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March 31, 2019

Proposed Part 121 Regulation for Protecting PII in Educational Agencies Commentary by Sheila Kaplan, Founder, Education New York

With the proposed Part 121 Regulation for Protecting PII in Education Agencies, New York State is squandering yet another opportunity to protect the student and family data collected and maintained by schools and education agencies. For more than 13 years, I have been deeply involved as a data privacy researcher and founder of [Education New York](#) in research and advocacy related to state and national efforts to protect student privacy. I also hold a master's in Information Policy and Records Management from the University at Albany, so I speak from both extensive experience and academic training in information and data privacy policy development and evaluation.

My work has resulted in New York taking significant steps to strengthen student privacy protections beyond what is provided under FERPA. This includes enactment of the New York State Education Law §2-d, the promulgation of the Parent's Bill of Rights for Data Privacy and Security, and the legislation to create the role of Chief Privacy Officer at the State Education Department, which I developed. To say that I am frustrated with the State's continued inability to recognize and address the significant gaps related to directory information in this proposed regulation is an understatement.

In my [comments](#) submitted in June 2018 in regard to New York State Education Department's student data privacy law, Education Law § 2-d, and the Parent's Bill of Rights for Data Privacy and Security, I went into great detail about the urgent need to protect students' directory information—not only from vendors but also from individuals who may do harm to a student or their family, law enforcement, or organizations unrelated to the educational mission. The proposed regulation does not extend needed protections to directory information, which includes a student's name, address, telephone number, email address, photograph, and date and place of birth, among other information. In fact, the proposed regulation does not even mention directory information, but reference is made to FERPA's definition of PII, under which directory information is an exception from protection.

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The State is making a very dangerous and negligent mistake in not addressing the protection of directory information and failing to make explicit exactly what student information is being protected under this regulation—and from whom. While the regulation extends PII protections to principals and teachers, it is silent on directory information, leaving students vulnerable to the sharing and/or sale of their information and data breaches. Even with privacy controls in place at the state and federal levels, it is still far too easy for individuals to get a hold of student information and use it for illegal purposes, including identity theft, child abduction in custody battles, and domestic violence. Few parents are aware, for example, that anyone can request—and receive—student directory information from a school. Schools also may not be aware that they may exercise discretion in responding to requests by third parties for directory information.

Recognizing the need to protect directory information under the law, the National School Boards Association last year adopted a resolution recommending that Congress amend the definition of directory information to limit disclosure by excluding address, telephone listing, and date and place of birth. The National Association of State Boards of Education has called on state boards of education across the country to lead on the issue of protecting directory information, noting in a [paper](#) that 36 state boards have some legal authority over student data privacy and those not so empowered can “raise awareness about the privacy issues that the disclosure of some directory information raises and point to useful resources and potential ways forward.” It is important to note that the paper is written by Amelia Vance, Policy Counsel at the Future of Privacy Forum and a member of the New York State Education Department’s Data Privacy Advisory Council.

New York must take action to protect directory information in this proposed regulation. The fix is simple: Amend §121.1 of the proposed regulation, which defines Personal Identifiable Information, to explicitly include directory information. The [Model State Student Privacy Protection Act](#) that I developed years ago in consultation with national privacy law experts remains a sound and sensible guide for states interested in truly protecting students’ personal information. But I am not optimistic that New York will take the steps needed.

New York’s failure to specifically address the protection of directory information on a state level leaves school districts to deal with this challenge—to the detriment of students and their families. In practice, school districts across the state are inconsistent and, in too many cases, inadequate in their practices of notifying parents and guardians annually of the right to “opt out” of disclosure of directory information. I have written about this for years and have conducted national campaigns to raise parents’ awareness of this right. Schools have been found to have varying degrees of conformance with the basic FERPA notice requirements to parents and guardians under FERPA. The opt-out system under which parents must file a form with the school to keep their children’s personally identifiable information from being shared remains haphazardly implemented and communicated to families. The risks of this are many and potentially dire. Last year, U.S. Department of Education cautioned that if parents do not opt out of directory information, then law enforcement may have access to that information. While attention has been almost exclusively on restricting vendor access to data, this regulation fails to address the risk of leaving directory information open to law enforcement—not to mention nefarious individuals who would use that information to do harm to students and families.

