



## Constitutional and Statutory Violations of Current State and Federally Mandated Student Assessment Program

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The Lee County School Board is under heavy pressure to rescind its historic vote<sup>1</sup> to opt the county out of all mandated state assessments. The public comments underscored the evidence that these tests are invasive, academically unhelpful, expensive, & needlessly stressful. The board members have been threatened by the heavy hand of the state and federal governments with all manner of sanctions for trying to stand up for their constituents and follow the constitution. Officials in Lee County and across the state of Florida frequently state that there is nothing that can be done to oppose the academically inferior, developmentally inappropriate, psychologically manipulative Common Core standards, tests and data collection system because “it is the law” and they “have taken an oath to uphold the Florida and U.S. Constitutions.” Yet, the question must be asked which laws and which parts of the Florida and US Constitutions are they going to follow? Based on the statutory constitutional provisions cited below, it is the state and federal mandates on these tests (and frankly the standards as well) that are illegal and unconstitutional.

### State Constitution

Article 9, Section 4b – **The school board shall operate, control and supervise all free public schools within the school district** and determine the rate of school district taxes within the limits prescribed herein. Two or more school districts may operate and finance joint educational programs. (Emphasis added).

COMMENT – This means that the districts controlled by parents who duly elect their school boards, and not the state or federal governments should be determining standards, curriculum, and testing. The Common Core standards, the testing regime, and the data collection violate this concept.

### State Statute

#### Circumstances for State Assessments

1008.22(3)(d)(1) - The Commissioner of Education shall establish and publish on the department’s website an implementation schedule to transition from the statewide, standardized Reading and Writing assessments to the ELA assessments and to the revised Mathematics assessments, including the Algebra I and Geometry EOC assessments. **The schedule must take into consideration funding, sufficient field and baseline data, access to assessments, instructional alignment, and school district readiness to administer the assessments online.** (Emphasis added)

COMMENT – There is not adequate funding for Lee County or any other county. Information was presented that between \$11.25 to \$20 million is spent on giving these state mandated tests. There is no field and baseline data for Florida because the tests were developed in Utah which has a very different and far less diverse student population than does Florida. No one knows if there is instructional alignment, because no one has seen the AIR test, and the districts are certainly not ready to administer the tests on line either academically or technologically. (See discussion of load testing below)

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<sup>1</sup> <http://www.flstopccoalition.org/news/2014-08/full-coverage-lee-county-school-board-takes-historic-vote-opt-out-common-core-testing.htm>

## Load testing

<sup>1</sup>Note to FS 1003.41—Section 6, ch. 2013-250, provides that “[f]ull implementation of online assessments for Next Generation Sunshine State Standards in English/language arts and mathematics adopted under s. 1003.41, Florida Statutes, for all kindergarten through grade 12 public school students shall occur only after the technology infrastructure, connectivity, and capacity of all public schools and school districts have been load tested and independently verified as ready for successful deployment and implementation.”

Note to FS. 1008.22.—Section 7, ch. 2013-250, provides that “[t]he technology infrastructure, connectivity, and capacity of all public schools and school districts that administer statewide standardized assessments pursuant to s. 1008.22, Florida Statutes, including online assessments, shall be load tested and independently verified as appropriate, adequate, efficient, and sustainable.”

COMMENT -This legislative requirement is nowhere near being fulfilled.

## Psychological Testing

There is clear evidence that the US Dept. Of Education, AIR, the National Association of State Boards of Education, and others have stated that part of the purpose of the Common Core standards and aligned assessments is to test psychological attitudes and attributes:

- “AIR is one of the world's largest behavioral and social science research and evaluation organizations.”<sup>2</sup>
- **“Various elements of SEL [social emotional learning] can be found in nearly every state’s K-12 standards framework and in the Common Core State Standards for the English Language Arts.”**<sup>3</sup>(Emphasis added.)
- “[A]s new assessment systems are developed to reflect the new 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.*”<sup>4</sup> (Emphasis added).
- “There are important opportunities to leverage new and emerging advances in technology (e.g., educational data mining, affective computing, online resources, tools for teachers) to develop unprecedented approaches for a wide range of students.”<sup>5</sup>
- The “affective computing” mentioned above, according to the same federal report, is to be accomplished using the devices in this picture:<sup>6</sup>

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<sup>2</sup> American Institutes for Research website: <http://www.air.org/about-us>

<sup>3</sup> National Association of State Boards of Education – *Social-Emotional Learning - From Practice to Policy*, October 2013 <http://www.nasbe.org/wp-content/uploads/FPP-Social-Emotional-Learning.pdf>

<sup>4</sup> U.S. Department of Education Office of Technology – *Promoting Grit, Tenacity, and Perseverance: Critical Factors for Success in the 21<sup>st</sup> Century* – February 2013 <http://www.ed.gov/edblogs/technology/files/2013/02/OET-Draft-Grit-Report-2-17-13.pdf>

<sup>5</sup> Ibid

EXHIBIT 11. Four parallel streams of affective sensors used while a student is engaged in Wayang Outpost, an online tutoring system



Source: Woolf, B., Bureson, W., Anaya, I., Dragon, T., Cooper, D., & Picard, R. (2008). Affect-aware tutors: Recognising and responding to student affect. *International Journal of Learning Technology*, 3(4), 129-164.

