

ATTORNEY GENERAL OF THE STATE OF NEW YORK
BUREAU OF INTERNET & TECHNOLOGY

In the Matter of

Assurance No. 24-004

Investigation by
LETITIA JAMES,
Attorney General of the State of New York, and by
BETTY A. ROSA
Commissioner of Education of the State of New York, of
The COLLEGE BOARD,

Respondent.

ASSURANCE OF DISCONTINUANCE

The Office of the Attorney General of the State of New York (“NYAG”) and the New York State Education Department (“NYSED”) commenced an investigation pursuant to Executive Law § 63(12) and Education Law § 2-d into the commercial use of student data by the College Board (“College Board” or “Respondent”). This Assurance of Discontinuance (“Assurance”) contains the findings of the investigation and the relief agreed to by the NYAG, NYSED, and Respondent, whether acting through their directors, officers, employees, representatives, agents, affiliates, or subsidiaries (collectively, the “Parties”).

NYAG AND NYSED FINDINGS

1. College Board is a New York-based non-profit institution founded in 1900 that develops and administers standardized tests, primarily to high school students who take them as part of the college admissions process. It also develops curricula and other educational programs intended to promote college readiness. College Board is a membership organization that includes more than 6,000 colleges, universities, school districts, high schools, and scholarship organizations.

2. Several of the examinations administered by the College Board are viewed as rites of passage for high school students, including the PSAT/NMSQT (“PSAT”) (primarily taken during the sophomore or junior year of high school) and the SAT (primarily taken during the senior year of high school). In addition, the Advanced Placement (“AP”) subject matter exams are taken by tens of thousands of New York students after having completed the requisite AP course.

The College Board Contracts with New York Schools and School Districts

3. Prior to 2010, New York students would typically sign up and pay for SAT exams directly through College Board. They would then take the exams on weekends at sites selected by College Board. PSAT exams were also often administered by schools on weekends.

4. In or around 2010, in addition to offering students the option of registering to take

administer them, subject to extensive requirements and guidance from College Board.¹ The school then charges students for the cost of their AP exam (currently \$97 for most tests) and, in turn, pay College Board.

6. In addition to this standard contracting relationship, the College Board separately contracts with NYC DOE to cover some or all of the cost of AP exams taken by its students. This contract expressly requires compliance with New York's student data privacy statute, New York Ed Law § 2-d, and other provisions related to the confidentiality of student data. This contract gives the NYC DOE the right to access data related to students' participation in and performance on the AP exams taken pursuant to the contract.

7. The NYSED also has a contract with College Board to subsidize some or all of the AP exam fees for low-income students.

8. The PSAT, SAT, and AP examinations provided pursuant to contracts between

in students. These criteria included, among other things, zip code, gender, ethnicity, and score ranges on PSAT, SAT, or AP exams.

e. The College Board then licensed data relating to the resulting student population—including name and contact information—to the Search Customers so they could contact students about their educational programs, scholarship opportunities, and other services.

f. Students who enrolled in Search during an exam could later opt-out of Search via their online College Board account, if they had created one.

11. Students were also solicited to join Search at other times, including when they create an online College Board account.

12. College Board earned approximately \$75 million in revenues from Search in 2021. Approximately 1300 College Board member institutions presently use Search and 1004 of them licensed New York student data between 2018 and 2022.

13. Prior to fall 2022, College Board solicited New York students to enroll in Search on answer sheets prior to taking a PSAT, SAT, or AP exam both during exams taken on a school day pursuant to a contract with the student's school or school district and exams taken independently, outside of school. New York students were also solicited to participate in Search

the school day. College Board also chose to prevent NY public school students who had taken PSAT and SAT exams in school during the school day from being solicited to participate in Search via their College Board online accounts during the two-week period after the students' PSAT or SAT score was released. In fall 2023, College Board discontinued soliciting any student to participate in Search in connection with its exams administered in school during the school day.

College Board Used Student Data to Market Its Own Services

15. College Board tags student information according to how the information was collected. Prior to fall 2022, College Board allowed student data tagged as related to PSAT and SAT exams taken during the school day to be used for purposes unconnected with the administration of the student's exam. In October 2022, College Board took steps to not use student data that had a tag associated with a PSAT or SAT exam taken during the school day to be used for commercial or marketing purposes.

