

Comments to the Commission on Evidence-Based Policymaking Opposing Lifting the Prohibition on a Student Unit Record System

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The thousands of parent, grandparents, teachers, and citizen supporters across the nation of Education Liberty Watch and the Florida Stop Common Core Coalition, as well as many allied groups¹ representing hundreds of thousands more that have repeatedly raised student data privacy concerns, are firmly against the lifting of the prohibition on a federal student unit-record for many reasons. Here are a just a few:

- The government has no constitutional or moral right to collect data and offer it, without consent, to governmental and non-governmental organizations for research without consent. It is a blatant violation of the Fourth Amendment to the US Constitution and of the numerous Supreme Court precedents affirming parents' inherent right to direct the education and upbringing of their children as outlined in this letter from Liberty Counsel.²
- The Obama administration has already gutted the outdated and fairly weak data protections of Family Educational Rights and Privacy Act (FERPA) for K-12, allowing multiple federal agencies and outside researchers to have access to sensitive student and family data without parental consent.³ Lifting the student unit-record prohibition will create a womb-to-tomb database of information that citizens will not be able to monitor themselves for any purpose, including to correct errors. Access to this data by so many entities will likely have life-altering consequences for the individual regarding college, jobs, military service, insurance, and other issues. Privacy expert Barmak Nassirian⁴ said of this idea:

“Tracking autonomous free individuals through most of their lives in the name of better information for the benefit of others may be justifiable, but its extremism should at the very least be acknowledged and addressed.”

- There is abundant evidence from multiple federal⁵ and state bills, from the National Assessment of Educational Progress (NAEP) effort to track mindsets and school climate data, from the National Commission on Social Emotional Learning,⁶ from the new Head Start Performance Standards,⁷ from policy efforts of foundations⁸ and business groups,⁹ etc. that there is a concerted effort to psychologically profile American students and workers starting at a very young age. This effort makes the plan to lift the prohibition on the student unit-record even more dangerous, very likely leading to the egregious violation of the most fundamental of American rights, the private right of conscience.

¹ <http://edlibertywatch.org/wp-content/uploads/2014/11/Congressional-ESEA-letter-10-24.pdf>

² Liberty Counsel Letter Regarding Assessing Mindsets in the NAEP - <http://edlibertywatch.org/wp-content/uploads/2014/11/Final-Ltr-NAEP-legal-and-privacy-concerns-06272016.pdf>

³ <http://edlibertywatch.org/2014/01/formal-response-to-the-chief-state-school-officers-letter-on-student-data-privacy/>

⁴ <http://www.studentprivacymatters.org/barmak-nassirian-is-the-student-right-to-know-bill-worth-the-risk-to-privacy/>

⁵ <http://www.flstopccoalition.org/files/7C7D2880-68E4-4C61-AF31-FF29E8FA9789--B4BCFE9D-8881-4C5A-B267-D9863CA280DB/setra-handout-final.pdf>

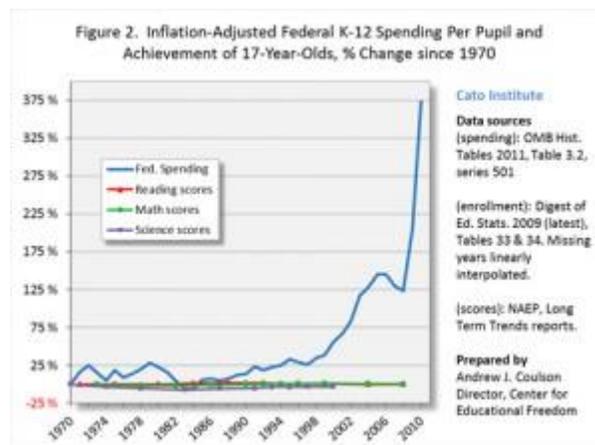
⁶ <https://www.conservativereview.com/commentary/2016/11/think-common-core-is-bad-new-standards-crank-the-creep-factor-up-to-eleven>

⁷ <http://truthinamericaneducation.com/federalized-education/enter-baby-common-core-new-head-start-performance-standards/>

⁸ <http://www.casel.org/from-casel/>

⁹ <http://www.usnews.com/news/articles/2016-05-13/op-ed-educational-data-mining-can-enhance-science-education>

