

Response to U.S. House Education and Workforce Committee March Hearing “Strengthening Education Research and Privacy Protections to Better Serve Students”

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**INTRODUCTION:**

We are grateful that the committee convened the very important recent hearing, “Strengthening Education Research and Privacy Protections to Better Serve Students,”<sup>1</sup> and for the opportunity to comment on it. With the Family Education Rights and Privacy Act being 40 years old; the Strengthening Research Through Education Act (SETRA)<sup>2</sup> continuing dossier building via state longitudinal databases; and the expanded efforts to psychologically manipulate and profile our children via social emotional and mindset assessments in standards, curriculum and tests; it is extremely important that these bills be updated. Government data gathering on our innocent children must be very significantly pared back in content and kept to the local level and privacy protections strengthened. It is not just the data security that is an issue, but they type and amount of data that is gathered.

Here is our review of the positives and negatives of the hearing followed by conclusions and recommendations.

**POSITIVES:**

- It is wonderful that Rachel Stickland<sup>3</sup> from The Parent Coalition for Student Privacy<sup>4</sup>, an organization that receives no government or special interest funding, founded and composed of parents, which brought down the Bill Gates multi-million dollar inBloom<sup>5</sup> operation was able to testify. Ms. Stickland did an excellent job given that she was defending herself and parents from three other Big Data witnesses. (See NEGATIVES below).
- Some of the questions by members seemed to indicate a good understanding about the dangers of the extensive student data collection taking place and took parental concerns on that topic seriously, particularly Mrs. Foxx, Mr. Thompson, Mr. Brat, and Ms. Bonamici.
- Ms. Stickland’s description of the State Longitudinal Data System (SLDS) was excellent and correct, especially the part about the result of this longitudinal data collection resulting in dossiers from birth. This includes genetic data at least in Rhode Island.<sup>6</sup> I would just add that although the funding push for SLDS occurred during the stimulus bill, in a separate provision, in the Race to the Top grants, and in the America COMPETES Act, they were codified in ESRA in 2002 and continue in SETRA, which is why the data transparency language she mentioned is so critical for both SETRA and FERPA. If, as Dr. Hannaway mentioned, it is really true that the data is completely anonymized, this should not be a problem.

<sup>1</sup> <http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=400420>

<sup>2</sup> <http://edlibertywatch.org/wp-content/uploads/2015/02/Common-Core-FERPA-and-ESRA-Update-for-Senate.pdf>

<sup>3</sup> [http://edworkforce.house.gov/UploadedFiles/Testimony\\_Stickland.pdf](http://edworkforce.house.gov/UploadedFiles/Testimony_Stickland.pdf)

<sup>4</sup> <http://www.studentprivacymatters.org/>

<sup>5</sup> <http://www.studentprivacymatters.org/background-of-inbloom/>

<sup>6</sup> <http://edlibertywatch.org/2013/08/feds-resolute-yet-tone-deaf-on-data-collection-part-1/>

- This question by Mr. Heck and Ms. Sticklands’s response as reported by Politico<sup>7</sup>:  
 “He asked whether Common Core has ‘required new depths of data mining’ of students. ‘I’ve heard the same concerns from parents across the country,’ said Rachael Stickland, Parent Coalition for Student Privacy co-founder and co-chairwoman. ‘There’s a lot of new measurements of student achievement that doesn’t necessarily have academic purposes - grit and tenacity and those sorts of things, the sort of emotional factors. There are a lot of parents who are very, very concerned about this.’”

