



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF MANAGEMENT

November 2, 2017

(b) (6)

Agora Cyber Charter School
590 North Gulph Road
King of Prussia, PA 19406

Complaint No. (b) (6)
Family Educational Rights
and Privacy Act

Dear (b) (6)

This is to inform you of the findings in the complaint (Complaint) first filed by (b) (6) (Parent) on December 16, 2012, alleging that Agora Cyber Charter School (Agora) violated her rights under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 CFR Part 99. By letter dated March 27, 2015, the Family Policy Compliance Office (Office) notified (b) (6), (b) (6), of the Parent's allegations, and requested that Agora respond to these allegations and provide certain relevant documents. By letter dated May 26, 2015 (Agora's 2015 Response), (b) (6), on Agora's behalf, responded to this Office, producing documents and stating, among other things, that disclosures of education records by Agora have been, and remain, consistent with the requirements of FERPA. By letter dated January 23, 2017 (Agora's 2017 Response), (b) (6), on Agora's behalf, provided this Office with additional information in connection with our investigation of the Complaint.

Below is this Office's finding regarding the Parent's allegations against Agora as set forth in our March 27, 2015, letter. Although the Parent's child is no longer enrolled at Agora, as of January 6, 2015, this Office's findings extend to all current Agora students, whom this Office considers to be "similarly situated" to the Parent's child as it relates to the Complaint.

Allegation 1: That, as a condition of her child's receipt of certain educational services (such as access to live classes and other resources) at Agora, the Parent was forced to agree to the "Terms of Use" and "Privacy Policy" governing the services of Agora's contractors, K12 Inc., Sapphire, and Blackboard Inc.; that these contractors did not protect her child's personally identifiable information (PII) from education records in compliance with FERPA; and, that the Parent was forced to give up protections of her child's education records that were afforded to her under FERPA.

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Allegation 2: That Agora violated FERPA by not complying with the requirements set forth in 34 CFR § 99.31(a)(1)(i)(B)(2)-(3) that permit a school to non-consensually disclose PII from students' education records in certain instances; that Agora is not maintaining direct control over its contractors with respect to the use and maintenance of the Parent's child's education records; and, that Agora is not ensuring that PII from her child's education records is only used by such contractors for the purposes for which Agora made the disclosure as required in 34 CFR § 99.31(a)(1)(i)(B)(2)-(3).

As explained more fully below, we find that Agora has violated FERPA with regard to Allegation 1. We do not find that Agora violated FERPA's legal requirements with regard to Allegation 2.

Also, we note that a review of Agora's website leads us to believe that Agora may no longer utilize certain third party service providers, such as K12 Inc., as defined below, relevant to the Complaint in the same manner it did when the Complaint was filed. Even assuming that this is accurate, we are issuing this letter regardless to ensure that Agora's current relationships with third party service providers comply with FERPA.

Summary of Facts

Based on our investigation we find the following facts (with the source of the fact noted in parenthesis):

1. Agora is a public charter school authorized by the Pennsylvania Department of Education. (Agora's 2015 Response, page 2).
2. On November 13, 2009, Agora and K12 Virtual Schools LLC (K12 Virtual) entered into an Educational Products and Services Agreement (Agreement). (Agreement, page 25)
3. K12 Virtual is a wholly-owned subsidiary of K12 Inc. (K12). (Agora's 2015 Response, page 1).
4. Section 2.3.2 of the Agreement states as follows:

[Agora] recognizes and agrees that for purposes of [FERPA]...K12 [Virtual] has a legitimate educational interest for purposes of [Agora] disclosing to K12 [Virtual Agora students'] education[] records. [Agora] shall define 'school officials' and 'legitimate educational interest' as permitted by FERPA, broadly enough to permit K12 [Virtual] to provide the [products and services] to the students of Agora.

(Agreement, page 4).

5. The products and services provided under the Agreement by K12 Virtual to Agora and its students include the K12® online school (K12 Online School). (Agreement, page 1).