16. Prior to around January 2023, when students registered for the AP program (which was mandatory to sit for an AP exam), they would be asked whether they wanted to opt in to receiving marketing materials from the College Board about its programs via email and/or text. If a student opted in at this point, College Board would use the contact information it collected when a student created their College Board account to send marketing communications to the student about College Board programs and services. The opt-in to receive marketing materials was removed for New York students in or around January 2023.

New York Enacts Education Law Section 2d Bars the Commercialization of Student Data

17. In 2014, in the wake of parental and public objections to plans to share student data with InBloom, a technology start-up that aimed to collect student information from states

“Commercial or Marketing Purposes,” which is defined in the rules as including the “use or disclosure for purposes of receiving remuneration, whether directly or indirectly,” “use of student data for advertising purposes,” and uses that “develop, improve or market products or services to students.”⁷ Thus, while student data can be transferred with the consent of a parent or eligible student, it cannot be sold or otherwise commercialized.

21. While those implementing regulations were under consideration in 2018 and 2019, College Board lobbied the NYSED to include language in the regulations that would explicitly exclude Search from the prohibition on using student data for commercial or marketing activities by allowing students to consent to the dissemination of their data through Search. This language was rejected and the NYSED adopted regulations that strengthened the prohibition on all uses of student data for commercial or marketing purposes, regardless of whether consent was purportedly given.

22. Even after the regulations were issued, College Board continued to advocate to the NYSED that College Board is not a “third-party contractor” within the meaning of Section 2d and its implementing regulations, Part 121 of the Regulations of the Commissioner of Education. In response, the NYSED informed College Board that it was not exempt from Section 2d and that College Board should seek a legislative change to Section 2d if it wishes to be exempted from its requirements. The College Board has not been successful in achieving such a change.

⁷ 8 CRR-NY § 121.9(a)(5) & (8).

College Board Has Violated Education Law Section 2d in Operating Search and Marketing to Students

23. College Board has been a party to the Contracts with several New York schools and school districts for the purpose of administering PSAT, SAT, and AP exams, often with the benefit of a school subsidy, to students in New York. In addition, College Board requires all schools that offer the AP exams to enter into contracts that govern the administration and scoring of those exams.

24. In performing under the Contracts, College Board received student data, including PII, from students and schools.

25. As such, College Board is a “third party contractor” within the meaning of Section 2d.

26. College Board subsequently used student data received pursuant to the Contracts with New York schools and school districts for a commercial or marketing purpose by licensing it to Search Customers.

27. College Board made tens of millions of dollars of revenue by licensing the data of New York students who have sat for in-school PSAT and SAT exams in the past five years. Specifically, College Board reported the following revenue:

Year	College Board's revenue for use of Search data related to New York students who sat for in-school PSAT and SAT exams
2018	\$5,092,456
2019	\$5,428,401
2020	\$6,045,313
2021	\$5,535,338
2022	\$5,918,689

28. College Board also used student data received pursuant to contracts with New York schools and school districts for commercial or marketing purposes by using that data to disseminate its own marketing materials to students who agreed when solicited to receive marketing communications from College Board.

29. The NYAG and the NYSED find that the practices described above constitute repeated violations of New York Ed Law § 2d and New York Executive Law § 63(12), which authorizes the NYAG to pursue repeated fraudulent or illegal acts.

30. Respondent neither admits nor denies the NYAG's and the NYSED's Findings, paragraphs 1-29 above.

31. The NYAG and the NYSED find the relief and agreements contained in this Assurance appropriate and in the public interest. THEREFORE, the NYAG and the NYSED are willing to accept this Assurance pursuant to Executive Law § 63(15) and New York Ed Law § 2d, in lieu of commencing statutory and administrative proceedings for violations of Executive Law § 63(12), New York Ed Law § 2d, and 8 NYCRR Part 121.9 (a)(5) and (a)(8).

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the Parties:

PROSPECTIVE RELIEF

32. For the purposes of this Assurance, the following definitions shall apply:

a. “Commercial or Marketing Purpose” shall mean the license or sale of Student Data to any third party, or any other use or disclosure of Student Data for purposes of receiving remuneration, whether directly or indirectly, including the use of Student Data for advertising purposes, or to develop, improve or market products or services offered by College Board or a third party to Students.

b. “Educational Agency” shall mean a New York school district, board of cooperative educational services, School, or the education department.

c. “Personally Identifiable Information” shall mean information that identifies or reasonably can identify an individual, including but not limited to a person's name, address, telephone number, e-mail address, date of birth, social security number, or other information that, when combined with other information, can identify an individual.

communications between Respondent and a Student that are necessary to a Student's participation in and/or obtaining their scores for, PSAT, School Day SAT, and AP exams.

