Going Paperless:  
Legal Requirements And Best Practices For Online Enrollment Agreements

April 11, 2013

By: William E. Hannum III and Arabela Thomas

As many independent schools consider ways to streamline the enrollment and re-enrollment process, and move towards “going paperless,” questions often arise about the legal enforceability of online enrollment agreements – meaning enrollment agreements that are displayed and signed electronically. The challenges that schools face are practical, technological and legal. As a practical and technological matter, the school must find the internal resources or an outside vendor to cross over into the paperless world. Some vendors are still developing their technology, which may limit a school in its ability to have some bell or whistle that it might like to have – or to meet some of the legal requirements described below. But, if a school has the resources, then it is possible to go paperless.

Generally, online enrollment agreements are enforceable – if they comply with the applicable laws governing electronic transactions (and any other substantive law that may apply, such as state contract law). This article will first outline the overarching legal framework applicable to online enrollment agreements, under federal law and state laws generally; this discussion may seem tedious, but it is important. The article will then conclude with a list of practical steps that may help boost the likelihood that an online enrollment agreement will be enforceable.

1 The information contained in this article is general in nature and is not offered, and should not be construed, as legal advice with respect to any specific matter. NAIS does not provide legal counsel to its schools and nothing in this document should be relied upon as appropriate, legally or otherwise, for any particular school in any particular state. NAIS schools should be aware that laws vary from state to state, as well as from time to time. Therefore, NAIS schools are strongly urged to seek legal counsel on the viability, enforceability, and validity of online enrollment agreements in their state.

2 William E. Hannum III is the Managing Partner of Schwartz Hannum PC, which represents independent schools, colleges and universities in connection with education law and labor and employment matters. Will received his law degree from the University of Virginia, where he received the Earl K. Shawe Labor Relations Award. He received his undergraduate degree in economics and English, magna cum laude, from Amherst College, and his master’s degree in English from Rutgers University, where he was awarded a Marion Johnson Fellowship for Academic Excellence. Will also graduated cum laude from Deerfield Academy. In case you have any questions regarding this article or would like a copy of the Schwartz Hannum PC’s enrollment agreement checklists, please email Will at whannum@shpclaw.com.

3 Arabela Thomas is an attorney at Schwartz Hannum PC. Arabela is a magna cum laude graduate of Boston College Law School and a cum laude graduate of University of Rochester. Arabela represents educational institutions in connection with a full range of education law matters, including employment agreements, employee/faculty handbooks, student/parent handbooks, internal investigations regarding allegations of misconduct, responses to data breaches, and acceptable use of technology agreements.
Of course, each independent school using or considering the use of online enrollment agreements should also consult with legal counsel regarding the establishment of the online enrollment agreement process and the substantive content of the enrollment agreement.

I. The Legal Framework For Online Enrollment Agreements

a. Electronic Signatures In Global And National Commerce Act

On June 30, 2000, Congress enacted the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq. (2000) (the “E-Sign Act”) to facilitate the use of electronic records and signatures in commerce. The E-Sign Act equates electronic signatures and records with their pen and ink counterparts. It states that electronic contracts “may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.” 15 U.S.C. § 7001(a)(2). While recognizing the enforceability of electronic contracts, the E-Sign Act does not require “any person to agree to use or accept electronic records or electronic signatures...” Id. at § 7001(b)(2).

The E-Sign Act applies to all types of electronic transactions that occur in or affect interstate or foreign commerce, unless specifically excepted. In this regard, the E-Sign Act specifically excludes from its scope the use of electronic signatures for testamentary instruments such as wills, codicils and testamentary trusts, adoption and divorce papers, contracts and other records to the extent that they are governed by the Uniform Commercial Code (“UCC”) (other than Sections 1-107 or 1-206 and Articles 2 and 2A of the UCC). Id. at § 7003(a). Generally, online enrollment agreements used by independent schools do not fall within the excluded transactions under the E-Sign Act.

The E-Sign Act does not require the use of a specific technology or method for creation of a legally enforceable electronic signature. It broadly defines an “electronic signature” as an “electronic sound, symbol, or process, attached to or logically associated with a contract or other record,” that is “executed or adopted by a person with the intent to sign the record.” Id. at § 7006(5). Thus, the E-Sign Act allows various electronic processes to be substituted for a handwritten signature, so long as the signatory intends to agree to the contract. See id.

---

4 The Act defines “transaction” as “an action or set of actions relating to the conduct of business, consumer or commercial affairs between two or more persons, including any of the following types of conduct – (A) the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods and intangibles, (ii) services, and (iii) any combination thereof…” 15 U.S.C. § 7006(13).