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I have discussed this issue with the Regents Chancellor, a member of the Board of Regents, and state legislators, to no avail. They do not seem interested in closing this hole in the law. Directory information continues to be unprotected under the law and puts the burden on parents to opt out while school districts often do the bare minimum to comply with FERPA notification. The families in New York state deserve more from our state board of education. They deserve comprehensive student privacy protection policies and regulations.

Public Hearing and Notification Process

Another major disturbing problem with this proposed regulation has been the lack of meaningful opportunities for parent and guardians to be involved in this process, share their ideas and experiences, and receive factual information about what the state can do to protect their children. This process has been hijacked by advocates like Leonie Haimson, a member of the Data Privacy Advisory Council, who is using this issue to build her constituency and shamelessly advance her own political agenda. Her [campaign to kill](#) InBloom several years ago gave her an inflated sense of her role as an expert in the student privacy field and launched her dubious career as a reliable source of information to parents worried about their children's privacy in the digital age. (Read more [here](#) about her campaign against InBloom and its negative consequences for under- and low-resourced school districts around the State.)

It is frankly ludicrous that she sits on the Council as a representative of parents, as she meanwhile engages in questionable and unethical practices via her groups and websites (see Appendix A for an example of how she employs her three interlocking 501(c)(3) organizations). Through her [Parent Coalition for Student Privacy](#) (an offshoot of her not-for-profit organization [Class Size Matters](#)) she has provided herself a platform to pose as an expert in student privacy although she lacks credentials for the role and deep experience with the issues. For example, in regard to this regulation, she has posted her [submitted comment](#) on this site and lists the email address for her followers to submit in support of her comment, and she provides a link to a [form](#) to do the same from her [blog](#), New York City Public School Parents. As of this writing, 224 emails have been submitted supporting Haimson's comment (her stated goal is 400 emails of support). Yet another organization with a connection to Haimson, NYS Allies for Public Education (she sits on the [Steering Committee](#)), posts the [same information](#) about her submitted comment with the [link](#) to submit an email of support. She also is pushing this information out via her [Twitter](#) accounts.

Last year, on her website [NYC Public School Parents](#) she posted talking points for parents to give input at the DPAC forums and to the State Education Department on the drafting of the privacy regulation—again creating her own echo chamber of input that would become part of the committee's recommendations. It does not seem right someone who is appointed to an important statewide policy advisory role uses that position to direct their "constituents" to submit the input that *she* wants to get before the committee.

Haimson is but one example of problematic members of DPAC. I brought serious student privacy concerns to the attention of Georgia Ascuitto of the Big Five in 2012, when a [bill](#) sponsored by Senator Susie Oppenheimer to notify parents when student directory information is released to third parties passed in the Senate by 62-0 (unfortunately, it died in the Assembly). Ascuitto declined to support the bill and laughingly dismissed the possibility that someone might use

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directory information to harm a child. Joseph Baranello, CPO of NYC Schools, represents a public school system that has been out of compliance with FERPA regulations for years.

The 14 public hearing held by the committee last year were heavily scheduled in the New York City metropolitan area, with many fewer opportunities for upstate parents to attend a forum in a reasonably accessible location. DPAC did little to fulfill its obligation to notify New Yorkers and provide opportunities to parents for meaningful engagement with this process. Given the proliferation of social media, it is reasonable to expect the committee would use every digital platform at its disposal to get the word out about the hearings.

While I have been compelled to submit my concerns about the proposed regulation, which also reflect the opinions of national experts about directory information, I have little confidence that the State will act to remedy the gaps in the regulation. This ongoing failure is a tremendous disservice to New York's students and their families that will inevitably lead to avoidable harms. The solution lies in a more thorough and carefully developed regulation that protects directory information, and a much more robust and comprehensive statewide program to inform parents of their rights and engage them meaningfully in the conversation. New York still can lead the way forward.

Please contact Sheila Kaplan, Education New York with any follow-up questions.

Appendix A: Example of Multiple Web Platforms Used by Leonie Haimson, Member of NYSED's Data Privacy Advisory Council

Protect Student Privacy! Strengthen Proposed Regulations for Education Law §2-d

The Parent Coalition for Student Privacy, New York State Allies for Public Education and Class Size Matters urges the state education department to strengthen the proposed regulations in Education Law §2-d, a law that was approved by the legislature in the spring of 2014. Please help us by sending a message to NYSED asking them to incorporate our proposed changes in the final regulations.

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