

TODAY'S JOHN HANCOCK

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As the business of running a school becomes more time consuming and legalistic, many schools are assessing whether to consider going paperless by using electronic signatures in the application, enrollment, and other processes. To help schools understand the issues, this article summarizes the law in this area and some best practice guidelines.

THE LAW ON ELECTRONIC SIGNATURES

Both federal and state laws recognize that an electronic signature can have the same validity as an ink signature on paper. The federal E-Sign Act and Uniform Electronic Transaction Act are intended to remove legal barriers that may have prevented electronic transactions from carrying the same weight and enforceability as written agreements to encourage electronic commerce.

The definition of electronic signature under both federal and state law is broad enough to cover most manifestations of electronic acceptance, including, for example, by clicking "I accept" or "I agree" for an agreement provided online, also known as "clickwrap" or "click through" agreements. If you have ever shopped online, booked travel over the internet, downloaded a song on iTunes or paid bills online, you have entered into a contract with an electronic signature.

Over the last decade, state and federal courts nationwide have recognized the validity and enforceability of "clickwrap" or "click through" agreements, if implemented properly. But because this area of law is still emerging, contracts bearing electronic signatures are sometimes challenged based upon grounds such as: 1) validating the identity of the signer; 2) verifying the authenticity of the document; and 3) determining the intent of the parties to be bound. If your school is ready to take the plunge, given that a school must be able to enforce its enrollment

contract, we recommend you consider taking some of the steps outlined below to minimize the risk of such challenges being sustained.

RECOMMENDATIONS FOR USING ELECTRONIC SIGNATURES

Invest in Electronic Signature Software

A common concern with going digital is how to validate the identity of the signer and the authenticity of the record. Courts have recognized that the same principles of evidence apply in determining whether an electronic signature or electronic record is authentic as in determining whether a handwritten signature has been forged. Accordingly, in this new era of technology, parties may rely, for example, on a computer forensic expert in lieu of a handwriting expert. Thus, schools should consider engaging one of the many companies that offer electronic signature technology solutions.

From a document security standpoint, engaging a reputable company that offers electronic signature technology solutions will maximize the assurance level as well as capture, secure and accurately reproduce the electronic evidence of the transaction in the event of a challenge. From a practical standpoint, the school will save time, money and resources as well as improve communication and access to information with its teachers, students and parents. Once a school is comfortable automating its enrollment process, it may want to consider adding a password-protected intranet whereby current students, parents and administration can access forms, policies, procedures and other resources.

Recommended Safeguards

There are certain safeguards the School can take to protect against a challenge that a parent did not intend to be bound by the agreement, such as:

- contract terms in the same font-size as the computer's own display;
- having the contract appear in a single scrollable window whereby the parent does not have to scroll down to a submerged screen or click on a series of hyperlinks to view the contract;
- including an option for the parent to download a printer-friendly full screen version of the contract for his or her review;
- requiring the parent to take affirmative action in order to proceed to next step, e.g. by clicking "I accept" button;

- requiring the parent to scroll to the end of the contract in order for the “I accept” button to become functional;
- including an option to decline terms, e.g. by clicking an “I decline” button; and
- placing a confirmation page (that is also sent to the parent via email) at the end of the transaction, which informs the parent about what steps to take in the event of an error or mistake in the transaction (e.g. who to contact at the School, etc.)

Ensure Compliance

Additionally, in order to ensure compliance with the statutory provisions, the School must provide the parent the option to either print or download the contract. In addition, the parent must consent to accept the record electronically and be provided a clear and conspicuous statement, which:

- informs the parent of the right to have the record made available in non-electronic form, and the right (with a description of the procedure) to withdraw consent to having a record provided in electronic form (and any fees associated with such a withdrawal);
- informs the parent of whether the consent applies to a particular transaction or identified categories of records;
- explains how parents can obtain a paper copy of the electronic record, and whether any fee will be charged for such copy; and
- includes a statement of the hardware and software requirements for access to the retention of the electronic records, with a consent that the consumer can access the records in this format.

OBTAINING PROPER LEGAL REVIEW

The consideration of the use of electronic signatures should be thoughtfully reviewed with your school’s legal counsel. If you choose to move forward, your counsel should review the contract between the school and the electronic signature company. Many issues should be discussed up front, such as the cost of the services to create the contract, roll it out, and process signatures. Additionally, if a parent asserts a challenge, the school will need to know the cost for the electronic signature company to assist in proving the validity of the signature, as well as providing the electronic data necessary to support the school’s case.

The school will also want to ensure that the contract with the electronic services company addresses issues such as ownership of the underlying data, privacy

protections, security steps, notifications for loss of information, complaint procedures, timetables for implementation, choice of law provisions, and many other issues unique to your situation. These, and many other contractual provisions, are serious issues that the school would be well served to thoughtfully consider up front.