



## *Google Apps for Education Privacy & Legal Issues*

The usage of **Google Apps for Education ("GAFE")** as a platform for the storage, transfer and use of data and as an integrated communication and collaboration solution has grown exponentially in the past few years. GAFE's total user base has grown from 8 million in 2010 to 40 million in February of 2015. 7 million of these users emanate from U.S. K-12 schools. Vermont schools are increasingly using GAFE as well. Given GAFE's immersion into the school world, the Multi-Line Program asked our legal partner to review the following:

- (1) What legal issues/liabilities are raised by the use of GAFE;
- (2) Are there steps that schools can take to minimize their exposure?
- (3) What recommendations are there for the proper use of GAFE?

### 1. Privacy/Legal Issues with GAFE

#### *Privacy Issues:*

- a) **FERPA**, the Family Educational Rights and Privacy Act, protects the privacy of student records. Google has anticipated this issue. GAFE is governed principally by the Google Apps Terms of Service ("TOS"), which provides that Google is considered a "School Official" under FERPA to the extent that Customer Data includes FERPA records. The Department of Education has expressly approved of this approach, in accordance with federal regulations contemplating outsourcing certain tasks to contractors or other third parties. **Thus, GAFE can reasonably be considered FERPA-compliant.**
- b) **COPPA** poses a greater challenge. COPPA, the Children's Online Privacy Protection Act, requires parental consent for the online collection of personal information from children under the age of 13. The FTC (which administers COPPA) has recently noted that there are limited circumstances in which a school may consent on behalf of the parents, such as where online services are offered to benefit students; however, the FTC has made clear that the services must be for "no other commercial purpose." Notably, Google has not made any representations giving comfort here. To the contrary, the TOS makes clear that schools are "solely responsible for compliance" with COPPA. **Thus, the sensible conclusion is that schools should obtain parental consent with regard to these children.**

*Please note that this document is not intended to be an exhaustive discussion of the issues, but is instead designed to provide an overview of some of the more pertinent observations our analysis has yielded. Also, please understand that this area is both new and constantly evolving, which necessarily presents additional uncertainty.*

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*Legal Issues:*

- a) **Under the TOS, Google may unilaterally make changes to the service.** If the change is “commercially reasonable” – a term with some ambiguity baked in – then Google may make the changes without giving any notice. Only where the changes are “material” will Google provide notice, but will do so only if the customer has affirmatively subscribed with Google to be so informed. Moreover, as with “commercially reasonable” changes, Google is not required to obtain agreement or consent from its customers when making a “material” change.
- b) **While GAFE is touted as being free, the TOS is not so clear – at least with respect to duration.** Specifically, the TOS provides that “Google will not charge Customer Fees” during “the Initial Term,” which would *seem* to be for one year. After that, Google may charge a fee “[u]pon the parties’ mutual written agreement.” (It is unclear what happens if the parties do *not* reach agreement. Indeed, it seems unlikely that – all things being equal – a customer paying no fee would voluntarily agree to start paying. *And if the TOS is terminated, then Google allows for the export of customer data for a “commercially reasonable period of time” for a price, namely, Google’s “then-current rates.”* Obviously, there are ambiguities here, and a school could be put in the position of paying a charge it did not anticipate.
- c) **Google’s use of student data was the subject of a federal lawsuit filed in California in early 2014.** It was alleged that Google, via GAFE, was “data mining” student emails for use in delivering targeted advertising in non-GAFE products. Although it denied any wrongdoing, on April 30, 2014, Google announced that it ceased “all ads scanning in Gmail for Apps for Education...” And earlier this year (in January 2015), Google signed a student privacy pledge, endorsed by the President. See <http://studentprivacypledge.org/>. Thus, Google seems to be moving in the right direction when it comes to student privacy issues. Still, Google’s status as a for-profit corporation (with a duty to maximize shareholder value), coupled with the value of large data reflecting preferences and trends, confirms the wisdom of maintaining vigilance on this issue.

2. **Steps to Minimize Exposure**

- a) The best way to minimize exposure under the privacy laws is to fully disclose to parents what a school intends to do, and then **obtain parental consent** prior to proceeding.

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- b) Schools should familiarize themselves with the issues, because understanding the general principles will help them navigate their particular circumstances. The Department of Education created the “**Privacy Technical Assistance Center**” (“PTAC”) as a resource on privacy and other issues related to student data. The website contains numerous guides, including a paper entitled “Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices.”
- c) Google agreements are complicated, and refer (sometimes obliquely) to other governing documents. **Schools should not blindly “accept” the terms set forth in online “click-wrap” agreements** without understanding the obligations and risks. Schools should understand which Google services are (e.g., Gmail, Google Docs) and are not (e.g., maps, YouTube) covered within GAFE. Discrepancies between Google’s agreements need to be resolved as well.

### 3. **Additional Recommendations**

In addition to the foregoing, PTAC has created a “Model Terms of Service,” suggesting best practices for terms of service provisions. **VSBIT’s Multi-Line Program recommends that these practices – and this contract language – be adopted to the fullest extent possible.**

Of course, that is easier said than done. Generally, Google’s terms of service are non-negotiable “click wrap” agreements. However, research indicates that they will negotiate them, at least with respect to larger institutions. For example, Rice University successfully negotiated more favorable terms – a negotiation which took two years, as described in a 30-minute video presentation entitled, “Google Apps for Education: A Not-So-Simple Decision.”

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