This is not just a concern, but absolute fact, and we applaud her for saying so. Here are a couple of important examples showing that non-academic social emotional teaching is being promoted through Common Core standards which means that there is psychological data gathering happening in the federally mandated mostly Common Core state tests:<sup>8</sup>

- **“Mindsets & Behaviors align with specific standards from the Common Core State Standards through connections at the competency level. (Emphasis added)”**<sup>9</sup>
- **“[A]s new assessment systems are developed to reflect the new [Common Core] standards in English language arts, mathematics, and science, significant attention will need to be given to the design of tasks and situations that call on students to apply a range of 21st century competencies that are relevant to each discipline. A *sustained program of research and development will be required to create assessments that are capable of measuring cognitive, intrapersonal, and interpersonal skills.*” (Emphasis added).**<sup>10</sup>

There is also acknowledgement and concern about this emphasis on social emotional learning and data gathering on the district level as evidence by this op-ed<sup>11</sup> by two Orange County, California school board members, especially relevant since California is leading the charge on efforts to use psychosocial data for accountability:

There also are fears that data collection under Common Core includes psychological and behavioral characteristics. A growing movement by progressive education leaders is the notion that academic achievement is insufficient for students to attain their “full potential.” This movement believes students “must have opportunities to engage and develop a much richer set of skills.”

This growing crusade among unelected educrats and administrators promotes “noncognitive” factors – personal student attributes, dispositions, social skills, attitudes and intrapersonal resources. In a report by the U.S. Department of Education, Office of Educational Technology, psychological attributes like “grit, tenacity and perseverance” are promoted as “critical factors for success in the 21st century.”

Parents want their children to learn academic material without the psychological conditioning, data mining, tracking and analyzing of behavioral patterns. These federal and state programs exclude local control of education, and the federal government reference to gathering of students’ personal information is too Orwellian and rightfully creates anxiety and worry for parents.

<sup>7</sup> <http://www.politico.com/tipsheets/morning-education/2016/03/essa-rulemaking-day-3-213370#ixzz43k2PpRdt>

<sup>8</sup> Please see the list of quotes on pages 1-7 of the research paper *Psychosocial Manipulation in the Common Core Standards and Aligned Tests and Curriculum* for the details and more quotes. <http://www.flstopccoalition.org/files/45ACDEA5-46D6-408B-9934-4D8BE4B74449--8035CC3C-673E-49B4-8293-E43078236473/psychosocial-manipulation-in-the-common-core-standards-and-aligned-tests-and-curriculum.pdf>

<sup>9</sup> American School Counselors Association - Change Behaviors by Changing Mindsets - <https://www.schoolcounselor.org/magazine/blogs/november-december-2014/change-behaviors-by-changing-mindsets>

<sup>10</sup> U.S. Department of Education Office of Technology – Promoting Grit, Tenacity, and Perseverance: Critical Factors for Success in the 21st Century – February 2013 removed from <http://www.ed.gov/edblogs/technology/files/2013/02/OET-Draft-Grit-Report-2-17-13.pdf> but now available at <http://www.flstopccoalition.org/files/F6A22756-73E4-4406-BC0F-F9E8340A37C6--E36F73DA-E434-44F5-B829-1C27BAA8532F/grit-tenacity-and-perseverance-feb-2013-doe.pdf> p. 49

<sup>11</sup> <http://www.oeregister.com/articles/data-708778-student-education.html>

## NEGATIVES AND LOST OPPORTUNITIES:

- The incontrovertible and unbalanced Big Data bias of the rest of the panel besides Rachel Stickland:
  - **Mr. Neil Campbell**<sup>12</sup> – From Jeb Bush’s former organization, The Foundation for Excellence in Education that is in partnership and receives significant funding from the corporations, foundations and organizations that are pushing the relentless data mining and psychological profiling of Common Core as implemented by ESSA.<sup>13</sup> Apparently they do not read the education research that is done, because that research actually shows<sup>14</sup> that the third grade retention based on the very developmentally inappropriate state tests that they push for children in Florida and across the nation actually does more harm than good for those students.
  - **Dr. Jane Hannaway**<sup>15</sup> – This woman’s belief that the privacy rights of children and opt-out rights of parents are subsumed by her completely unconstitutional view that she is entitled to “complete” data for the federal government is alarming in its arrogance. Liberty Counsel attorney Richard Mast lays out the constitutional issues and Supreme Court case law of why she is wrong very well in a letter to me regarding the related and also concerning plan to assess mindsets in the National Assessment of Educational Progress (NAEP):<sup>16</sup>

