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Reply to: Virginia

February 29, 2016

**Via Email Only – office@educationlibertywatch.org**

Dr. Karen Effrem  
Education Liberty Watch  
9601 Annapolis Lane North  
Maple Grove, MN  
55369

RE: Proposed National Education Assessment Plan and student/parental rights

Dear Dr. Effrem:

Liberty Counsel is an international legal, media and policy organization with an emphasis on religious liberties protected by the First Amendment. With offices in Washington, D.C., as well as Florida and Virginia, Liberty Counsel has numerous constituents across the nation. Liberty Counsel advocates on behalf of parents' rights to raise their children consistent with their religious beliefs, and views overreaching government actions with concern.

In light of this, I write regarding recent proposals by the National Assessment Governing Board ("NAEGB"), the authority over the National Assessment of Educational Progress ("NAEP" aka "the Nation's Report Card"), which intends to begin assessing "noncognitive" education factors, maintaining extensive student data in pursuit of the evergreen rationale of "improving education." While the proffered goals of any program are always laudable (for their proponents), the questions on the assessments, and the retention and dissemination of the data collected raise significant privacy concerns for students and parents, and appear to violate existing law about gathering such information.

The NAEP is expanding beyond academic content knowledge to include noncognitive, socioemotional parameters in the [background survey, which will include five core areas](#): "grit," "desire for learning," "school climate," "technology use," and "socioeconomic status." The first two factors focus on a student's noncognitive skills, and the third focuses on noncognitive factors in the school.

While “grit” and “desire for learning” appear to be benign terms on their face, other amorphous “mindsets” categories such as these have been used by activist educators in other surveys and material to reshape students’ moral and religious beliefs about controversial social issues such as “comprehensive sex education,” “gender roles” and the traditional family, and the normalization of homosexuality. The subject of “school climate” frequently arises relating to “anti-bullying,” which in turn is often a stand-in for the creation of additional “protected classes” such as “sexual orientation” and “gender identity,” again to undermine traditional values. Education Week reports that

These core areas [*“grit,” “desire for learning,” “school climate,” “technology use,” and “socioeconomic status”*] would currently be **part of the background survey for all NAEP** test-takers. In addition, questions about other noncognitive factors, such as self-efficacy and personal achievement goals, may be included on questionnaires for specific subjects to create content-area measures, according to Jonas P. Bertling, ETS director for NAEP survey questionnaires. (Emphasis added).<sup>1</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) (Emphasis added).

While educational overreach to “standardize the State’s children” is troubling in itself, if these proposed questions regarding “mindsets” are part of the actual test, they violate the federal statute governing the NAEP (currently known as the Education Sciences Reform Act – “ESRA”). The National Assessment of Educational Progress (NAEP), [20 USC §9622 \(b\)\(5\)\(A\)](#) authorizes assessments, but requires that they “**objectively** measure academic achievement, knowledge, and skills, and ensure that **any academic assessment authorized under this section be tests that do not evaluate or assess personal or family beliefs and attitudes or publicly disclose personally identifiable information.**” (Emphasis added). “Mindset” questions are inherently subjective, and leave a wide door for

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<sup>1</sup> <http://www.edweek.org/ew/articles/2015/06/03/nations-report-card-to-gather-data-on.html>

exploitation and collation of information about student beliefs and attitudes which the statute forbids. The federal government has not proven to be a trustworthy keeper of sensitive information which it intends to keep private; but revisions to federal regulations now allow wide loopholes for the sharing of student information. See, e.g., 34 C.F.R § 99.

If the proposed non-cognitive questions are part of a so-called “background survey,” then they appear to violate the Protection of Pupil Rights Amendment (“PPRA”), 20 USC §1232(h), which protects pupil rights by requiring all instructional materials to be made available for parental inspection, **prior to use**, including any “**supplementary material which will be used in connection with any survey, analysis, or evaluation as part of any applicable program.**” Liberty Counsel is aware of numerous instances where parents have been denied an opportunity to review surveys prior to educators requiring students to partake in them.

Moreover, non-cognitive questions, if dealing with issues touching religious and political belief, sexuality, sexual orientation, or gender identity, may particularly run afoul of various prohibitions contained in Section 1232h, which places “[l]imits on survey, analysis, or evaluations” whereby no “student shall be required, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information concerning:”

- (1) **political** affiliations or **beliefs** of the student or the student's parent;
- (2) **mental or psychological problems of the student or the student's family;**
- (3) sex behavior or **attitudes;**
- (4) illegal, **anti-social**, self-incriminating, or demeaning **behavior;**
- (5) critical appraisals of other individuals with whom respondents have close family relationships;
- (6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
- (7) **religious practices, affiliations, or beliefs** of the student or student's parent; (Emphasis added)

These potential privacy violations are not prohibited by the Family Educational Rights and Privacy Act (“FERPA”) as amended in 2012, because [34 C.F.R § 99.31](#) allows individual student data to be released without consent, to organizations and entities that have “legitimate educational interests,” as determined by the educational agency or institution. See 34 C.F.R § 99.31(a)(1)(i)(A).

The list of parties to whom disclosures of sensitive information may be made is quite long: “**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**” (See § 99.31(B)); “to authorized representatives of” “the **Secretary [of Education];**” or to “state and local educational authorities” and their designees (§ 99.31 3); or “to organizations conducting studies for, or on behalf of, educational agencies or institutions to “**develop, validate, or administer predictive**

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**tests;**" or to "improve instruction." See 34 C.F.R § 99.31 6(i)(A), (B), and (C). (Emphasis added).

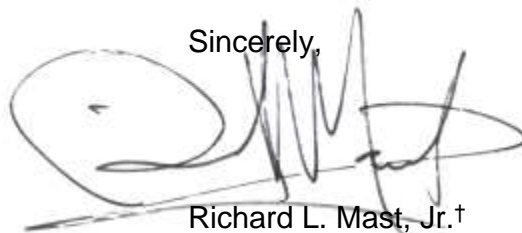
Finally, "nothing in the Act" "prevents a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section **from entering into agreements with organizations conducting studies** under paragraph (a)(6)(i) of this section and **redisclosing personally identifiable 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.)

Having reviewed the applicable statutes and regulations, your concern is well-founded, that the NAEP is poised to violate federal law by collecting extremely sensitive psychological/socioemotional data on children; to do so in a necessarily subjective manner; to expose the subject children to possible negative consequences in their later schooling and careers, to the extent that even supporters of such assessments are concerned; and to entrust that data to agencies that are no longer governed by serious privacy law and that have proven they cannot or will not keep personal student data secure.

These proposed changes constitute potential parental rights violations, and expose the children to a litany of harms in the present and in the future. Thus, any efforts to ask questions concerning mindsets and other socioemotional parameters and to collect that data via the NAEP should be halted immediately.

Should you have questions about any of the points contained in this letter, please don't hesitate to contact me at 407-875-1776.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard L. Mast, Jr.", written over a horizontal line.

Richard L. Mast, Jr.†

CC

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†Licensed in Virginia  
RLM/vab