



Office of Commissioner  
Andrew N. Ferguson

UNITED STATES OF AMERICA  
**Federal Trade Commission**  
WASHINGTON, D.C. 20580

**Concurring Statement of Commissioner Andrew N. Ferguson**  
Regarding the Commission's Brief *Amicus Curiae* in  
*Shanahan v. IXL Learning, Inc.*, No. 3:24-cv-02724 (N.D. Cal.)  
Matter No. 2223135

August 19, 2024

The Commission today approves the filing of a brief *amicus curiae* in *Shanahan v. IXL Learning, Inc.*<sup>1</sup> I concur in the filing of the brief, subject to one qualification.

The defendant in *IXL* is an educational technology, or “EdTech,” company, that creates, markets, and sells online-based educational software to school divisions all over the country.<sup>2</sup> Tens of millions of students log on to IXL’s online platforms every day to use its various products.<sup>3</sup> The plaintiffs in *IXL* are some of those students and their parents.<sup>4</sup> They allege that IXL has been collecting the private data of millions of IXL’s users in violation of California and federal law.<sup>5</sup>

IXL responded to the complaint by moving the district court to compel the plaintiffs to arbitrate. IXL argues that the terms of service in its purchase agreements with the school districts include a mandatory arbitration clause which binds the parents.<sup>6</sup> But the parents are not parties to the purchase agreements; the school districts that purchased the software are. That creates a problem for IXL’s motion because the law generally does not bind to the terms of a contract a person who did not consent to them.<sup>7</sup> No matter, argues IXL, because “an express agency existed between Plaintiffs and the relevant school districts as a matter of federal law,” and the school districts “consented to the Terms [of the arbitration clause] as agents of the parents.”<sup>8</sup>

The “federal law” on which IXL relies is the Children’s Online Privacy Protection Act (“COPPA”).<sup>9</sup> Relevant here, COPPA requires website operators like IXL to (1) give parents notice of what information is being collected from their children as well as how such information is used and disclosed, and (2) to obtain “verifiable parental consent for the collection, use, or disclosure of personal information” of those children.<sup>10</sup>

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<sup>1</sup> No. 3:24-cv-02724 (N.D. Cal.).

<sup>2</sup> Compl. ¶¶ 26–27, *Shanahan v. IXL, Inc.*, No. 3:24-cv-0274 (N.D. Cal. May 7, 2024).

<sup>3</sup> *Id.* ¶ 29.

<sup>4</sup> *Id.* ¶¶ 6–12.

<sup>5</sup> *Id.* ¶¶ 266–329.

<sup>6</sup> Mot. to Compel Arbitration 1, 4–7, *Shanahan v. IXL, Inc.*, No. 3:24-cv-0274 (N.D. Cal. July 12, 2024).

<sup>7</sup> *Jensen v. U-Haul Co. of California*, 18 Cal. App. 5th 295, 300 (2017) (“[A]s a general rule, ‘the right to arbitration depends on a contract, and a party can be compelled to submit a dispute to arbitration only if the party has agreed in writing to do so.’”) (quoting *Matthau v. Superior Court*, 151 Cal. App. 4th 593, 598 (2007)).

<sup>8</sup> Mot. to Compel Arbitration 4, 5.

<sup>9</sup> 15 U.S.C. § 6501 *et seq.*

<sup>10</sup> *Id.* § 6502(b)(1).

IXL's argument does not pass the smell test. It is impossible to read COPPA's notice-and-consent requirements to have transformed schools into parents' agents with federal authority to bind those parents to arbitration agreements. COPPA does not mention schools or agency at all. The Commission's *amicus* brief persuasively rebuts IXL's brutal misreading of COPPA. I am grateful for the service the Commission's staff has done the country by uncovering this argument and preparing a brief to combat it.

The brief suggests, however, that schools can act as agents of their students' parents "for purposes of complying with COPPA's notice and consent requirements."<sup>11</sup> The brief cites the Statement of Basis and Purpose of the Children's Online Privacy Protection Rule ("COPPA Rule")<sup>12</sup> and a blog post in support of this proposition.<sup>13</sup> The Commission's recent Notice of Proposed Rulemaking for amending the COPPA Rule similarly proposed "codifying" the Commission's "long-standing guidance that schools, State educational agencies, and local educational agencies may authorize the collection of personal information from students younger than 13 ... where the data is used for a school-authorized education purpose and no other commercial purpose."<sup>14</sup>

I have substantial reservations about this interpretation of COPPA. I see nothing in COPPA's text that limits parents' statutory right to notice and consent when their children are online at school, nor anything suggesting the creation of a federal-law agency relationship between parents and anyone else. Indeed, because COPPA preempts inconsistent state laws,<sup>15</sup> it may require website operators to obtain consent from parents even if state law otherwise authorizes schools to act on behalf of parents regarding the purchase of software. But we do not need to resolve these questions here.<sup>16</sup> Even if the brief were correct that schools can act as agents for purposes of COPPA's notice-and-consent requirements, that agency relationship would not extend to the arbitration agreement on which IXL's motion rests. I will therefore withhold judgment on these questions until they come before me in an enforcement proceeding or in the pending rulemaking.

Subject to that qualification, I concur in the filing of this brief. I congratulate the staff on their important work in this case.

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<sup>11</sup> Br. for *Amicus Curiae* Fed. Trade Comm'n 7, *Shanahan v. IXL, Inc.*, No. 3:24-cv-0274 (Aug. 19, 2024).

<sup>12</sup> *Id.* at 6–7 (citing 64 Fed. Reg. 59888, 59903).

<sup>13</sup> *Ibid.* (citing Lisa Weintraub Schifferle, COPPA Guidance for Ed Tech Companies and Schools during the Coronavirus (Apr. 9, 2020), <https://www.ftc.gov/business-guidance/blog/2020/04/coppa-guidance-ed-tech-companies-and-schools-during-coronavirus>).

<sup>14</sup> Child's Online Priv. Prot. Rule, NPRM, 89 Fed. Reg. 2034, 2055 (Jan. 11, 2024).

<sup>15</sup> 15 U.S.C. § 6502(d).

<sup>16</sup> Nothing in the *amicus* brief or my statement affects the status of the Commission's current COPPA guidance.