- An official for the ACT who is developing Common Core tests for other states in grades 3-10 such as those that have pulled out of PARCC and SBAC said, "There would be interest inventories for students, as well as **assessment of behavioral skills** for students and teachers to evaluate."<sup>7</sup> (Emphasis added)
- Psychological assessment and monitoring is also accomplished directly via Common Core aligned curriculum, such as in the Voices curriculum for third grade<sup>8</sup>:
  - "The Student Observation Form on Assessment Handbook page 11 is an informal assessment tool that notes **growth and change in individual students' behaviors and attitudes.**" (Emphasis added)
  - Under that rubric,<sup>9</sup> students are graded at various levels on whether they "Use first person plural voice (our) to **advocate ways to solve the problem.**" (Emphasis added)
- Activity 4.9 – Justice and Moral Reasoning contains a survey in the Common Core aligned SpringBoard curriculum<sup>10</sup> called "How Just Are You?" with items such as:
  - I should pay all my taxes because I could go to jail if I do not
  - people will think of me as a good citizen
  - my taxes along with those of others will help to pay for services used by all

Depending on whether students respond with a majority of "a," "b," or "c" responses they are forced to rate themselves as "pre-conventional," "conventional," and "post-conventional" based on psychologist Lawrence Kohlberg's Three Levels and Six Stages of Moral Reasoning. This is clearly a psychological test about which parents receive no notification and for which their consent is not asked.

<sup>6</sup> Ibid

<sup>7</sup> [http://blogs.edweek.org/edweek/college\\_bound/2012/07/act\\_plans\\_to\\_roll\\_out\\_career\\_and\\_college\\_readiness\\_tests\\_for\\_3rd-10th\\_grades.html](http://blogs.edweek.org/edweek/college_bound/2012/07/act_plans_to_roll_out_career_and_college_readiness_tests_for_3rd-10th_grades.html)

<sup>8</sup> Indoctrination in Common Core ELA Text, Third grade, Voices ELA Curriculum as quoted and filmed in You Tube video "Indoctrination in Common Core ELA Texts"

<http://www.youtube.com/watch?v=rGph7QHzmo8&feature=youtu.be>

<sup>9</sup> Ibid

<sup>10</sup> Quoted from Springboard English Textual Power Level 5 – 2011, The College Board, p. 256

This is a violation of Florida Statute 490.002, which says, “The Legislature further finds that, since such psychological services assist the public primarily with emotional survival, which in turn affects physical and psychophysical survival, the practice of psychology and school psychology by unqualified persons presents a danger to public health, safety, and welfare.” This kind of psychological teaching and testing by testing companies who are forcing our schools and teachers, who are untrained and unlicensed, in psychology, is extremely concerning, if not dangerous and illegal.

### **Federal Constitutional Violations:**

#### Tenth Amendment

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

COMMENT – The lawsuit filed by Governor Bobby Jindal against Secretary Duncan and the US Department of Education<sup>11</sup> says the following:

The sovereignty of the States is assured by the Tenth Amendment to the Constitution of the United States, which reserves to the States all “powers not delegated to the United States by the Constitution.” U.S. Const. amend X. “State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’” *New York v. United States*, 505 U.S. 144, 181 (1992) (internal citations omitted)

The Constitution makes no provision for federal power in setting education policy. Thus, as acknowledged by the Department, “the federal role in education is limited. Because of the Tenth Amendment, most education policy is decided at the state and local levels.” U.S. Dept. of Education, Policy Overview, <http://www2.ed.gov/policy/landing.jhtm>

The entire US Department of Education, No Child Left Behind, conditional waivers, Race to the Top with its incentivizing Common Core standards and tests are all in violation of this amendment.

#### Fourth Amendment

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

COMMENT: - The data and psychological profiling by the government schools of students, families, and teachers violates this amendment.

