The

University of the State of New York

Education Department

In the Matter of
A Privacy Complaint
Filed Against

Monroe One BOCES and
Grand Island Central School District
("Respondents")

Review and Determination by
New York State Education Dept.
Chief Privacy Officer.

On February 9, 2023, a complaint was filed with the New York State Education Department's ("NYSED's") Chief Privacy Officer by a parent ("Complainant"), whose child ("student") attends the Grand Island Central School District ("District"). Complainant states that in October 2022, Complainant received a text message with an alert that their child "was not in compliance with New York State requirements for immunizations." According to Complainant, this message contained personally identifiable information ("PII"), including student vaccination status, parent information and phone number and student name. Complainant states that several conversations ensued between Complainant and the District's middle school principal during October and November of 2022 regarding the message. Eventually, Complainant received a copy of an exhibit to a contract between Monroe One Board of Cooperative Educational Services ("Monroe One BOCES") and Custom Computer Specialists, Inc. ("Vendor"). This exhibit, the Education Law Section 2-d Addendum ("2-d Addendum") is attached to this determination as Attachment A.

The District purchased the use of Infinite Campus, the District's student management system ("SMS"), through Monroe One BOCES. Vendor is the reseller of Infinite Campus in New York State. Complainant was told that the text message was delivered from ShoutPoint, Inc. a subcontractor of Infinite Campus.

Complainant alleges that the 2-d Addendum to the contract between Monroe One BOCES and the Vendor and the sharing of PII with ShoutPoint are inconsistent with Education Law § 2-d. Complainant further alleges that the District did not have the supplemental information required by Education Law § 2-d [3] [c] applicable to the Vendor on its website.

In response, NYSED's Chief Privacy Officer requested that the District and Monroe One BOCES investigate and provide a written response, including a summary of its investigation and addressing specific questions and issues. The District and BOCES submitted a response on February 14. 2023.

Applicable Law

The Federal Family Educational Rights and Privacy Act ("FERPA")[1] protects the privacy of student education records and places restrictions on the release of student PII. New York has adopted additional privacy laws and regulations. Education Law § 2-d[2] protects PII from unauthorized disclosure and provides parents with rights regarding their child's PII, especially as it pertains to third party contractors.

In accordance with the requirements of Education Law § 2-d, NYSED has adopted a § 2-d Bill of Rights for Data Privacy and Security that authorizes NYSED's Chief Privacy Officer to address complaints about possible breaches and unauthorized disclosures of student PII. Section 121.1 (a) of the regulations of the Commissioner of Education defines a breach as the "unauthorized acquisition, access, use, or disclosure of student data and/or teacher or principal data by or to a person not authorized to acquire, access, use, or receive the student data and/or teacher or principal data." Section 121.1 (t) defines an unauthorized disclosure or release as "any disclosure or release not permitted by federal or State statute or regulation, any lawful contract or written agreement, or [a disclosure] that does not respond to a lawful order of a court or tribunal or other lawful order."

District Response

Monroe One BOCES responded by providing the full contract with the Vendor, a copy of the Infinite Campus End User License Agreement, and a link to the District's Data Privacy Inventory on its website. The response also stated that Monroe One BOCES was confident that the contract and attached addenda with the Vendor meet regulatory requirements since they had undergone a thorough review by their counsel before being submitted for signature. No analysis was submitted as to how the documents comply with Education Law § 2-d and Part 121 of the regulations of the Commissioner of Education ("Part 121"). No additional response was received from the District. A subsequent conversation was held with Monroe One BOCES to ask specific questions about the contract and the 2-d Addendum.

[1] 20 USC § 1232g; 34 CFR Part 99

[2] N.Y. EDUC. LAW § 2-d

Analysis

Section 121.4 of the regulations of the Commissioner of Education and NYSED's § 2-d Bill of Rights for Data Privacy and Security, allow parents, eligible students, teachers, principals or other staff of an educational agency to file complaints about possible breaches and unauthorized releases of personally identifiable information. Complainant is the parent of a student who attends the District and NYSED's privacy office may therefore address the complaint. Neither Monroe One BOCES nor the District dispute complainant's standing to bring this complaint

Allegation One: The 2-d Addendum to the contract between Monroe One BOCES and the Vendor does not comply with Education Law § 2-d.

