



New York State
EDUCATION DEPARTMENT

Knowledge › Skill › Opportunity

July 15, 2019

Proposing Part 121 of Commissioner's
Regulations – Review of Revisions

Assessment of Public Comment – Summary of Issues (1)

ISSUE	RESPONSE
<p>Whether Ed Law §2-d and Part 121 apply to charter schools as charter schools are expressly included in the definition of schools in proposed Part 121.</p>	<p>Education Law §2854 (1)(b) specifically provides that a charter school shall meet the same health and safety, civil rights, and student assessment requirements applicable to all other public schools. Education Law §2-d protects personally identifiable student data, which includes highly personal and sensitive information related to students. The requirements related to the protection of such data contained in Education Law §2-d are therefore related to health and safety as well as civil rights. Therefore, the Department’s position is that the Education Law §2-d and the proposed rule apply to charter schools.</p>
<p>Impact of Part 121 on the use of software applications with non-compliant clickwrap agreements on technology based classroom learning.</p>	<p>The statute applies regardless of the form of contract utilized. Making an exception merely based on the form of contracting would not align with the purpose of the statute to protect personally identifiable information.</p>
<p>Concerns about whether Part 121 would preclude entities that offer college entrance examinations from providing student data to colleges.</p>	<p>We added a provision that where a parent/eligible student requests a service or product from a third-party contractor and provides express consent to the use or disclosure of PII by the 3rd party contractor for purposes of providing the requested product or service, such use shall not be deemed a marketing or commercial purpose prohibited by the proposed rule.</p>

Assessment of Public Comment – Summary of Issues (2)

ISSUE	RESPONSE
Concerns about funding and costs.	Proposed Part 121 is consistent with the requirements of Education Law §2-d and does not impose costs beyond that imposed by the statute.
Aggressive timeline concerns.	Proposed Part 121 included only one date – the date educational agency’s must adopt the Data Privacy and Security Policy. The original date was December 1, 2019 but is now July 1, 2020.
Whether the NIST Framework is applicable to the education sector, and whether it is robust enough to protect student data.	The NIST Cybersecurity Framework is a national standard that is also flexible to allow entities to implement it from a risk based approach, and is intended to be tailored to different sectors such as the education sector.
Questions about the Data Protection Officer’s role, finding qualified personnel and whether a shared services model could be applied.	SED does not believe that an educational agency can completely outsource the job function of a Data Protection Officer but does not prohibit the use of a 3rd party such as a BOCES from providing some of the functions.
Request that professional service providers (e.g. school attorneys, school physicians, school psychologists, etc.) rules of ethics and practice be allowed as a substitute for compliance with the data privacy and security requirements of Ed Law §2-d and Part 121.	SED does not believe that such rules are equivalent substitutes for the data security and privacy requirements for protecting PII. Such an exception is not contemplated by the law and permitting it could jeopardize the privacy and security of PII and very sensitive data that these service providers receive from educational agencies.

Assessment of Public Comment – Summary of Issues (3)

ISSUE	RESPONSE
<p>Armed Services Vocational Aptitude Battery Test (ASVAB) related comments that Part 121 does not do enough to protect student PII from military recruiters.</p>	<p>The comment is beyond the scope of Education Law §2-d. However, the Department acknowledges these comments and will review them to determine if additional guidance is needed.</p>
<p>Requests that SED (or BOCES in the alternative) negotiate state contracts for districts, maintain an approved list of compliant/approved vendors (clearinghouse).</p>	<p>Each educational agency is responsible for ensuring that their third-party contracts are compliant with Education Law §2-d and the proposed rule. See response to Comment #43, which explains that the proposed rule does not prohibit school districts from seeking assistance and efficiencies through partnerships with third parties including BOCES, consistent with Education Law §1950.</p>

Review of Proposed Part 121 Revisions (1)

121.1	Definitions
	Added a definition of encryption
	Clarified that parents and eligible students may sign up for services and consent to the use of PII that they provide to a vendor
	Revised the definition of 'commercial and marketing purpose' to replace 'profit' with 'remuneration and make other revisions for clarity
121.2	Educational Agency Data Collection Transparency and Restrictions
	Revised to incorporate provisions from Ed. Law §2-d
121.3	Parent's Bill of Rights
	Revised to incorporate provisions from Ed. Law §2-d

Review of Proposed Part 121 Revisions (2)

121.4	Parent Complaints of Breach or Unauthorized Release of PII
	Revision made to permit agencies to require that complaints must be made in writing
121.5	NIST Cybersecurity Framework
	Revision made to provide that agencies must now complete and post their Data Privacy and Security Policies by July 1, 2020 instead of December 1, 2019
121.6	Data Security and Privacy Plan
	No change
121.7	Training for Educational Agency Employees
	Revision made to add examples of the types of training that could be provided

Review of Proposed Part 121 Revisions (3)

121.8	Data Protection Officer
	No change
121.9	Third Party Contractors
	Revised for clarity
121.10	Reports and Notifications of Breach and Unauthorized Release
	No change
121.11	Third Party Contractor Civil Penalties
	Revised to incorporate provisions from Ed. Law §2-d
121.12	Right of Parents and Eligible Students to Inspect and Review Student Education Records
	No change
121.13	The Powers of the Chief Privacy Officer
	Revised to incorporate provisions from Ed. Law §2-d

Discussion.



Thank you.