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<sup>11</sup> <http://caffeinatedthoughts.com/2014/08/bobby-jindal-sues-u-s-dept-education-common-core/>

## Federal Statutory Violations

As delineated by the recently filed federal lawsuit, Bobby Jindal, Governor of the state of Louisiana vs. the US Department of Education and Secretary Arne Duncan, Chairman John Kline of the US House Education and Workforce Committee, and many others, the tests required as part of the Race to the Top Program and the No Child Left Behind waivers violate at least three federal laws:

### The General Education Provisions Act of 1965

No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system . . .”<sup>12</sup>

### The Elementary and Secondary Education Act

“Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.”<sup>13</sup>

### The Department of Education Organization Act (DEOA)

“The DEOA likewise prohibits the construction of any ‘provision of a program administered by the Secretary or by any other officer of the Department . . . to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.’”<sup>14</sup>

“It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the State and the local school systems and other instrumentalities of the States.”<sup>15</sup>

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<sup>12</sup> 20 U.S.C. § 1232a

<sup>13</sup> 20 U.S.C. § 7907(a)

<sup>14</sup> 20 U.S.C. § 3403(b) as quoted in Jindal vs US DOE

<sup>15</sup> 20 U.S.C. § 3403(a)

## Issues with the No Child Left Behind Waivers

“In 2011, the department began issuing waivers to states regarding specific requirements of the No Child Left Behind Act, and to date, 42 states and the District of Columbia have received ESEA waivers. In order to receive waivers, these states were required to comply with a new set of requirements, not authorized by Congress, related to standards and assessments, school accountability, and teacher and principal evaluation systems...However, Congress has little information about how the department utilizes the data required of these and other states to grant, deny, renew, or revoke a state waiver...Additionally, Congress has little insight into how states are impacted by the time and cost associated with applying for and implementing these waiver requirements....Finally, the department has recently altered various requirements for certain states regarding implementation timelines for teacher and principal evaluation systems. At the same time, other states have had their waivers put on ‘high risk’ status, and Washington recently had its waiver revoked, over issues related to teacher and principal evaluation systems. The department has provided no justifications for these seemingly contradictory decisions.”<sup>16</sup>

COMMENT – The Obama administration just sanctioned Oklahoma, stripping it of control of \$23 million in education funds for daring to repeal Common Core in their state,<sup>17</sup> saying that “because the state could no longer demonstrate that its school standards were preparing students for college and careers.” This absurd notion is based on the illegal and unconstitutional waivers for NCLB containing conditions that are not in law requiring “college and career ready standards.” However, even those waivers give two options:

**College- and Career-Ready Standards:** “College- and career-ready standards” are content standards for kindergarten through 12<sup>th</sup> grade that build towards college and career readiness by the time of high school graduation. A State’s college- and career-ready standards must be either (1) **standards that are common to a significant number of States**; or (2) standards that are approved by a **State network of institutions of higher education**, which must certify that students who meet the standards will not need remedial course work at the postsecondary level.

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<sup>16</sup> Excerpts from letter by Rep. John Kline & Senator Lamar Alexander to U.S. General Accounting Office

[http://edworkforce.house.gov/UploadedFiles/Kline\\_Alexander\\_GAO\\_ESEA\\_waivers\\_8\\_12\\_14.pdf](http://edworkforce.house.gov/UploadedFiles/Kline_Alexander_GAO_ESEA_waivers_8_12_14.pdf) as quoted from US House Education and Workforce Committee press release <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=390732>

<sup>17</sup> <http://www.timesunion.com/default/article/US-says-Oklahoma-schools-not-meeting-standards-5719024.php>

Oklahoma's bill<sup>18</sup> provides for the second option, actually referencing the DOE's waiver language:

3.B.4. 4. Upon the effective date of this act, the State Board of Education shall seek certification from the State Regents for Higher Education that the subject matter standards for English Language Arts and Mathematics which were in place prior to the revisions adopted by the Board in June 2010 are college-and career-ready as defined in the Federal Elementary and Secondary Education Act (ESEA) Flexibility document issued by the United States Department of Education and referenced in Option B of Principle 1: College and Career-Ready Expectations for All Students. The State Regents shall provide the Board a detailed description of the certification process and results, including a list of deficiencies if the State Regents conclude that the standards are not college-and career-ready. The Board shall post all documents, materials, reports, descriptions and correspondence produced by the State Regents or used by the State Regents in the certification process on the website for the State Department of Education.

Secretary Duncan is not even following the rules of his own Department, much less the law or the Constitution.

**CONCLUSION:** It is the state of Florida and the federal government that are not following the law or our state or U.S. Constitutions. The Lee County School Board is well within its rights and much closer to the truth.

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<sup>18</sup>HB 3399 Enrolled version - [http://webserver1.lsb.state.ok.us/cf\\_pdf/2013-14%20ENR/hB/HB3399%20ENR.PDF](http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20ENR/hB/HB3399%20ENR.PDF)