Both FERPA and Education Law § 2-d prohibit the unauthorized disclosure of student PII from students' education records. However, schools may contract with third party contractors or vendors based upon the school official exception under FERPA[3] and upon entering a contract that meets the requirements of Education Law § 2-d, and Part 121. Specifically, Education Law § 2-d and Part 121 require:

1) That each contract or data protection agreement, if separate, contains a statement that shared student data will remain confidential in accordance with federal and State law and the educational agency's[4] data security and privacy policy [Education Law § 2-d (5) (d) and 8 NYCRR § 121.2 (c)];
2) That each educational agency ensure that an agreement with a third-party contractor includes a data privacy and security plan that is acceptable by the educational agency. The plan must, at a minimum, meet seven requirements listed in 8 NYCRR § 121.6 (a);
3) That each educational agency publishes a parents' bill of rights on its website as well as supplemental information for each contract the educational agency enters into with a third-party contractor whereby the contractor receives PII. The supplemental information must at least include the six requirements listed in 8 NYCRR § 121.3 (c), including identification of the exclusive purpose for which the student data will be used by the third-party contractor; and
4) That each third-party contractor receiving PII will comply with the eight requirements enumerated in 8 NYCRR § 121.9 (a) and ensue that the data protection obligations imposed on the third-party contractor are met by any subcontractor [Education Law § 2-d and 8 NYCRR § 121.9].

I have reviewed the contract submitted to my office in response to this complaint and find that:

[3] 34 CFR § 99.31(a)(1)(i)(B)

[4] Both Monroe One BOCES and the District are Educational Agencies as defined in Education Law § 2-d and 8 NYCRR § 121.1 (g).

1) Section (i) of the 2-d Addendum contains the necessary statement, required by Education Law § 2-d (5) (d) and 8 NYCRR § 121.2 (c), that shared data will remain confidential in accordance with Federal and State law and the Monroe One BOCES's data security and privacy policy;
2) There appears to be no Vendor data security and privacy plan included in the contract or the 2-d Addendum as required by Education Law § 2-d (5) (e) and 8 NYCRR § 121.6 (a);
3) While the supplemental information required by 8 NYCRR § 121.3 (c) was part of the 2-d Addendum, and the requirements listed in 8 NYCRR § 121.3 (c), were included, the supplemental information inaccurately identifies the exclusive purpose for which PII will be provided to the Vendor (*i.e.*, "to provide the meal payment-related services described in the Agreement to BOCES..."). It appears that meal payment-related services are only one function of the Infinite Campus SMS.
4) The eight requirements enumerated in 8 NYCRR § 121.9 (a) and a statement that the data protection obligations imposed on the third-party contractor apply to any subcontractor are addressed in the 2-d Addendum and the supplemental information.

Therefore, allegation one is sustained in part.

Allegation Two: The sharing of PII with ShoutPoint violates Education Law § 2-d.

Third party contractors are authorized to engage a subcontractor to perform their contractual obligations. However, when doing so, the data protection obligations imposed on the third-party contractor by State and federal law and the contract shall apply to the subcontractor. [Education Law § 2-d (c) (2); (f) (3) and 8 NYCRR § 121.9 (b)]. This is acknowledged in Section (n) of the 2-d Addendum, which states that the Contractor must ensure that any subcontractor "is legally bound by legally compliant protection obligations imposed on the [C]ontractor by law, the [A]greement and this [A]ddendum." Additionally, section (c) of the 2-d Addendum's supplemental information, states that PII may only be shared with a subcontractor pursuant to a written contract that binds such a party to at least the same data protection and security requirements imposed on Vendor under this agreement as well as federal and State laws and regulations. This requirement complies with Education Law § 2-d (c) (2) and 8 NYCRR § 121.3 (c) (2).

Therefore, Custom Computer Specialists, Inc.'s subcontract with ShoutPoint for an additional add-on service for VOIP lines in conjunction with Campus Messenger (one of the many components of the Infinite Campus SMS) does not, in and of itself, violate Education Law § 2-d. Any violation would have entailed an improper disclosure of PII, which Complainant has not alleged and this investigation has not substantiated.

Allegation Three: The District did not have the supplemental information required in Education Law § 2-d [3] [c] pertaining to the Vendor on its website.

As indicated in a February 10, 2023, letter to Monroe One BOCES and the District, I was unable to find the District's supplemental information on its website. I did find, however, a Parents' Bill of Rights ("PBOR") for Data Privacy and Security and the following statement:

> **APPENDIX**
>
> SUPPLEMENTAL INFORMATION REGARDING THIRD-PARTY CONTRACTORS
>
> This Bill of Rights is subject to change based on regulations of the commissioner of education and the SED chief privacy officer, as well as emerging guidance documents from SED. For example, these changes/additions will include requirements for districts to share information about third-party contractors that have access to student data, including:
>
> - How the student, teacher or principal data will be used;
> - How the third-party contractors (and any subcontractors/others with access to the data) will abide by data protection and security requirements;
> - What will happen to data when agreements with third party contractors expire;
> - If and how parents, eligible students, teachers or principals may challenge the accuracy of data that is collected; and
> - Where data will be stored to ensure security and the security precautions taken to ensure the data is protected, including whether the data will be encrypted.