- 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.
- Congress and the rest of the federal government already ignore research that does not fit the paradigm of expanding the federal role in education and further usurping the parental role. Disastrous federal welfare policies that subsidize unwed parenthood have resulted in terrible academic performance, more out-of-wedlock births, and increased rates of crime, drug abuse, suicide, etc. Multiple studies have shown that very few, if any, of the government programs designed to address these government-created problems – for example, school-improvement¹⁰ early childhood,¹¹ or home visiting programs¹² -- have had significant sustainable benefit or reached their stated national goals.¹³ According to data presented to the US House Education and Workforce Committee by the Cato Institute several years ago, federal involvement in education has yielded either stagnant or declining academic performance:



And often federal education programs have made things worse. But of course, the federal government simply disregards the research it disagrees with – and insists, through advocacy of a unit-record system, that it should be given even more data for even more research, which will be ignored if it reaches the “wrong” conclusions. The research of the esteemed co-chairman, Dr. Haskins, is an important example of this situation as he has authored several early-childhood studies, including analysis of Head Start¹⁴ and Abecedarian,¹⁵ and has seen first-hand the failure and or harm of these programs on poor children. Regardless of his views on lifting the prohibition on the creation of a student unit-record system, it is somewhat ironic that he is serving on this commission that is hearing so many pleas to expand access to more privacy-destroying data for more government programs.)

- The US Department of Education (USED) has terrible data-security:
 The US House Oversight and Government Accountability Committee chaired by Rep. Jason Chaffetz held two hearings dealing with the deplorable state of student data-security in USED. Here are some of its findings (emphasis added):

At the **November 17, 2015** hearing,¹⁶ the Committee learned that the US Department of Education:

¹⁰ <https://edexcellence.net/commentary/education-gadfly-daily/flypaper/2012/the-disappointing-but-completely-predictable-results-from-SIG.html>

¹¹ <http://edlibertywatch.org/wp-content/uploads/2014/11/Updated-Preschool-Compilation-4-16.pdf>

¹² <http://thefederalist.com/2016/07/13/sending-government-agents-into-peoples-homes-wont-fix-preschools-failures/>

¹³ <http://thefederalist.com/2016/12/07/7-things-betsy-devos-needs-immediately-becomes-education-secretary/>

¹⁴ Dr. Haskins was on the Head Start Research Committee involved in Head Start Impact Study that showed very early fade out and harm to math skills of three year olds - https://www.acf.hhs.gov/sites/default/files/opre/hs_impact_study_final.pdf

¹⁵ Dr. Haskins’s study found that Abecedarian children were “more aggressive than children in the control group” in elementary school. http://www.jstor.org/stable/1129759?seq=1#page_scan_tab_contents

¹⁶ <https://oversight.house.gov/hearing/u-s-department-of-education-information-security-review/>

- o **Holds 139 million unique Social Security numbers;**
- o **Continues to be "vulnerable to security threats"** according to the IG, and has repeat findings in annually required FISMA audits;
- o **Failed to detect a penetration test of its systems conducted by the IG during its FY2015 [Federal Information Modernization Security Act];**
- o **Received an "F" on the Committee's FITARA scorecard. [Federal Information Technology Acquisition Reform Act]**

At the **February 2, 2016** hearing,¹⁷ the Committee learned:

- o **The Department of Education's (ED) Chief Information Officer (CIO) Danny Harris received substantial bonuses despite poor performance in securing IT systems at the Agency and significant ethical lapses in judgment.**
- o Despite the IG's evidence to the contrary, Acting Secretary King asserted that Mr. Harris did not violate any law, regulation, policy, or standard of ethical conduct.
- o Mr. Harris testified his home theatre installation and car detailing activities were "hobbies" and not businesses. The IG testified that these activities qualified as businesses.
- o **It was in excess of two years before ED responded to the IG's initial report of findings and referral for administrative action.**
- o The Department of Justice (DOJ) declined to prosecute the IG's criminal referral and deferred to ED leadership for action. Acting Sec. King deemed verbal counseling and a three page ethics guidance letter as appropriate consequences.

Does anyone really want psychosocial research and assessment results housed in the US Department of Education under these circumstances?