The NAEP categories examining “mindsets” directly impact the fundamental liberty interest which parents possess in overseeing the upbringing and education of their children. As the Supreme Court has repeatedly held (as recently as 2000 in *Troxel v. Granville*, 530 U.S. 57 (2000), **parents, not the state and its functionaries, are the ones possessed with the ultimate authority over the parents’ own children**: “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction...The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (Emphasis added). “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . .” *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944). **“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”** *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Ms. Stickland’s response about metadata allowing re-identification of supposedly anonymized or aggregate data was right on point. With all due respect, the attitude of bureaucrats, researchers, and corporations that they have a right to our children’s data without consent because they say they are supposedly going to do good things with it, because it is too expensive to get consent, or the federal government wants to know if their unconstitutional and largely ineffective programs are working is unacceptable to parents. The amount and type of data desired and gathered on students without consent is growing exponentially. The CEO of Knewton<sup>17</sup> admitted that they are gathering ten million data points per student per day because they have every sentence of the Common Core aligned curricula digitized and linked.

<sup>12</sup> [http://edworkforce.house.gov/UploadedFiles/Testimony\\_Campbell.pdf](http://edworkforce.house.gov/UploadedFiles/Testimony_Campbell.pdf)

<sup>13</sup> <http://thepulse2016.com/karen-r-effrem/2016/02/19/jeb-bush-partners-friends-contributors-are-supporting-setra-federalstate-student-data-grab/>

<sup>14</sup> [http://educationbythenumbers.org/content/new-research-failing-students\\_2034/](http://educationbythenumbers.org/content/new-research-failing-students_2034/)

<sup>15</sup> [http://edworkforce.house.gov/UploadedFiles/Testimony\\_Hannaway.pdf](http://edworkforce.house.gov/UploadedFiles/Testimony_Hannaway.pdf)

<sup>16</sup> <http://www.flstopccoalition.org/files/644FBB6D-2E9F-4B4E-B95A-673F164F13BD--91493589-A4B0-4CEF-8C23-6F65E266E853/ltr-re-neap-legal-and-privacy-concerns-02292016.pdf> (Emphasis added in original)

<sup>17</sup> <https://www.youtube.com/watch?v=Lr7Z7ysDluQ>

Her designation of anyone, even of future researchers, as “human capital”<sup>18</sup> is also highly offensive. Our children are unique individuals created by God, free American citizens; not anyone’s capital, data point, or as noted by the U.S. Supreme Court, “mere creatures of the state.” Our children do not exist to provide capital or data for corporations, the federal government, or researchers.

- Mr. Robert Swiggum<sup>19</sup> – Some of his statements about how it was so inconvenient to have to get parental consent to use student data and that parents were agreeing to have data collected on their children when they enroll them in school were almost as concerning as those of Dr. Hannaway for the same reasons. This is especially true when Georgia activists like attorney Jane Robbins, a senior fellow at the American Principles Project, who testified in favor of the Georgia<sup>20</sup> bill Mr. Swiggum criticized said the following in an email to me after reviewing his testimony:
  - The types of “fine-grained” data collected by the sophisticated software platforms, which are the target of 281, are NOT covered by last year’s bill.
  - Nor, in the amended form, did 281 require parental consent -- just an explanation to parents of how all this works.
  - Nor would teachers have been required to do anything -- all the information required to be given to parents would have come from the platform providers.

The Fourth Amendment rights of innocent American children are not abrogated at the schoolhouse door. Their right to have their data be secure from unconsented research and their thoughts & attitudes secure regardless, trumps the ease, convenience, & profits of adults every time. Additionally, evidence contradicting his assurances of data security will be discussed below.