While this page describes what is generally included in each contract's supplemental information, it does not contain the supplemental information for any specific contract.

In response to my letter, Monroe One BOCES provided a URL to a District webpage that included a link for Infinite Campus. This link, in turn, allowed access to the 2-d Addendum attached to this determination. The URL, however, includes a specific page designation ("Page/11383") and was very difficult to find via the District's website using the website's internal search function.

Therefore, Allegation three is sustained in part.

Determination:

With respect to allegation one, within 30 days of the date of this determination, Monroe One BOCES must submit a response to my office, ensuring that each of its contracts include the third-party contractor's data privacy and security plan as required by Education Law § 2-d (5) (e) and 8 NYCRR § 121.6 (a). Additionally, Monroe-One BOCES must either provide a sufficient explanation or amend section (a) of the supplemental information to clarify the "exclusive purpose" for which PII may be provided to the Vendor.

With respect to allegation three, while the District uploaded the supplemental information to its website, the information was so hard to find that it was of little to no assistance. The purpose of the PBOR and supplemental information requirements is to provide parents with information as to which third party contractors receive student PII and for what purpose. Even if the Complainant were able to find the District's supplemental information, Complainant would have been unable to identify the contractual chain that led to the subcontractor providing them with the text containing vaccination information. Finally, even its website was lacking, the District should have been able to explain the contractual arrangement to Complainant upon request. Its inability to do so led directly to the filing of the instant complaint. Therefore, within 30 days of this determination, I direct the District to make its supplemental information more accessible to parents; ideally, this would entail placing this information on the same page as the PBOR.

I look forward to hearing from both respondents within 30 days of this determination.

March 17, 2023

Louise DeCandia
Chief Privacy Officer
New York State Education Department

Attachment A

Exhibit C

Education Law Section 2-d Contract Addendum

The parties to this Contract Addendum are the Monroe 1 Board of Cooperative Educational Services ("BOCES") and Custom Computer Specialists, Inc. ("Vendor"). BOCES is an educational agency, as that term is used in Section 2-d of the New York State Education Law ("Section 2-d") and its implementing regulations, and Vendor is a third party contractor, as that term is used in Section 2-d and its implementing regulations. BOCES and Vendor have entered into this Contract Addendum to conform to the requirements of Section 2-d and its implementing regulations. To the extent that any term of any other agreement or document conflicts with the terms of this Contract Addendum, the terms of this Contract Addendum shall apply and be given effect.

Definitions

As used in this Addendum and related documents, the following terms shall have the following meanings:

"Student Data" means personally identifiable information from student records that Vendor receives from an educational agency (including BOCES or a Participating School District) in connection with providing Services under this Agreement.

"Personally Identifiable Information" ("PII") as applied to Student Data, means personally identifiable information as defined in 34 CFR 99.3 implementing the Family Educational Rights and Privacy Act (FERPA), at 20 USC 1232g.

"Third Party Contractor," "Contractor" or "Vendor" means any person or entity, other than an educational agency, 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, including, but not limited to data management or storage services, conducting studies for or on behalf of such educational agency, or audit or evaluation of publicly funded programs.

"BOCES" means Monroe #1 Board of Cooperative Educational Services.

"Parent" means a parent, legal guardian, or person in parental relation to a student.

"Student" means any person attending or seeking to enroll in an educational agency.

"Eligible Student" means a student eighteen years or older.

"State-protected Data" means Student Data, as applicable to Vendor's product/service.

"Participating School District" means a public school district or board of cooperative educational services that obtains access to Vendor's product/service through a cooperative educational services agreement ("CoSer") with BOCES, or other entity that obtains access to Vendor's product/service through an agreement with BOCES, and also includes BOCES when it uses the Vendor's product/service to support its own educational programs or operations.

"Breach" means the unauthorized access, use, or disclosure of personally identifiable information.

"Commercial or marketing purpose" means the sale of PII; and the direct or indirect use or disclosure of State-protected Data to derive a profit, advertise, or develop, improve, or market products or services to students other than as may be expressly authorized by the Student Management Services Agreement (the "Services").

