

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 SAT exams on weekends, the College Board began contracting with New York schools and school districts to offer the PSAT and SAT exams during the school day and to pay for the students’ exam fees. In the past five years, approximately 20 New York schools or school districts have entered into such contracts, including the New York City Department of Education (“NYC DOE”), which operates more than 500 high schools. Among other things, these contracts give the contracting schools or school districts the right to pay students’ exam fees and attain access to student scores and summary score reports.

5. Unlike the SAT exams, AP exams have consistently been offered on school days in a student’s school. To offer an AP exam, a school must register online to offer AP classes and host AP exams and sign an “AP Participation Form” agreement. Once the school has signed the Participation Form, it can offer AP Classes and order AP exams directly from College Board and

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 College Board and New York schools, school districts, and/or education departments (together, the “Contracts”) are typically administered at the student’s school during the school day.

The Student Search Service

9. In 1972, College Board created the Student Search Service (“Search”). Search is a business line through which the College Board (a) allows colleges, universities, scholarship programs, and nonprofit educational institutions (hereinafter, “Search Customers”) to request names and contact information for high school students that meet selected criteria based on the students’ personal characteristics (*e.g.*, race, zip code, GPA range, PSAT score range) and (b)

¹ See 2022-2023 AP Coordinator’s Manual, *available at* <https://apcentral.collegeboard.org/media/pdf/ap-coordinators-manual-part-2.pdf>.

licenses the requested data—including student names and contact information—for a fee to the Search Customers for use in recruiting students to their programs or services.

10. Prior to June 2022, Search generally operated as follows during the administration of PSAT, SAT, and AP exams:

- a. College Board collected information from students during the administration of the PSAT, SAT, or AP exam or while students signed up for a College Board online account. The surveys and/or sign-up flows were presented to students as optional, although many students were first solicited to participate in Search in the high-pressure context of an important exam and were encouraged to sign up because it will connect them with scholarship and college opportunities. The information requested from students included, among other things, GPA, anticipated course of study, interest in a religiously affiliated college and religious activities, and parents' level of education.
- b. After College Board collected the data from consenting students, most of whom are minors, it was processed and stored in College Board systems by using certain tags or storage locations based on how the information was collected.
- c. Search Customers contracted with the College Board to license a certain number of student "names." Customers were charged between \$0.40 and \$0.50 per name.
- d. Search Customers were then provided access to an online portal through which they could then identify the characteristics they were searching for

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 when they created an online College Board account, including on the date their scores for in-school exams were released to be viewed online. While students do not need to create College Board accounts to take the PSAT or SAT exams, they do need College Board accounts to register for My AP and sit for AP exams.

14. In fall 2022, at the request of NYSED, College Board stopped soliciting New York public school students to participate in Search during PSAT and SAT exams taken during

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

and districts to create a centralized platform for data sharing and to develop educational technology products, New York state passed New York Ed Law § 2d (“Section 2d”). Section 2d is a data privacy law intended to protect students and their families from the unauthorized distribution of personal data and the commercialization of student data.

18. Among other things, Section 2d places certain restrictions on “third party contractor[s]”, defined as “any person or entity . . . that receives student data . . . from an educational agency pursuant to a contract or other written agreement for purposes of providing services to such educational agency.”² These restrictions include barring third party contractors that receive student data³ from selling student data or otherwise using it for “marketing purposes.”⁴

19. Third party contractors are also barred from “disclos[ing] any [student] personally identifiable information”⁵ (“PII”) received from an educational agency pursuant to a contract “to any other party” without the prior written consent of a parent or eligible student (defined as a student older than 18).⁶

20. In January 2020, the NYSED issued implementing regulations that further clarified the limits on third-party contractors’ use of student data. Among other things, the regulations clarify that, while third party contractors can release student PII to a third party with the consent of a parent or 18-year-old student, they nonetheless cannot use PII for any

2 New York Ed Law § 2d(1)(k).

3 “Student data” is defined as “personally identifiable information from student records of an educational agency.” *Id.* § 2d(1)(i).

4 *Id.* § 2d(4)(f).

5 “Personally identifiable information” is defined as a subset of “student data” and means “personally identifiable information as defined in section 99.3 of title thirty-four of the code of federal regulations implementing the family educational rights and privacy act, section twelve hundred thirty-two-g of title twenty of the United States code.” *Id.* § 2d(1)(d).

6 *Id.* § 2d(5)(f)(3).