- Except for Mr. Heck’s excellent question, there was no discussion of the large elephant in the room – the social emotional data mining in ESSA, SETRA, the NAEP, etc.<sup>21</sup> The social emotional research language in SETRA in Sec. 132 is completely unacceptable both to parents and even education researchers and professionals like Dr. Angela Duckworth that used to support the idea of gathering this data for accountability purposes due to subjectivity and validity concerns.<sup>22</sup>

A recent update to federal education law requires states to include at least one nonacademic measure in judging school performance. So other states are watching these districts as a potential model. But the race to test for so-called social-emotional skills has raised alarms even among the biggest proponents of teaching them, who warn that the definitions are unclear and the tests faulty.

“I do not think we should be doing this; it is a bad idea,” said Angela Duckworth, the MacArthur fellow who has done more than anyone to popularize social-emotional learning, making “grit” — the title of her book to be released in May — a buzzword in schools.

She resigned from the board of the group overseeing the California project, saying she could not support using the tests to evaluate school performance. Last spring, after attending a White House meeting on measuring social-emotional skills, she and a colleague wrote a paper<sup>23</sup> warning that there were no reliable ways to do so. “Our working title was all measures suck, and they all suck in their own way,” she said.

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<sup>18</sup> Hannaway, op. cit., p. 4

<sup>19</sup> [http://edworkforce.house.gov/UploadedFiles/Testimony\\_Swiggum.pdf](http://edworkforce.house.gov/UploadedFiles/Testimony_Swiggum.pdf)

<sup>20</sup> The SB 281 language at: <http://www.legis.ga.gov/Legislation/20152016/155096.pdf> was later amended to remove the parental consent requirement.

<sup>21</sup> <http://edlibertywatch.org/2015/06/1294/>

<sup>22</sup> [http://www.nytimes.com/2016/03/01/us/testing-for-joy-and-grit-schools-nationwide-push-to-measure-students-emotional-skills.html?\\_r=0](http://www.nytimes.com/2016/03/01/us/testing-for-joy-and-grit-schools-nationwide-push-to-measure-students-emotional-skills.html?_r=0)

<sup>23</sup> <http://edr.sagepub.com/content/44/4/237.full>

- Despite the glowing descriptions of the wonderful benefits of education research, there was no acknowledgement of research showing the ineffectiveness or harm of various government education programs. A prime example is the multiplicity of large well-conducted research studies<sup>24</sup> showing the ineffectiveness or academic and or emotional harm of Head Start or state preschool programs being ignored to the tune of \$250 million being spent on another Common Core/Head Start aligned federal preschool program in the Every Student Succeeds Act.<sup>25</sup> Related research showing that it is two parent families and religious involvement, not government preschool, home visiting or other nanny state programs that absolutely eliminate the achievement gap that the federal government has spent 50 years and \$2 trillion trying to fix.<sup>26</sup> And other research contradicts the plan of the USED to do “parent interventions” with home visiting programs that their own research has shown to be ineffective, expensive and harmful to family privacy and Fourth Amendment rights as part of the “family engagement program of ESSA.<sup>27</sup> Why should parents risk the data, psychological privacy and futures of their children when the data is used only to expand these unconstitutional, ineffective, harmful, and expensive government programs, especially when these programs collect more sensitive data and we have a national debt of \$19 trillion?
- There seemed to be little awareness or concern by the committee of the whole section of FERPA regulations allowing sharing of personally identifiable student information with the federal government and third parties without parental consent.<sup>28</sup>

**§ 99.31 Under what conditions is prior consent not required to disclose information?**

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1)(i)(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(B) **A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party...**(Emphasis added).

- These same regulations say that personally identifiable information may be “redisclosed” to other entities without consent, again justifying the concerns of parents about loss of control over their children’s longitudinal data that can have life-changing consequences.
  - (ii) Nothing in the Act or this part prevents a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section **from entering into agreements with organizations conducting studies under paragraph (a)(6)(i) of this section and redisclosing personally identifiable information from education records on behalf of educational agencies and institutions** that disclosed the information to the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section in accordance with the requirements of §99.33(b). (Emphasis added.)