"Disclose", "Disclosure," and "Release" mean to intentionally or unintentionally permit access to State-protected Data; and to intentionally or unintentionally release, transfer, or otherwise communicate State-protected Data to someone not authorized by contract, consent, or law to receive that State-protected Data.

Vendor Obligations and Agreements

Vendor agrees that it shall comply with the following obligations with respect to any student data received in connection with providing Services under this Agreement and any failure to fulfill one of these statutory or regulatory obligations shall be a breach of this Agreement. Vendor shall:

(a) limit internal access to education records only to those employees and subcontractors that are determined to have legitimate educational interests in accessing the data within the meaning of Section 2-d, its implementing regulations and FERPA (e.g., the individual needs access in order to fulfill his/her responsibilities in providing the contracted services);

(b) only use personally identifiable information for the explicit purpose authorized by the Agreement, and must/will not use it for any purpose other than that explicitly authorized in the Agreement;

(c) not disclose any personally identifiable information received from BOCES or a Participating School District to any other party who is not an authorized representative of the Vendor using the information to carry out Vendor's obligations under this Agreement, unless (i) if student PII, the Vendor or that other party has obtained the prior written consent of the parent or eligible student, or (ii) the disclosure is required by statute or court order, and notice of the disclosure is provided to the source of the information no later than the time of disclosure, unless such notice is expressly prohibited by the statute or court order;

(d) maintain reasonable administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of the personally identifiable information in its custody;

(e) Infinite Campus Cloud Hosting uses encryption technology to protect data while in motion or in its custody (i.e., in rest) from unauthorized disclosure by rendering personally identifiable information unusable, unreadable, or indecipherable to unauthorized persons through the use of a technology or methodology specified or permitted by the Secretary of the United States department of health and human services in guidance issued under Section 13402(H)(2) of Public Law 111-5 using a technology or methodology specified or permitted by the secretary of the U S.);

(f) not sell personally identifiable information received from BOCES or a Participating School District nor use or disclose it for any marketing or commercial purpose unless otherwise expressly authorized by the Services, or facilitate its use or disclosure by any other party for any marketing or commercial purpose or permit another party to do so;

(g) notify the educational agency from which student data is received of any breach of security resulting in an unauthorized release of such data by Vendor or its assignees in violation of state or federal law, or of contractual obligations relating to data privacy and security in the most expedient way possible and without unreasonable delay, in compliance with New York law and regulation;

(h) reasonably cooperate with educational agencies and law enforcement to protect the integrity of investigations into any breach or unauthorized release of personally identifiable information by Vendor;

(i) adopt technologies, safeguards, and practices that align with the NIST Cybersecurity Framework, Version 1.1, that are in substantial compliance with the BOCES data security and privacy policy, and that comply with Education Law Section 2-d, Part 121 of the Regulations of the Commissioner of Education and the Monroe #1 BOCES Parents' Bill of Rights for Data Privacy and Security, set forth below, as well as all applicable federal, state and local laws, rules and regulations;

(j) acknowledge and hereby agrees that the State-protected Data which Vendor receives or has access to pursuant to this Agreement may originate from several Participating School Districts located across New York State. Vendor acknowledges that the State-protected Data belongs to and is owned by the Participating School District or student from which it originates;

(k) acknowledge and hereby agrees that if Vendor has an online terms of service and/or Privacy Policy that may be applicable to its customers or users of its product/service, to the extent that any term of such online terms of service or Privacy Policy conflicts with applicable law or regulation, the terms of the applicable law or regulation shall apply;

(l) acknowledge and hereby agrees that Vendor shall promptly pay for or reimburse the educational agency for the full third party cost of a legally required breach notification to parents and eligible students due to the unauthorized release of student data caused by Vendor or its agent or assignee;

(m) ensure that employees, assignees and agents of Contractor who have access to student data, or teacher or principal data receive or will receive training on the federal and state laws governing confidentiality of such data prior to receiving access to such data; and

(n) ensure that any subcontractor that performs Contractor's obligations pursuant to the Agreement is legally bound by legally compliant data protection obligations imposed on the Contractor by law, the Agreement and this Addendum.

Monroe #1 BOCES Parents' Bill of Rights for Data Privacy and Security
(https://www.monroe.edu/domain/1478)

The Monroe #1 BOCES seeks to use current technology, including electronic storage, retrieval, and analysis of information about students' education experience in the BOCES, to enhance the opportunities for learning and to increase the efficiency of our operations.