33. Respondent shall comply with Executive Law § 63(12), New York Ed Law § 2d, 8 CRR-NY Part 121, and GBL § 349 in connection with the offer, development, administration, and provision of educational services in the State of New York, including but not limited to the collection of any Student Data in connection with the conduct of standardized examinations; advertisements or solicitations to participate in or purchase the services offered by Respondent; and in performing under any agreements or contracts with an Educational Agency.

34. Respondent shall not sell, license, or otherwise use for Commercial or Marketing Purposes any Student Data that Respondent receives, is provided access to, or otherwise collects in the performance of a contract with an Educational Agency, including but not limited to Student Data received in the course of administering and scoring PSAT, School Day SAT, and AP exams or in Transactional Communications with Students related thereto, unless otherwise permitted by a change in the applicable law.

35. Respondent shall only use Student Data that Respondent receives, is provided access to, or otherwise collects in the course of administering and scoring PSAT, School Day SAT, and AP exams, or in Transactional Communications with Students related thereto, in accordance with the applicable contract with an Educational Agency and Respondent's data

Students related thereto, to send Students marketing materials or otherwise solicit them to participate in Student Search Service or any other present or future service, program, or business line through which College Board uses Student Data for a Commercial or Marketing Purpose, unless otherwise permitted by a change in the applicable law.

37. For the avoidance of doubt, use of Student Data for Commercial or Marketing Purposes does not include:

- a. Disclosing Student Data to the National Merit Scholarship Corporation or other scholarship institutions;
- b. Disclosing Student Data to colleges, universities, or other educational institutions at the request of a Student for the purpose of allowing the Student to apply to courses of study or other programs offered by those institutions and with the Student's consent; and
- c. The use of Student Data by College Board to provide or measure the validity of its educational exams, services, and products.

38. For the avoidance of doubt, Students retain a right of access to their exam scores. Nothing herein shall be construed to impede Students' ability to download, export, or otherwise save or maintain their own exam scores.

39. Respondent shall exclude Students from opting into Search or any other present or future service, program, or business line through which College Board uses Student Data for a Commercial or Marketing Purpose during the administration of PSAT, School Day SAT, and AP exams, or in Transactional Communications with the Student related thereto, unless otherwise

waives any objection based upon personal jurisdiction, inconvenient forum, or venue; and

- d. evidence of a violation of this Assurance shall constitute prima facie proof of a violation of the applicable law pursuant to Executive Law § 63(15).

44. If a court of competent jurisdiction determines that Respondent has violated the Assurance, Respondent shall pay to the NYAG and/or NYSED the reasonable cost, if any, of

49. All notices, reports, requests, and other communications pursuant to this Assurance must reference Assurance No. 24-004, and shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery; express courier; or electronic mail at an address designated in writing by the recipient, followed by postage prepaid mail, and shall be addressed as follows:

If to Respondent College Board, to:

Matthew Griffin, General Counsel
or in his absence, to the person holding the title of General Counsel
College Board
250 Vesey Street
New York, NY 10281

With an electronic copy sent to privacy@collegeboard.org

If to NYAG, to:

Jina John, Assistant Attorney General
or in her absence, to the person holding the title of Bureau Chief
Bureau of Internet & Technology
28 Liberty Street
New York, NY 10005

If to NYSED, to:

Respondent or its counsel are later found to be inaccurate or misleading, this Assurance is voidable by NYAG in its sole discretion.

51. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by Respondent in agreeing to this Assurance.

52. Respondent represents and warrants, through the signature below, that the terms and conditions of this Assurance are duly approved.

53. Unless a term limit for compliance is otherwise specified within this Assurance, the Respondent's obligations under this Assurance are enduring. Nothing in this Agreement shall relieve Respondent of other obligations imposed by any applicable state or federal law or regulation or other applicable law.

54. Respondent agrees not to take any action or to make or permit to be made any public statement denying, directly or indirectly, the propriety of this Assurance or the NYAG's and NYSED's investigation. Nothing in this paragraph affects Respondent's right to take legal or factual positions in defense of litigation or other legal proceedings to which the NYAG or NYSED is not a party.

55. Nothing contained herein shall be construed to limit the remedies available to NYAG or NYSED in the event that Respondent violates the Assurance after its effective date.

56. This Assurance may not be amended except by an instrument in writing signed on behalf of the Parties to this Assurance.

57. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or

LETITIA
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STATE

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Date

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COMMISSIONER
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Date