<sup>24</sup> <http://edlibertywatch.org/2015/11/compilation-analysis-of-early-childhood-research-regarding-effect-fade-out-academic-emotional-harm/>

<sup>25</sup> <http://thepulse2016.com/karen-r-effrem/2015/11/16/nanny-state-preschool-expansion-another-reason-the-esea-rewrite-should-be-voted-down/>

<sup>26</sup> <http://eric.ed.gov/?q=%22Jeynes+William+H.%22>

<sup>27</sup> <http://edlibertywatch.org/2016/01/education-liberty-watch-comments-on-federal-family-engagement-policy/>

<sup>28</sup> <http://www.ecfr.gov/cgi-bin/text->

<http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=11975031b82001bed902b3e73f33e604&rgn=div5&view=text&node=34:1.1.1.1.33&idno=34#34:1.1.1.1.33.4.132.1> with analysis at <http://edlibertywatch.org/2013/03/issues-with-florida-sb-878-common-core-linked-data-warehouse-bill/>

- Closely related to this “rediscovery” concern is the fact that the FERPA regulations allow the use of personally identifiable information for “predictive testing.”<sup>29</sup> To have this subjective, validity-challenged socioemotional data not only stay in a longitudinal database that follows a student for life, but also be used to make predictions of future academic or workforce performance used for critical life decisions appalls and horrifies parents when they learn of it. This however, has been the plan of the big government and corporate education reformers for a very long time as witnessed by these two quotes 21 years apart:

Mark Tucker, President of the National Center on Education and the Economy – 1992<sup>30</sup>

His vision is “...to remold the entire American system” into “a **seamless web that literally extends from cradle to grave and is the same system for everyone**” that is coordinated by “a system of labor market boards at the local, state and federal levels” where curriculum and “**job matching**” will be handled by counselors “**accessing the integrated computer-based program.**”

Global Education Futures report titled *Future Agendas for Global Education* – 2013<sup>31</sup>

Platforms for crowd investing like Upstart that “allows to invest up to US\$ 200,000 into a talented young person who then shares a small share of their income over 5 or 10 years). This model...can soon become **a mass solution as big data models of competence profiles would allow to estimate the most beneficial educational & career tracks.**”

- There was no mention of the two very important and illuminating recent hearings convened by Chairman Chaffetz and the Oversight and Government Reform Committee showing the deplorable state of data security at the US Department of Education.<sup>32</sup> A November Inspector General’s report showed how vulnerable those data are to hackers and that by comparison, it would dwarf the Office of Personnel Management data breach. Chairman Chaffetz said after the first of those hearings:

“Almost half of America’s records are sitting at the Department of Education,” Chaffetz said at a Brookings Institution event on Thursday. “I think ultimately that’s going to be the largest data breach that we’ve ever seen in the history of our nation.”<sup>33</sup>

Assurances of data security like those of Mr. Swiggum in his oral and written testimony are not comforting under these circumstances. Mrs. Robbins also said in her correspondence:

“In many ways the bill Mr. Swiggum touts<sup>34</sup> is a ‘fox and henhouse’ bill. It allows the GaDOE to appoint a senior official to make sure all these privacy recommendations are followed, which means there is no independent monitoring. When he says GaDOE is so careful and so protective of the data, we just have to take his word for it. The bill does require some transparency about what data is collected, but with very few exceptions it doesn’t lay out any specific requirements for data security.”

## CONCLUSIONS:

- We believe that student privacy and parental consent should always be considered pre-eminent compared to the research desires of the government or private sector, especially in the realm of psychological profiling.

<sup>29</sup> CFR §99.31(6)(i)(A)

<sup>30</sup> Tucker letter to Hillary Clinton 1992 - [http://www.eagleforum.org/educate/marc\\_tucker/](http://www.eagleforum.org/educate/marc_tucker/) (Emphasis added).