6. According to Agora, “[t]he purpose of the [K12] Online School...is to provide online education.” (Agora’s 2017 Response, page 3).
7. Agora states that “[a]s part of the enrollment process...at Agora, [Parent] agreed that ‘[] each software application provided shall be subject to, and used in accordance with, the license and/or use agreement that accompanies that software application.’” (Agora’s 2017 Response, page 3).
8. The Parent expressed concerns to Agora on October 20, 2014, in part about agreeing to the K12 Online School terms of use (K12 Terms of Use). Agora denied the Parent’s request on October 21, 2014, noting that “the school’s expectations were no different than for other families.” Agora responded in part that “parents will access and use student information system and other systems as intended as part of a cyber education, ..., that Agora was a public school of choice, and that the refusal to access and use the systems and tools caused a deviation from and degradation of the educational experience at Agora, including a failure to align with the requirements of the Pennsylvania Core Standards for cyber schools.” (Agora’s 2017 Response, page 5).
9. The K12 Online School terms of use (K12 Terms of Use) state that “[a]ll Members must accept the [K12 Terms of Use] as a condition of membership to the K12 Service.” (Agora’s 2015 Response, Exhibit B, K12 Terms of Use, page 1).
10. According to Agora, “‘Member’ is, as a matter of context, descriptive of those individuals such as parents, guardians, and students who agree to the [K12 Terms of Use].” (Agora’s 2017 Response, page 6).
11. According to Agora, “‘Service’ is, as a matter of context, descriptive of the services received by a Member under the [K12] Terms of Use.” (Agora’s 2017 Response, page 8).
12. In order to use the “Service,” the K12 Terms of Use requires that users provide “Registration Data,” defined therein as, “true, accurate, current and complete information about [themselves] as prompted by the Service’s registration form.” (Agora’s 2015 Response, Exhibit B, K12 Terms of Use, page 2).
13. The K12 Terms of Use contains the following provisions:

K12 does not claim ownership of Member Content you submit or make available for inclusion on the Service. With respect to Member Content you submit or make available for inclusion on Member accessible areas of the Service, however, you grant K12 the following world-wide, perpetual, royalty free and non-exclusive license(s), as applicable:

By posting or submitting Member Content to this Site, you grant K12 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; and you warrant and represent that you own or otherwise control all of the rights to the content and that public posting and use of your content by K12 will not infringe or violate the rights of any third party.

“Member accessible” areas of the Service are those areas of the K12 network of properties that are intended by K12 to be available to Members. By way of example, Member accessible areas of the Service would include K12 Discussion boards and portions of the K12 Community Chest.

(Agora’s 2015 Response, Exhibit B, K12 Terms of Use, page 4).

14. “Member Content” is defined as “all information, data, text, software, music, sound, photographs, graphics, video, messages, tags or other materials.” (Agora’s 2015 Response, Exhibit B, K12 Terms of Use, page 2).
15. Agora acknowledges that “Member Content could include, for example, personally identifiable information from student education records that is posted to the...K12 Online School.” (Agora’s 2017 Response, page 7).
16. Agora also acknowledges that “Registration Data could constitute Member Content.” (Agora’s 2017 Response, page 8).

Legal Analysis

Allegation 1 – Requiring Parent to Accept the K12 Terms of Use

The Department has long held that a parent or eligible student cannot be required to waive the rights and protections accorded under FERPA as a condition of acceptance into an educational institution or receipt of educational training or services. For example, in our July 26, 2005, letter to the College of Southern Maryland (<https://studentprivacy.ed.gov/resources/letter-college-southern-maryland>), we noted that while generally “nothing precludes a party from *knowingly* and *voluntarily* waiving constitutional and statutory rights...[this] principle does not apply where a party is required to waive statutory rights or protections in exchange for the mere ability to participate in the activity the statute is designed to protect.” *Id.* at 3 (emphasis in original). The FERPA statute and regulations set forth very limited circumstances in which a student may be effectively required by a postsecondary institution to waive his or her FERPA right to inspect and review certain education records, namely to waive a student’s inspection and review rights of statements and letters providing confidential recommendations. 20 U.S.C. 1232g(1)(C)(iii) and (D) and 34 CFR 99.12(b)(3)(i) and (c). In addition, the Department has identified very limited circumstances in which a postsecondary institution may ask certain eligible students to waive their right to consent to the disclosure of education records or PII contained therein (such