5 Further, the E-Sign Act does not apply to court orders or notices, or official court documents, notice of cancellation or termination of utility services, notice of “default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual,” notice of cancellation or termination of health insurance or benefits or life insurance benefits, recall of a product that risks endangering health or safety or any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials. Id. at § 7003(b).
While the E-Sign Act legitimizes the use of electronic signatures and records, it provides little guidance for ensuring that an online enrollment agreement will be enforceable. The E-Sign Act does, however, contain a provision commonly referred to as the “consumer consent provision,” which applies if there is a “statute, regulation, or other rule of law” that “requires that information relating” to the transaction “be provided or made available to a consumer in writing.” *Id.* at § 7001(c)(1). In cases where there is such an applicable statute, regulation, or law, a number of steps intended to protect consumers must be taken. *Id.* at § 7001(c).

Even though the consumer consent provision generally does not apply to online enrollment agreements used by independent schools, it lists a number of protective measures that may be used in the context of online enrollment agreements to help an independent school increase the likelihood that an online enrollment agreement will be enforceable. In summary, the consumer consent provision requires that:

(A) the consumer has affirmatively consented to use electronic records and has not withdrawn such consent;

(B) the consumer, prior to consenting, was provided with a clear and conspicuous statement:

(i) informing the consumer of any right or option he or she has to have the record provided or made available in non-electronic form, the right of the consumer to withdraw the consent to have the record provided or made available in electronic form, and any consequences of such withdrawal;

(ii) informing the consumer of whether the consent applies only to the particular transaction or to categories of records or transactions;

(iii) describing the procedures the consumer must use to withdraw consent and to update information needed to contact the consumer electronically; and

(iv) informing the consumer how to, upon request, obtain a paper copy of the electronic record, and whether any fee will be charged for such a copy;

(C) the consumer:

(i) prior to consenting to conduct the transaction using electronic means is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and

(ii) consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent;

(D) if after the consumer provides his or her consent, there is a material change in the hardware or software requirements needed to access or retain the electronic documents, the consumer should be provided with
a statement of the revised hardware and software requirements, informed of the right to withdraw the consent without any penalties, and provide consent again.

See id. at § 7001(c)(1).

Even though independent schools are generally not required to comply with the consumer consent provision for online enrollment agreements, it may be beneficial to use some of the steps listed in it. For example, by both: (1) informing parents of the technological specifications necessary to access and electronically sign the enrollment agreement, and (2) obtaining the parents’ electronic consent that their computers meet those specifications, an independent school may effectively argue against parents who claim that they were not able to see all of the terms of an electronically signed enrollment agreement due to the technology they were using. We recommend that each independent school discuss with its legal counsel and online enrollment vendor (or internal information technology personnel) whether it may be appropriate and feasible to incorporate some of the protective measures included in the consumer consent provision.

b. State Laws Pertaining To Online Enrollment Agreements

In addition to the E-Sign Act, independent schools converting to an online enrollment agreement should consider state laws applicable to the substantive provisions of the enrollment agreement and to the electronic signature and processes used. The E-Sign Act explicitly provides that it does not “limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or rule of law other than a requirement that contracts or other records be written, signed, or in nonelectronic form.” Id. at § 7001(b)(1). Therefore, the online enrollment agreements used by independent schools must satisfy the substantive rule of law applicable to enrollment contracts, such as the traditional contract formation elements of offer, acceptance and consideration.

State law may also come into play if the state has a statute, regulation or other law that modifies or limits the main provision of the E-Sign Act, adopts or enacts the Uniform Electronic Transaction Act, or uses an alternative procedure that is consistent with the E-Sign Act, as well as meets some other criteria. See id. at § 7002(a). As of the writing of this article, forty-seven (47) states, the District of Columbia, Puerto Rico, and the Virgin Islands have enacted state laws modeled on the Uniform Electronic Transactions Act (“UETA”), which was drafted and recommended for enactment by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) to create uniformity in electronic transactions around the country. While a comprehensive discussion of the state laws applicable to electronic transactions is beyond the scope of this article, some

---

states, such as Massachusetts, enacted state statutes modeled on UETA and made relatively few changes to UETA as drafted by NCCUSL. In contrast, others states, such as California, incorporated more significant changes to the model UETA. Additionally, Illinois, New York and Washington have not adopted the model UETA, and all three of them have passed their own unique laws pertaining to electronic transactions. Therefore, when converting to online enrollment agreements, it is important to consult with legal counsel to ensure that the electronic process used is consistent with applicable state law(s).

As 47 states have adopted state statutes modeled on UETA, this article will highlight the key provisions of the model UETA, recognizing of course that each independent school will also need to carefully consider, with the assistance of legal counsel, any applicable state variations in the UETA.