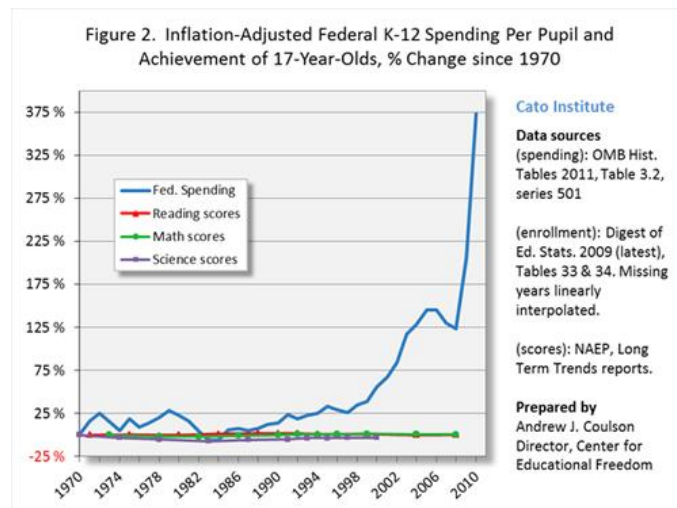
<sup>31</sup> [http://edu2035.org/pdf/GEF.Agenda\\_eng.pdf](http://edu2035.org/pdf/GEF.Agenda_eng.pdf) - p. 25

<sup>32</sup> <https://oversight.house.gov/hearing/u-s-department-of-education-information-security-review/> and <https://oversight.house.gov/hearing/u-s-department-of-education-investigation-of-the-cio/>

<sup>33</sup> <http://thehill.com/policy/cybersecurity/265209-oversight-chair-breach-of-education-department-would-dwarf-opm-hack>

<sup>34</sup> <http://www.legis.ga.gov/Legislation/20152016/153829.pdf>

- The government has no constitutional, statutory, or moral right to collect data on highly personal and sensitive socioemotional data on our children.
- According to data presented to this committee by the Cato Institute several years ago, federal involvement in education has yielded either stagnant or declining academic performance:



- The vast majority of federal education programs are unconstitutional because the entire US Department of Education is unconstitutional, meaning that most of these programs should be eliminated with any remaining that can be shown to be effective and constitutional programs being block granted to the states.
- Many studies showing the ineffectiveness and or harm of current government education and child social programs and the effectiveness of two parent family structure and other non-government academic and social measures are ignored raising the question of why we need so much research in the first place.

#### RECOMMENDATIONS:

1. Remove the social emotional research language from Section 132 of SETRA.
2. Prohibit social emotional data gathering and the use of data for predictive testing in the FERPA reauthorization.
3. Put in strict data transparency language and update the data security language per the recommendations of technical experts like Dr. Joel Reidenberg<sup>35</sup> or Barmak Nassirian<sup>36</sup> in any FERPA reauthorization.
4. Require third party software and testing vendors to notify parents of what data is collected on students and how it is used.
5. Find a way for students whose identity and privacy is compromised to be compensated, not just researchers or private vendors to be penalized.
6. Close the curriculum and assessment loophole for invasive surveys in PPRA.<sup>37</sup>
7. Immediately demand that the US Department of Education repair the federal data security failures found in the Inspector General's recent report and uncovered by the House Oversight Committee.
8. Strongly consider a moratorium on further federal research until programs already shown to ineffective and harmful are transformed or eliminated and until actually effective measures are actually implemented.

<sup>35</sup> [http://edworkforce.house.gov/uploadedfiles/reidenberg\\_testimony\\_final.pdf](http://edworkforce.house.gov/uploadedfiles/reidenberg_testimony_final.pdf)

<sup>36</sup> <http://www.studentprivacymatters.org/barmak-nassirian-is-the-student-right-to-know-bill-worth-the-risk-to-privacy/>

<sup>37</sup> <http://edlibertywatch.org/wp-content/uploads/2015/02/Common-Core-FERPA-and-ESRA-Update-for-Senate.pdf>