as asking them to sign waivers permitting the release of certain PII from education records to the National Collegiate Athletic Association in order to participate in certain extracurricular sports and activities at the postsecondary level). As noted in the Southern Maryland College letter, however, “[i]n no circumstances does FERPA permit an educational agency or institution to require a student to waive the rights and protections afforded under FERPA in order to apply for or receive educational training or services.” *Id.* at 4.

The Parent, in part, contends that, as a condition of her child’s receipt of certain educational services at Agora, she was forced to agree to the “Terms of Use” governing the services of Agora’s contractor, K12; that K12 does not protect information in compliance with FERPA; and, that the Parent was forced to give up protections of her child’s education records that were afforded to her under FERPA.

As an initial matter, you object to the characterization that acceptance of the K12 Terms of Use is required as a condition of school attendance or receipt of educational services from Agora. You argue, instead, that “[p]arents freely-choose to enroll their sons and daughters at Agora, and in doing so there are various terms to which a parent agrees, as with any school. There is no coercion; no one is *forced* to sign any agreement(s).” (Agora’s 2015 Response, page 3 (emphasis in original)).

While we agree that the Parent did, in fact, choose to enroll her child in Agora, rather than, for instance, a neighborhood school, such decision did not relieve Agora of its obligations to comply with FERPA, nor lessen the Parent’s rights and protections under FERPA. Agora is an educational institution to which funds have been made available under programs administered by the Secretary of Education, and, therefore, Agora is subject to, and must in all respects comply with, the requirements of FERPA with respect to all students who choose to enroll at Agora.

Further, it is undisputed that the purpose of the K12 Online School was to provide the Parent’s child with an online education. (Agora’s 2017 Response, page 3). It is also undisputed that the Agora student enrollment process involved the Parent’s execution of documentation agreeing to be subject to any use agreement that accompanied software applications used by Agora to provide such online education. *See id.* at 3. In addition, the K12 Terms of Use, itself, required that all users “accept the [K12 Terms of Use] *as a condition of membership to the K12 Service.*” (Agora’s 2015 Response, Exhibit B, K12 Terms of Use, page 1 (emphasis added)). In fact, you acknowledge that the Parent’s requests “not to agree or abide by the [K12] Terms of Use...and yet still have [her child] otherwise participate fully in online learning, were inconsistent with basic operations of a cyber school, and *made virtual learning impracticable.*” (Agora’s 2017 Response, page 5 (emphasis added)). Further, Agora denied the Parent’s request not to use the K12 Terms of Use. (*Id.*) Thus, Agora required the Parent’s acceptance of the K12 Terms of Use as a condition of Parent’s child’s attendance at, and receipt of educational services from, Agora.

The issue that remains, therefore, is whether by requiring the Parent to accept the specific terms and conditions set forth in the K12 Terms of Use Agora forced the Parent to waive her statutory rights and protections under FERPA. Based on our investigation, we determine that such requirement did, in fact, constitute a forced waiver of the Parent’s rights.

