, and to set standardized terms. The Texas Education Technology

Leaders also offers a [sample student data privacy agreement](#) for Texas schools. Finally, the Texas Tri-Agency Workforce Initiative has developed a [model data-sharing agreement](#) for use by public schools, public and private institutions of higher education, and state and local workforce entities when sharing FERPA-protected data among themselves and with other entities authorized to receive such data without parental consent. However, under Texas law, just as a district is authorized to sue a contractual party to enforce the agreement, a vendor may also sue a school district for breaching a contract for goods and services. Tex. Loc. Gov't Code §§ 271.151-.160 (Subchapter I). Therefore, it is critical for the district's legal counsel to review all legally binding agreements prior to contract execution.

Keep in mind, while laws like COPPA and TSPA are designed to keep up with the most recent forms of technology, Texas school districts maintain many types of student information that is subject to other federal and state laws, including FERPA and parental rights provisions in Texas Education Code chapter 26. To discuss a specific situation, please contact TASB Legal Services at 800.580.5345.

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