“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” or “PII”, as applied to student data, shall mean personally identifiable information as defined in New York Ed. Law § 2d.
 - d. “School” shall mean a school as defined in New York Ed. Law § 2d.
 - e. “School Day SAT” shall mean an SAT examination administered at a Student’s School during the school day pursuant to a contract with an Educational Agency or a weekend make-up test therefor.
 - f. “Student” shall mean any person residing in New York that is attending or is seeking to enroll in an Educational Agency.
 - g. “Student Data” means the Personally Identifiable Information of a Student.
 - h. “Student Search Service” or “Search” shall mean the Student Search Service™ operated by College Board.
 - i. “Transactional Communications” means letters, texts, emails, and/or online

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 protection agreement with NYSED.

36. Respondent shall not use Student contact information, including email address, that it 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, 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 permitted by NYSED or a change in the applicable law.

40. Respondent shall negotiate in good faith with the NYSED on a data protection agreement for inclusion in all contracts with Educational Agencies for Covered Services that covers, among other things, the authorized use of Student Data and data protection standards in relation to performing under a contract with an Educational Agency as defined in New York Ed. Law § 2d.

MONETARY RELIEF

41. Respondent shall pay to the State of New York seven hundred and fifty thousand dollars (\$750,000) in penalties, disgorgement, and costs. Payment shall be made in full within thirty (30) days of the effective date of this Assurance.

42. Payments shall be made in accordance with instructions provided by a NYAG representative and shall reference Assurance No. 24-004.

MISCELLANEOUS

43. Respondent expressly agrees and acknowledges that NYAG or NYSED may initiate a subsequent investigation, civil action, or proceeding to enforce this Assurance, for violations of the Assurance, or if the Assurance is voided pursuant to paragraph 50, and agrees and acknowledges that in such event:

- a. any statute of limitations or other time-related defenses are tolled from and after the effective date of this Assurance;
- b. the NYAG and the NYSED may use statements, documents or other materials produced or provided by Respondent prior to or after the effective date of this Assurance;
- c. any civil action or proceeding must be adjudicated by the courts of the State of New York, and that Respondent irrevocably and unconditionally

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 obtaining such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

45. This Assurance is not intended for use by any third party in any other proceeding.

46. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of Respondent. Respondent shall include in any such successor, assignment or transfer agreement a provision that binds the successor, assignee or transferee to the terms of the Assurance. No party may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of NYAG and NYSED.

47. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

48. Any failure by the NYAG or the NYSED to insist upon the strict performance by Respondent of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions hereof, and the NYAG, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Assurance to be performed by Respondent.

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:

Louise DeCandia, Chief Privacy Officer,
or in her absence, to the person holding the title of Chief Privacy Officer
New York State Education Department
89 Washington Avenue
Albany, NY 12234

50. NYAG and NYSED have agreed to the terms of this Assurance based on, among other things, the representations made to NYAG and NYSED by Respondent and their counsel and the factual investigation of NYAG and NYSED as set forth in the Findings, paragraphs 1-29 above. Respondent represents and warrants that neither it nor its counsel have made any material representations to NYAG that are inaccurate or misleading. If any material representations by

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

unenforceable in any respect, in the sole discretion of NYAG, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

58. Respondent acknowledges that it has entered this Assurance freely and voluntarily and upon due deliberation with the advice of counsel.

59. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

60. The Assurance and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.

61. This Assurance may be executed in multiple counterparts by the Parties hereto. All counterparts so executed shall constitute one agreement binding upon all Parties, notwithstanding that all Parties are not signatories to the original or the same counterpart. Each counterpart shall be deemed an original to this Assurance, all of which shall constitute one agreement to be valid as of the effective date of this Assurance. For purposes of this Assurance, copies of signatures shall be treated the same as originals. Documents executed, scanned and transmitted electronically and electronic signatures shall be deemed original signatures for purposes of this Assurance and all matters related thereto, with such scanned and electronic signatures having the same legal effect as original signatures.

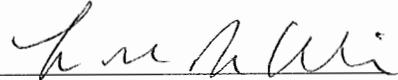
62. The effective date of this Assurance shall be the date of the last signature on this Assurance.

**LETITIA JAMES
ATTORNEY GENERAL OF THE
STATE OF NEW YORK**

By: 
Jina E. John
Laura C. Mumm
Assistant Attorneys General
Bureau of Internet and Technology
New York State Attorney General
28 Liberty St.
New York, NY 10005

2/12/2024
Date

**BETTY A. ROSA
COMMISSIONER OF
EDUCATION OF THE STATE OF
NEW YORK**

By: 
Louise DeCandia
Chief Privacy Officer
New York State Education Department
89 Washington Avenue
Albany, NY 12234

2/5/24
Date

COLLEGE BOARD, INC.

By: 
Matthew Griffin
General Counsel
250 Vesey Street
New York, NY 10281

2/5/2024
Date