Similar to the E-Sign Act, the model UETA states that it applies to electronic records and signatures relating to transactions, except as specifically excluded from its coverage. The model UETA excludes from its coverage electronic transactions, to the extent that they are governed by: (1) “a law governing the creation and execution of wills, codicils, or testamentary trusts”; (2) UCC other than Sections 1-107 and 1-206, Article 2, and Article 2A; (3) the Uniform Computer Information Transactions Act; and (4) other laws, if any, identified by the state that adopts UETA. Various states have adopted different approaches to the exclusion of additional transactions.

Similar to the E-Sign Act, the model UETA establishes that a “record or signature may not be denied legal effect or enforceability solely because it is in electronic form” or “because an electronic record was used in its formation.” The model UETA uses the same broad, technology-neutral definition of electronic signature as the E-Sign Act. The official comments to the model UETA confirm that the definition of an electronic signature is intended to be broad, stating that “including one’s name as part of an electronic mail communication” or a “voice on an answering machine” may suffice as an electronic signature under UETA if the requisite intent to agree to the contract is present. A comment to the model UETA also makes clear that the definition of an

---

10 Illinois, New York and Washington have not adopted statutes based on the model UETA, and thus schools in those states should consult applicable state law with the assistance of legal counsel.
11 Uniform Electronic Transactions Act, at § 3(a).
12 Id. at § 3(b).
13 See e.g., Cal. Civ. Code at § 1633.3 (excluding a significant number of transactions from coverage); Delaware Uniform Electronic Transactions Act, Del. Code Ann. Tit. 6, § 12A-103 (2000).
14 Uniform Electronic Transactions Act, at § 7(a)-(b).
15 Id. at § 2(8) (electronic signature “means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”).
16 Id. at § 2, cmt. 7.
electronic signature includes the “standard webpage click through process,” which is used by some independent schools in their online enrollment agreements.\(^{17}\)

While the model UETA recognizes electronic signatures as being equivalent to ink signatures, the model UETA specifies that it “applies only to transactions between parties each of which has agreed to conduct transactions by electronic means.”\(^ {18}\) Whether the parties agreed to “conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties’ conduct.”\(^ {19}\) Also, the model UETA states that if a “sender” of an electronic record “inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.”\(^ {20}\) An official comment to the model UETA explains that this requirement “applies in all transactions.”\(^ {21}\)

The model UETA specifically addresses attribution of electronic signatures and states that “[a]n electronic record or electronic signature is attributable to a person if it was the act of the person.”\(^ {22}\) The model UETA further explains that the act of the person may be shown through any manner, including the efficacy of the security procedures used to determine who signed the online contract.\(^ {23}\) A comment explains that, in certain circumstances, using a security procedure may be the best way to establish that the electronic signature was generated by a particular person.\(^ {24}\)

It is important to note that under the model UETA, a party that agrees to conduct a certain transaction by electronic means retains the option to refuse to conduct other transactions by electronic means.\(^ {25}\) Therefore, simply because a parent electronically signed an enrollment agreement for one year does not mean that he or she also has to sign the enrollment agreement electronically for the following year.

II. Practical Considerations For Converting To Online Enrollment Agreements

Moving to an online enrollment agreement process will require an initial investment of time and resources. Many independent schools converting to online enrollment agreements use vendors to help them set up and maintain the electronic

\(^{17}\) Id. The “standard click through process” is described in an example contained in a comment to the model UETA: “when a person orders goods or services through a vendor’s website, the person will be required to provide information as part of a process which will result in receipt of the goods or services. When the customer ultimately gets to the last step and clicks ‘I agree,’ the person has adopted the process and has done so with the intent to associate the person with the record of that process.” Id. The comment describes that “[t]he actual effect of the electronic signature will be determined from all the surrounding circumstances, however, the person adopted a process which the circumstances indicate s/he intended to have the effect of getting the goods/services and being bound to pay for them.” Id.

\(^{18}\) Id. at § 5(b) (emphasis added).

\(^{19}\) Id.

\(^{20}\) Id. at § 8(c).

\(^{21}\) Id. at § 8, cmt. 5.

\(^{22}\) Id. at § 9(a).

\(^{23}\) Id.

\(^{24}\) Id. at § 9, cmt. 4.

\(^{25}\) Id. at § 5(c).
process. We recommend that each school discuss with its legal counsel and online enrollment vendor (or internal information technology specialist) the steps and safeguards that the school should take to ensure that its electronic process meets the needs of the school, such as ensuring the process is free of glitches and generating enforceable contracts. Schools should not assume that the vendor is taking on the responsibility of meeting all of the requirements of online signatures, the enforceability of the contracts and other online documents, and data security. This is true even if a vendor has provided these services to other schools. Beyond the legal requirements, schools should be aware that it may take anywhere from a month to a year to implement the transition to a paperless online enrollment agreement, depending upon the vendor or internal resources available to the school, as well as the legal review of the process.