According to the K12 Terms of Use, the Parent was required to agree that by “posting or submitting Member Content to this Site, you grant K12 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.” (Agora’s 2015 Response, Exhibit B, K12 Terms of Use, page 4 (emphasis added)). The K12 Terms of Use defined “Member Content” broadly to include “all information, data, text, software, music, sound, photographs, graphics, video, messages, tags or other materials.” *Id.* at 3. As you acknowledge, “Member Content could include, for example, *personally identifiable information from student education records* that is posted to...K12 Online School.” (Agora’s 2017 Response, page 7 (emphasis added)). For instance, during the school registration process, the K12 Terms of Use required Parent to provide her child’s “Registration Data,” which was comprised of “true, accurate, current and complete information about [users] as prompted by the Service’s registration form,” (Agora’s 2015 Response, Exhibit B, K12 Terms of Use, page 2), and, which you also acknowledge could constitute “Member Content.” (Agora’s 2017 Response, page 8). As such, the K12 Terms of Use required Parent to allow near-universal use and distribution by K12 and various third party affiliates and licensees of information that could have constituted her child’s PII from education records (posted or submitted as “Member Content”), such as her child’s Registration Data. Under the aforementioned licensing provision, K12 and its affiliates and licensees could 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. The scope of K12’s rights to use and distribute the Parent’s child’s PII from education records through the K12 Terms of Use and its licensing provision, in effect, required the Parent’s forfeiture of her rights under FERPA to protect against the unauthorized disclosure of PII from her child’s education records that was posted or submitted to the Site as “Member Content.”

Therefore, we find that Agora violated the legal requirements set forth in FERPA with regard to Allegation 1.

Allegation 2 - Agora’s Direct Control over its School Officials

In 2012, when Parent first filed her Complaint, the Department had yet to release guidance regarding the establishment of direct control by an educational agency or institution over the use and maintenance of education records and the PII from such education records by a contractor or other third party acting as a school official with legitimate educational interests in the context of providing online educational services. While the written agreement Agora used as a mechanism to establish direct control over the use and maintenance of student education records by third parties acting as school officials could have been more effective, we conclude that Agora did not violate the legal requirements set forth in FERPA in this regard. In 2014, the Department issued guidance on this subject entitled “[Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices](#)” and then in 2015 issued the companion document entitled, “[Protecting Student Privacy While Using Online Educational Services: Model Terms of Service](#).” These guidance documents provide substantial clarity to the education community on best practices for effectively establishing direct control over the use and maintenance of education records and the PII from such education records by third parties acting as school officials with legitimate educational interests in the online educational service context. We encourage Agora, and other educational agencies and institutions, to consider the best practices contained in the guidance when entering into future agreements for online educational services with a third party that will act as a school official with legitimate educational interests under

FERPA, particularly the provisions in the 2015 guidance relating to “Data Use” (p. 5) and “Rights and License in and to Data” (p. 7).

Coming into Compliance

Due to the reasons discussed above, we find that Agora violated FERPA by requiring that the Parent waive her rights and protections under FERPA as a condition of her child’s attendance at, and receipt of educational services from, Agora. In order to come into compliance Agora must agree to the following actions:

1. Agora shall no longer disclose education records or PII from education records to K12 Virtual and K12 or to any other third party servicer as long as the third party servicer includes a licensing provision in its terms of use that (i) parents or eligible students are required to accept to apply for or receive educational training or services; (ii) covers “Registration Data” or other information that would constitute PII from education records; and, (iii) grants the third party servicer, its affiliates, or its licensees the “right to use, reproduce, display, perform, adapt, modify, distribute, have distributed, and promote [such covered] content in any form, anywhere, and for any purpose.” (Agora’s 2015 Response, Exhibit B, K12 Terms of Use, page 4).
2. Agora shall no longer require, as a condition of attendance or receipt of educational training or services, parents or students to accept or enter into any agreement, such as a terms of use or terms of service, with any contractor or other third party that is acting for Agora as a school official with legitimate educational interests in performing outsourced institutional services or functions that waives the rights and protections afforded to the parent or student under FERPA.

Please provide the above outlined assurances within 30 days from the date of this letter.

As noted above, we understand that Agora no longer utilizes the same online educational service providers that it did at the time of this complaint. Nevertheless, Agora needs to be in compliance with FERPA in accordance with the principles outlined in this letter.

If you have any additional questions about this matter please don’t hesitate to contact this Office. Thank you for your continued cooperation with regard to this matter.

Sincerely,

Dale King
Director
Family Policy Compliance Office

Cc: Parent

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