



May 18, 2020

Corrina Guardipee-Hall, Superintendent
Browning Public School District
PO Box 610,
Browning MT 59417

Dear Superintendent Guardipee-Hall,

The Montana Digital Academy (“MTDA”) is a statutorily authorized public entity, housed within a unit of the Montana University System. It is authorized for the purpose of developing distance learning opportunities for all school children in Montana and offers instruction subject to relevant education and distance learning rules, standards. *See* Mont. Code Ann. § 20-7-1201(2). The governing board is composed of various public school educators, administrators, and trustees, including the Commissioner of Higher Education and the Superintendent of Public Instruction or their designees. The governing board is imbued with rulemaking authority by statute, and MTDA is funded through public funding by the Montana Legislature. Mont. Code Ann. § 20-7-1202. The Montana Digital Academy is a governmental entity, not a private one. *See*. § 2-9-101(3), (5), and (7).

The Montana Pupil Online Personal Protection Act requires “operators” to engage in specified conduct with regard to the receipt and distribution of “protected information” as that term is defined in the statute. An “operator” is the operator of a K-12 online application who knows or reasonably should know that the application is used primarily for K-12 schools. A K-12 application” means “an internet website online service, cloud computing service, online application, or mobile application, that is used primarily for K-12 school purposes and that was designed for and is marketed for K-12 school purposes.”

Because MTDA is a governmental entity, specifically designed for the purposes of offering distance learning to public school students and subject to oversight by agents of public

schools at the K-12 and University levels, MTDA has never functioned as a private “vendor” in its delivery of services. MTDA is a partner and complimentary governmental agency to school districts, offering learning opportunities not otherwise available to the students in the brick and mortar context.

The Montana Pupil Online Personal Protection Act is designed to protect student information from predatory practices employed by private entities and selling information to others and ensuring compliance with the Family Education Records Privacy Act (“FERPA”), as noted in the testimony of the bill’s sponsor, Andrea Olson, and the support of education providers who testified in favor of the bill. MTDA, as a governmental entity, maintains records, both private and public, subject to the maintenance and disclosure requirements of Montana law, including the obligation to maintain, preserve and protect personal information under Title 2, Chapter 6 of the Montana Code; thus, the requirements imposed on “operators” are not consistent with the obligations of MTDA, as a governmental entity with a higher responsibility to maintain its governmental records, even if not subject to public disclosure. Moreover, MTDA is an educational institution, already subject to FERPA. As such, the precipitating concerns regarding the imposition of privacy requirements on third-party vendors not otherwise subject to protect privacy are simply not triggered with reference to the Montana Digital Academy, a governmental provider of educational services.

Though the definition of “operator” under Montana Code Annotated § 20-7-1234(4) is sufficiently broad to suggest application to MTDA, MTDA is governed by more specific standards which supersede the requirements of the Montana Pupil Online Personal Protection Act. The Montana School Boards Association (“MTSBA”) template agreement for use with private and third-party vendors providing student record management services and online applications, while useful with private vendors, is inconsistent with the obligations of MTDA as a governmental entity and its governance. Given MTDA’s status as a governmental entity, the following provisions of the template agreement are inconsistent with MTDA’s legislative authorization:

1. The term of the agreement establishes a fixed start and end date that is advantageous and necessary with private providers, but it does not recognize that MTDA functions as

an educational institution whose records are routinely consulted after the student has completed coursework. MTDA will engage in the process of de-identification and systematic protection of student information, but it is independently obligated to retain records for access by students and their parents after completion of distance learning access.

2. The stipulation regarding the school district's status as a political subdivision implies that the MTDA is not an agency of the State. The template agreement does not recognize that the MTDA is also subject to open records laws and privacy protections of individuals, as well as governmental immunity protections.
3. As the MTDA cannot simply "delete" information it maintains pursuant to Montana law and FERPA, commitment to compliance with all provisions of the Montana Pupil Online Personal Protection Act would not conform to MTDA's broader obligations under Montana's public records laws.
4. Data breaches are handled in accordance with Montana law which already applies to the MTDA, thus, to the extent the contractual data breach provision conflicts with applicable law governing remediation of data breaches by a governmental entity, the provision may not be applied to MTDA.
5. MTDA has an independent obligation to maintain, preserve and protect its records in accordance with Montana's public records laws, thus, the District's retention of responsibility over MTDA's records retention unnecessarily assumes this responsibility.

Given the inconsistency of the Montana Pupil Online Personal Protection Act provisions with the legislative authorization and governance of the MTDA, the MTSBA template agreement is an inappropriate tool for the provision of MTDA services to Montana school districts. As the MTDA was specifically created under Title 20 to enable access to distance learning opportunities, MTDA is subject to greater responsibilities to protect and maintain data and information, which are equivalent to those of the districts themselves.

In lieu of entering into an agreement designed to impute responsibility over public and educational records to private entities, the MTDA proposes entry into an interlocal agreement, pursuant to Mont. Code Ann. § 7-11-101, by which both public agencies mutually cooperate to

provide educational services on a joint basis. This mode of agreement recognizes, protects and preserves both agencies' respective rights and obligations under Montana law. The proposed agreement is enclosed. Thank you for your review and consideration.

Sincerely,

A handwritten signature in black ink, reading "Robert Currie". The signature is written in a cursive style with a large, stylized "R" and "C".

Robert Currie
Executive Director
Montana Digital Academy
Phyllis J. Washington College of Education
University of Montana