Perhaps most disturbing is the appearance of arrogant dismissal of citizens' privacy concerns by in this discussion during this Commission's meeting that occurred on December 13, 2016.¹⁸

A question asked by Commission member Bruce Meyer¹⁹ to witness Ron Jarmin of the Census Bureau starting at 1:26:47:

"Let me try and ask what I think is a very difficult question, and I don't expect you to be able to answer it, but maybe we can start a conversation that could be useful to us. So, I see Census as having made a lot of steps to move in the kinds of directions that are suggested or anticipated by the Commission bill, in that you are working to bring data from other agencies or you have, into the RDCs — you've broadened their mission and you are bringing together data from many agencies and **allowing researchers in and outside of government to access the data that you've brought together. What are the ways that you could expand those efforts? Um, and I'm not suggesting that we talk about a single statistical agency across government, but how could there be more of a coordination or maybe a virtual one statistical agency** where *Census is playing a coordinating role*, or what kinds of movements in that direction should we think about? What kinds of things have you thought about? What are the barriers to moving towards more coordination between the statistical agencies?"

The response at 1:28:54 from the Mr. Jarmin:

"...One of the biggest constraints that everybody involved in this sort of endeavor faces is the different rules that are attached to data that are sourced from different agencies or different levels of, you know, whether

¹⁷ <https://oversight.house.gov/hearing/u-s-department-of-education-investigation-of-the-cio/>

¹⁸ <https://www.youtube.com/watch?v=MXasJLAWgtc> as transcribed at <https://whatiscommoncore.wordpress.com/2016/12/13/feds-comment-on-childrens-privacy-ripping-the-band-aid-would-probably-not-fly/>

¹⁹ <https://www.cep.gov/commissioners/meyer.html>

it's federal or state... that if there was broad agreement in, that, you know, if there was one law that prosc- [sic – word not fully pronounced] had the confidentiality protections for broad classes of data, as opposed to, you know, here's **data with PII [personally identifiable information] on it that's collected from SSA, here's data with PII on it that's collected from the IRS; here's data with PII on it that's collected from a state**; versus from a statistical agency– if data with PII on it was treated the same, you know I think that would permit, you know, **organizations that were collecting PII-laden data for different purposes to make those data available more easily**. Now, that's probably a pretty heavy lift... to show people through examples like that, that there is not an explosion and the world keeps working, maybe even works better, um, **to do this in sort of baby steps showing by example, as opposed to trying to rip the Band-Aid off. I think ripping the band-aid would probably not fly."**

This attitude that all PII, no matter from where it comes, belongs to the federal agencies and corporate researchers, is extremely distasteful to American citizens,²⁰ especially for parents when it comes to womb-to-tomb education and health data about their children. This is especially true when one considers that this is advocated by the Census Bureau, whose only constitutional charge is to:

*Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers...The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.*²¹

We therefore strongly recommend the following for CEP and for Congress:

- 1. Retain the prohibition of a student unit-record system.**
- 2. Strongly consider a moratorium on further federal research until programs already shown to be ineffective and harmful are transformed or eliminated and until effective measures are actually implemented.**
- 3. Prohibit social emotional data-gathering and the use of data for predictive testing in the FERPA and Strengthening Education Through Research Act (SETRA) reauthorizations.**
- 4. Put in strict data-transparency language and update the data-security language per the recommendations of technical experts like Dr. Joel Reidenberg²² or Barmak Nassirian²³ in any FERPA reauthorization.**
- 5. Require third-party software and testing vendors to notify parents of what data is collected on students and how it is used.**
- 6. Find a way for students whose identity and privacy is compromised to be compensated, in addition to penalizing researchers or private vendors that breach data-security.**
- 7. Close the curriculum and assessment loophole for invasive surveys in the Protection of Pupil Rights Amendment.²⁴**
- 8. Demand that the US Department of Education immediately repair the federal data-security failures found in the Inspector General's recent report and uncovered by the House Oversight Committee.**

²⁰ <http://thepulse2016.com/karen-r-effrem/2016/06/22/memo-to-big-data-parents-are-not-fearful-they-are-furious-about-data-mining/>

²¹ U.S. Constitution, Article 1 Section 3 Clause 1

²² http://edworkforce.house.gov/uploadedfiles/reidenberg_testimony_final.pdf

²³ <http://www.studentprivacymatters.org/barmak-nassirian-is-the-student-right-to-know-bill-worth-the-risk-to-privacy/>

²⁴ <http://edlibertywatch.org/wp-content/uploads/2015/02/Common-Core-FERPA-and-ESRA-Update-for-Senate.pdf>