

August 15, 2011

Commission Releases Order Implementing Protecting Children in the 21st Century Act

The Commission has released the long-awaited Order¹ adding statutory language from the Protecting Children in the 21st Century Act (“PCCA”)² to the existing Commission rules implementing the Children’s Internet Protection Act (“CIPA”)³ for the E-rate program. The Commission also took the opportunity to revise its current rules to more closely reflect the statutory language from the CIPA. The following are key items required of schools making their certification:

- Internet safety policy must educate minors about: “appropriate online behavior,” how to interact with others on social network sites and in chat rooms, and being aware of and responding to cyberbullying;
- Schools and libraries must enforce their technology protection measures while their Internet is in use;
- Schools are required to maintain their Internet safety policies for at least five years after the last day of service delivered in a particular funding year.

Background

Since 2001, schools and libraries that have computers with Internet access have been required to certify that they have in place specific Internet safety policies and technology protection measures. The Commission’s current rules require that Internet safety policies must include a technology protection measure that protects both adults and minors from viewing obscenity or child pornography, and, with respect to viewing by minors, images that would be harmful to minors. The rules also require schools to certify that their Internet safety policy includes monitoring Internet use by minors.

Congress passed the PCCA in 2008. Pursuant to the PCCA, in addition to the current CIPA requirements, schools, school boards, local education agencies, or other school administrators must certify that their Internet safety policy also educates minors about “appropriate online behavior, including interacting with other individuals on social networking

¹ *In the Matter of Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future*, Report and Order, FCC 11-125 (2011) (“Order”).

² *Protecting Children in the 21st Century Act*, Pub. L. No. 110-385, Title II, 122 Stat. 4096 (2008) (“PCCA”).

³ *Federal-State Joint Board on Universal Service, Children’s Internet Protection Act*, CC Docket No. 96-45, Report and Order, 16 FCC Rcd 8182 (2001).

websites, and in chat rooms and cyberbullying awareness and response.”⁴ In 2009, the Commission released a Notice of Proposed Rulemaking seeking to implement the new requirements under the PCCA and revise existing rules to more accurately reflect the statutory language of CIPA. The Commission’s newly released Order implements the changes raised in the 2009 NPRM.

Discussion

Certification of School Internet Safety Policy

Beginning with funding year 2012, applicants receiving E-rate funding must certify on their Form 486 or Form 479 that they have updated their Internet safety policy to include monitoring the online activities of minors and are providing for the education of minors about “appropriate online behavior,” how to interact with others on social network sites and in chat rooms, and being aware of and responding to cyberbullying.⁵ The Commission noted in the Order that the instructions to the Forms 486 and 479 would be updated to list all requirements individually. The Commission declined to define “social networking” or “cyberbullying” or provide schools with specifics regarding appropriate updates to their procedures or curriculum in order to abide by the new rule.⁶

Defined Terms

In addition to adding the PCCA certification requirement, the Commission also revised certain rules to more accurately reflect existing statutory language. First, the Commission clarified and added certain defined terms to the current CIPA rules. The Commission revised rules defining “elementary” and “secondary” education, so that the rules would consistently define an “elementary” school as: “a nonprofit institutional day or residential school, including a public secondary charter school, that provides elementary education, as determined under State law” and a “secondary school” as: “a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that the term does not include any education beyond grade 12.”⁷

Second, the Commission has added “school board” to the list of entities that are subject to filing CIPA certifications.⁸ The revision is intended to clarify that school boards are authorized to make CIPA certifications. Third, rather than continuing to require applicants to refer to the statute for the definitions of “minor,” “obscene,” “child pornography,” “harmful to minors,” “sexual act,” “sexual contact,” and “technology protection measure” the Commission has added these statutory definitions to the rules.⁹

⁴ PCCA at §215.

⁵ Order at ¶7.

⁶ Order at ¶8.

⁷ Order at ¶10.

⁸ Order at ¶11.

⁹ Order at ¶13.

Enforcement and Disabling of Technology Protection Measures

The Commission further revised its rules to state that schools or libraries must enforce technology protection measures while their Internet-accessible computers are being used. While this obligation currently exists, the Commission simply clarified the rules to reflect the requirement. With regard to disabling the technology protection measures, the rules now will specifically state that certain authorized personnel may disable the technology protection measures to perform “bona fide research,” though the Commission declined to specify procedures for doing so or to define the term “bona fide research.”¹⁰

Determination of Appropriateness

The Commission also added a provision to the rules that the determination of what material is appropriate for minors should be determined on the local level. Though the statute already requires those determinations to be made on a local level, the Commission felt it was important to clarify this in the rules. The Commission also addressed an issue raised by the State E-Rate Coordinators Alliance, whereby the Alliance expressed concern that USAC had found that allowing access to the websites “Facebook” and “MySpace” violated CIPA. The Commission declined to find that allowing access to those specific websites was a per se violation of the CIPA requirements, though the Commission acknowledged that certain pages from the websites may contain material that is harmful to minors.

Internet Safety Policy Requirement

The Commission now clarifies in its rules that Internet safety policies must be provided to the Commission upon request. The Commission emphasized that it does not intend to start collecting all Internet safety policies, begin to collect them more frequently, or withhold funding pending review of the policies. The Commission notes that schools are required to maintain the Internet safety policies for at least five years after the last day of service delivered in a particular funding year in accordance with Commission audit and recordkeeping policies. For example, if a policy originally created in 2002 was used for the 2009 funding year, the policy must still be retained for at least five years after the last day of service delivered in the 2009 funding year. The revised rules also require that newly adopted Internet safety policies must go on local public notice and a hearing or meeting to address the newly adopted policies must be held. The Commission does not require notice or hearings for amendments to existing policies. Thus, for example, the Commission noted that those schools that held hearings or sent public notice prior to August 2004 will not be required to produce records of the meeting or notice. However, records for meetings and notice provided after that date must be retained. Moreover, the Commission noted that Internet safety policies previously drafted that already encompass the requirements of the new rule are not required to be re-amended.

Minor CIPA Violations

With regard to minor violations of the CIPA requirements, the Commission found that USAC should give applicants the opportunity to correct the errors prior to instituting recovery of

¹⁰ *Order* at ¶¶ 14-15.

funds. However, the Commission notes that such violations must be “immaterial” to fulfilling the statutory CIPA certification compliance.¹¹

Grace Period

Under the existing rules, there is an option for a grace period, during which an applicant’s administrative authority may certify that it will come into compliance with the CIPA requirements prior to the next funding year. The Commission has revised its rules to clarify that only applicants applying for funding for the first time may opt for the grace period.

Application of CIPA to Portable Devices

The Commission intends to seek clarification from the public on the potential application of the CIPA requirements to portable devices owned by students and library patrons when the devices are used within the school or library to obtain Internet access funded by the E-rate program. The Commission intends to seek public comment in a separate proceeding on this issue.

If you have any questions, contact [Mark Palchick](#), [Rebecca Jacobs](#) or any member of the firm’s [Communications Law Group](#).

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¹¹ Order at ¶ 21.