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Parents Not Bound By Schools' Arbitration Pact, FTC Argues

By **Allison Grande**

Law360 (August 19, 2024, 10:58 PM EDT) -- The Federal Trade Commission has stepped into a proposed class action accusing education technology company IXL Learning of unlawfully collecting and selling children's personal information, telling a California federal court that the company's agreement with schools to arbitrate disputes doesn't extend to the parents pressing the data privacy suit.

In an amicus brief filed Monday, the FTC contested IXL's bid to compel arbitration of a group of parents' claims that the ed tech company violated the federal Wiretap Act, multiple California statutes, and common law privacy torts by relying on a "massive data-harvesting apparatus" to illegally scoop up personal information from the more than 15 million school-age children nationwide that use its educational software and to then sell that data to third parties that "exploit" the information to market products to kids.

IXL had argued in a July motion that the parents were bound by the same mandatory arbitration and class action waiver provisions contained in the terms of service that schools had agreed to for IXL software used in their classrooms because, under the Children's Online Privacy Protection Act and its implementing rule established by the FTC, school districts operate as "agents" for the parents in the use of company's educational services.

But the FTC in its friend-of-the-court brief countered that there is "nothing in COPPA's text, purpose, or legislative history, or the interpretation thereof by the commission and its staff" that "addresses whether parents and their children should be bound by every provision contained in a contract between an operator like IXL and a school district."

While IXL pointed to a trio of statements addressing schools' role in the COPPA context that the FTC has made since the statute took effect in 2000, the commission characterized the company's reliance on this commentary and guidance as misguided.

The FTC argued that IXL relies on a "mischaracterization" of a statement of basis and purpose that the FTC issued along with its initial COPPA rule, which responded to comments seeking a request for an exception for information collected in the educational setting.

In that statement, the FTC said that the COPPA rule "does not preclude schools from acting as intermediaries between operators and parents in the notice and consent process, or from serving as the parents' agent in the process" and that the operator of child-directed sites and services "can presume" that the school's authorization to collect information from children under 13 is "based on the school's having obtained the parent's consent."

However, in pointing to this statement in its motion to compel, IXL only "quotes selectively" from the passage, "while omitting relevant language that narrowly limits that discussion to the COPPA-required notice and consent process" rather than the broader issue of consent for terms of service agreed to by the schools, according to the commission.

Similarly, an FTC staff blog post from April 2020 that confirmed schools' role as intermediaries between operators and parents in the notice and consent process as schools moved en masse to remote learning due to the COVID-19 pandemic "also does not support IXL's position," since it didn't go beyond the topic of authorization for collecting and using such information.

The language involving schools contained in a notice of proposed modifications to the COPPA rule that the FTC issued in **late 2023** additionally falls short, according to the commission.

In its notice, the FTC has proposed to codify in the COPPA rule its "long-standing guidance that schools, state educational agencies, and local educational agencies may authorize the collection of personal information from students younger than 13 in very limited circumstances; specifically, where the data is used for a school-authorized education purpose and no other commercial purpose."

As with the other two references cited by IXL, "the commission's commentary was limited to addressing circumstances under which schools are acting as an agent for purposes of complying with COPPA's notice and consent requirements," according to the commission.

"Thus, contrary to IXL's claims, the commission and its staff's comments and guidance do not create an agency relationship between plaintiffs and their school districts," the FTC asserted.

While the agency's five commissioners voted unanimously to approve the filing of the amicus brief, Commissioner Andrew Ferguson, a Republican who joined the agency in April, issued a concurring statement noting one "qualification" to his assent.

Ferguson agreed that IXL's argument that the terms of service in its purchase agreements with school districts include a mandatory arbitration clause that binds the parents "does not pass the smell test," since it's "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," Ferguson asserted, adding that the commission's amicus brief "persuasively rebuts IXL's brutal misreading of COPPA."

However, Ferguson expressed "substantial reservations" with the reading of COPPA advanced by the commission in its brief and the statements cited in it that schools "can act as agents of their students' parents 'for purposes of complying with COPPA's notice and consent requirements.'"

"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," Ferguson asserted. However, he noted that, since the issue wasn't pertinent to the case before the district court, he would "withhold judgment on these questions until they come before me in an enforcement proceeding or in the pending rulemaking."

The parents pressing the proposed class action against IXL filed a brief of their own Monday slamming the arbitration bid, contending that the company had "not produced any evidence to support its extraordinary request."

"There are no executed agreements with any purported arbitration clause," the plaintiffs argued. "There is no evidence that the school districts (who have the more direct relationship with IXL) had any knowledge of, let alone consented to, the arbitration agreements. There is no evidence of how plaintiffs or their minor children purportedly agreed to any terms or other purported agreements that contain arbitration agreements. Put simply: IXL wholly failed to carry its burden for compelling arbitration."

The parents also echoed the FTC's contention that COPPA doesn't "impose a conservatorship on parents or their children in favor of schools for any purpose — especially to bind those parents and children to secret arbitration," in addition to asserting that there was no way that they could have directly consented to IXL's terms of service merely by using public school services "to which they are already legally entitled."

"This is an important case that implicates the rights of parents and children across the country," the plaintiffs added. "That process should not unfold in secret away from public scrutiny."

The FTC is represented in-house by Roberto Anguizola and James Evans.

The plaintiffs are represented by Ryan J. McGee, John A. Yanchunis and Michael F. Ram of Morgan &

Morgan Complex Litigation Group and Julie Liddell of EdTech Law Center PLLC.

IXL Learning is represented by Aravind Swaminathan, David P. Fuad and Thomas Fu of Orrick Herrington & Sutcliffe LLP.

The case is Shanahan et al. v. IXL Learning Inc., case number 3:24-cv-02724, in the U.S. District Court for the Northern District of California.

--Editing by Jay Jackson Jr.