It is important to ensure that the vendor (or the school’s information technology department) can provide the resources necessary to effectively manage the school’s enrollment agreement in an electronic environment. There have been serious technological glitches at a few schools. For instance, one vendor confused online paperwork from different schools, when the same family was enrolled at more than one school. In another situation, a vendor’s technology did not “lock down” the agreement when it was signed, but rather, allowed each subsequent edit to the model agreement to propagate into the online agreements that had previously been signed. These kinds of technological challenges must be vetted in advance, when the school is identifying the vendor or internal resources to manage the online enrollment agreements.

Finally, depending on applicable state law, the following steps should increase the likelihood that your online enrollment agreement will lead to the creation of enforceable contracts:

1. Provide each individual who will be signing the enrollment agreement with a unique log-in username and password. It should allow access to the electronic enrollment agreement and should not be shared with others.

   **Practical Tip:** While some vendors resist, it is technologically feasible for them to provide unique log-ins. The school may need to demand unique log-ins, but it is usually worth it from a legal perspective in order to maximize the enforceability of the agreement.

   **Practical Tip:** In addition to the parents or guardians, it is often helpful to have students age 18 and over sign an enrollment agreement. While not all schools choose to do so, for those that do, it is also worth having such students receive their own unique log-in for signing online enrollment agreements.

2. Consider providing signatories with a list of terms and conditions applicable to the transaction, and requiring that signatories agree to them before proceeding to view the agreement. For example, the terms and
conditions could specify the technological specifications needed to access, electronically sign and retain the on-line enrollment agreement or instructions for updating contact information or any information pre-populated on the enrollment agreement. Some schools use different formats, such as a list of frequently asked questions, to provide relevant information to the signatories. It is important to consider the method that may be most effective for your school’s community.

3. Clearly identify the enrollment agreement and any other documents to which the signatory will be applying his or her electronic signature.

4. Before anyone electronically signs the enrollment agreement or any other documents, you may want to explicitly require the signatory to indicate that he or she agrees to conduct the transaction using electronic means.

5. Require the signatory to execute an electronic symbol (such as typing his or her name) and/or a process (such as clicking an “I agree” button) to indicate agreement to the enrollment contract and any other documents.

Practical Tip: Some schools combine steps 4 and 5 into a single process, where directly above the “I agree” button and the electronic signature box, they include a statement indicating that the parent or guardian is agreeing to conduct the transaction using electronic means, has reviewed the enrollment agreement and any other documents, and that by clicking the button and/or typing his or her name, he or she is providing his or her legally binding signature for the enrollment agreement and any other documents.

6. After the signatories indicate their agreement to the relevant documents, it may be helpful to provide them with both an opportunity to withdraw their electronic signature and any applicable deadline or instructions for withdrawing their signature.

Practical Tip: Some schools accomplish this step by presenting the signatories with a simple confirmation page that shows the entire agreement and allows the signatories to go back if they did not intend to sign the agreement.

7. Provide the individuals who sign the enrollment agreement with the ability to print and/or download the agreement, and request a paper version from the school.

8. Securely retain all electronically signed enrollment agreements, including any associated electronic audit trail.
Practical Tip: Be sure that the electronically signed documents cannot be subsequently altered, and that they can be easily reproduced accurately in the future, in case they are needed as evidence. (See the “war story” referenced above, in which a modification to the model agreement changed previously “signed” electronic agreements.)

9. Consider sending an email confirmation that the electronically signed enrollment agreement was received and/or accepted.

Each independent school should carefully consider the state laws applicable in the jurisdiction in which it operates. The list of steps above is based on the E-Sign Act, the model UETA, general contract principles, and our experience with online enrollment agreements; however, variations will be necessary and appropriate, based on the requirements of applicable state laws and each school’s individual needs and electronic resources. Additionally, since this is an evolving area of the law, we strongly recommend that independent schools watch for evolving best practices and any relevant developments in the law before each enrollment agreement season.

III. Conclusion

As more independent schools convert to online enrollment agreements – to streamline the enrollment and re-enrollment process – it is essential that each school carefully consider, with the assistance of legal counsel, the laws applicable to electronic transactions and contracts in its jurisdiction. Each school should also consider adopting a number of safeguards, which may not be required by applicable law, but which may help the school boost the enforceability of its online enrollment agreements. Partnering with experienced information technology personnel and legal counsel in devising a strategy for online enrollment agreements is a key step in maximizing the enforceability of electronic contracts.