The Monroe #1 BOCES seeks to ensure that parents have information about how the BOCES stores, retrieves, and uses information about students, and to meet all legal requirements for maintaining the privacy and security of protected student data and protected principal and teacher data, including Section 2-d of the New York State Education Law.

To further these goals, the BOCES has posted this Parents' Bill of Rights for Data Privacy and Security.

1. A student's personally identifiable information cannot be sold or released for any commercial purposes.
2. Parents have the right to inspect and review the complete contents of their child's education record. The procedures for exercising this right can be found in Student Records Policy 6320. (https://www.monroe.edu/6320)
3. State and federal laws protect the confidentiality of personally identifiable information, and safeguards associated with industry standards and best practices, including but not limited to, encryption, firewalls, and password protection, must be in place when data is stored or transferred.
4. A complete list of all student data elements collected by the State is available at http://www.p12.nysed.gov/irs/sirs/documentation/NYSEDstudentData.xlsx and a copy may be obtained by writing to the Office of Information & Reporting Services, New York State Education Department, Room 863 EBA, 89 Washington Avenue, Albany, New York 12234.
5. Parents have the right to have complaints about possible breaches of student data addressed. Complaints should be directed in writing, to:

   Chief Privacy Officer
   New York State Education Department
   Room 863 EBA
   89 Washington Avenue
   Albany, New York 12234.

   or
   Monroe One Data Protection Officer
   William Gregory
   Monroe #1 BOCES
   41 O'Connor Road
   Fairport, NY 14450

Supplemental Information About Agreement Between Custom Computer Specialists, Inc. and BOCES

(a) The exclusive purposes for which the personally identifiable information provided by BOCES or a Participating School District will be used by Vendor is to provide the meal payment-related services described in the Agreement to BOCES or other Participating School District pursuant to a BOCES Purchase Order.

(b) Personally identifiable information received by Vendor, or by any assignee of Vendor, from BOCES or from a Participating School District shall not be sold or used for marketing purposes.

(c) Personally identifiable information received by Vendor, or by any assignee of Vendor shall not be shared with a sub-contractor except pursuant to a written contract that binds such a party to at least the same data protection and security requirements imposed on Vendor under this Agreement, as well as all applicable state and federal laws and regulations.

(d) The effective date of this Contract Addendum shall be July 1, 2020 and the Agreement and Addendum shall remain in effect until July 31, 2025, unless sooner terminated in accordance with the terms of the Agreement.

(e) Upon expiration or termination of the Agreement without a successor or renewal agreement in place, and upon request from BOCES or a Participating School District, Vendor shall transfer all educational agency data to the educational agency in a format agreed upon by the parties. Vendor shall thereafter securely delete all educational agency data remaining in the possession of Vendor or its assignees or subcontractors (including all hard copies, archived copies, electronic versions or electronic imaging of hard copies) as well as any and all educational agency data maintained on behalf of Vendor in secure data center facilities, other than any data that Vendor is required to maintain pursuant to law, regulation or audit requirements. Vendor shall ensure that no copy, summary or extract of the educational agency data or any related work papers are retained on any storage medium whatsoever by Vendor, its subcontractors or assignees, or the secure data center facilities unless Vendor is required to keep such data for legal, regulator, or audit purposes, in which case the data will be retained in compliance with the terms of this Addendum. To the extent that Vendor and/or its subcontractors or assignees may continue to be in possession of any de-identified data (data that has had all direct and indirect identifiers permanently removed with no possibility of reidentification), they each agree not to attempt to re-identify de-identified data and not to transfer de-identified data to any party. Upon request, Vendor and/or its subcontractors or assignees will provide a certification to the BOCES or Participating School District from an appropriate officer that the requirements of this paragraph have been satisfied in full.

(f) State and federal laws require educational agencies to establish processes for a parent or eligible student to challenge the accuracy of their student data. Third party contractors must cooperate with educational agencies in complying with the law. If a parent or eligible student submits a challenge to the accuracy of student data to the student's district of enrollment and the challenge is upheld, Vendor will cooperate with the educational agency to amend such data.

(g) Vendor shall store and maintain PII in electronic format on systems maintained by Vendor in a secure data center facility in the United States in accordance with its Privacy Policy, aligns with NIST Cybersecurity Framework, Version 1.1, and the BOCES data security and privacy policy, Education Law Section 2-d, Part 121 of the Regulations of the Commissioner of Education, and the Monroe #1 BOCES Parents' Bill of Rights for Data Privacy and Security, set forth above. Encryption technology will be utilized while data is in motion and at rest, as detailed above.

______________________________ Vendor Signature

8/25/2020
______________________________ Date