TESTIMONY SUBMITTED TO THE

KENTUCKY SENATE EDUCATION COMMITTEE

IN CONSIDERATION OF SENATE BILL _____ (STUDENT PRIVACY ASPECTS)

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The bill before you, SB _____, is designed to reinstitute the protections on student and family data-privacy that existed before the changes in federal privacy law that occurred in 2012. It also would impose additional protections to ensure that students' personally identifiable information is safeguarded. I believe that both these goals are vitally important and, in fact, should meet with bipartisan agreement.

A particularly troubling aspect of the Common Core scheme is the emphasis on massive data-collection on students, and the sharing of that data for various purposes essentially unrelated to genuine education. U. S. Secretary of Education Arne Duncan has said:

> Hopefully, some day, we can track children from preschool to high school
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> and from high school to college and college to career . . . . We want to see
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> more states build comprehensive systems that track students from pre-K
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> through college and then link school data to workforce data. We want to know
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> know whether Johnny participated in an early learning program and then
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> completed college on time and whether those things have any bearing on
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> his earnings as an adult.[1]

To know all this, of course, we have to know pretty much everything Johnny does, throughout his lifetime.

The underlying philosophy has its roots in early-20th-century Progressivism. The Progressives believed that the modern world had become so much more complex than the world that existed at the time of the American founding, that the old principles of individual freedom and

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[1] Remarks of Arne Duncan to the Fourth Annual IES Research Conference, June 8, 2009, *available at* http://www2.ed.gov/news/speeches/2009/06/06082009.html.

limited government were no longer sufficient. In the modern world, experts would be needed to address increasingly complex challenges. Experts – armed with sweeping data on the citizenry – offer the best hope for societal progress.

An essential component of this "necessary" data is data that can be gleaned from the captive audience of public-school students (and maybe private and homeschooled as well). Progressive education reformers such as Marc Tucker, of the National Center on Education and the Economy, have long advocated the creation of massive student databases that can be used to track children from birth into the workforce. This is what Arne Duncan, quite openly, wants to do.

Now the problem here, from Duncan's point of view, is that a federal statute prohibits maintaining a national student database.[2] What to do? What the federal government has chosen to do – and this predates the Obama Administration – is to incentivize the states to build identical databases so that the data can be easily shared. We end up with a *de facto* national student database.

All this was done, of course, through the power of the federal purse. In 2002 the federal government began something called the Statewide Longitudinal Data System grant program to offer grants to states that agreed to build their student data systems according to federal dictates.[3] The most recent iterations of this grant program were the infamous Stimulus bill of 2009, which required the construction of particular data systems in exchange for money from the State Fiscal Stabilization Fund[4] (and under which Kentucky received a grant)[5] and then the Race to the Top program. A successful Race to the Top application required the state to adopt the Common Core Standards, to adopt an assessment aligned with Common Core, and to commit to expanding its student database.[6] This is what Kentucky, in its Race to the Top application, agreed to do.[7]

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[2] 20 U.S.C § 7911.

[3] 20 U.S.C. § 9501 *et seq.*

[4] U. S. Department of Education, "State Fiscal Stabilization Fund" (March 7, 2009), *available at* http://www2.ed.gov/policy/gen/leg/recovery/factsheet/stabilization-fund.html.

[5] U. S. Department of Education, "Kentucky to Receive More Than $175 Million in Additional Recovery Funds" (April 21, 2010), *available at* https://www.ed.gov/news/press-releases/kentucky-receive-more-175-million-additional-recovery-funds.

[6] U. S. Department of Education, "Race to the Top Program Executive Summary" (Nov. 2009), *available at* http://www2.ed.gov/programs/racetothetop/executive-summary.pdf.

[7] Application for Race to the Top Funding, Phase I (Kentucky), *available at* http://www2.ed.gov/programs/racetothetop/phase1-applications/kentucky.pdf.

What kinds of data are we talking about? The National Education Data Model includes over 400 data points, including health history, disciplinary history, family income range, voting status, religious affiliation, and on and on.[8]

Well, is this really connected with Common Core? Yes. The most direct connection is through the national assessments, PARCC and Smarter Balanced. Each of those consortia has signed a cooperative agreement with the U.S. Department of Education in which the Department is allowed access to all *student-level data* the consortium gets through the testing. This access is to be allowed "on an ongoing basis" for purposes including undefined "research."[9] Parents will not be allowed to object to this; indeed, they won't even know it is happening.

Even for those states that have had the good sense to opt out of the PARCC and Smarter Balanced assessments, the privacy threat remains. The U. S. Department of Education is becoming increasingly aggressive about demanding personally identifiable student data in conjunction with all sorts of federal grants, as can be attested by the states that are not in Common Core. And the federal government is encouraging widespread sharing of student data within states, such as with departments of labor, public health, corrections, etc.[10] The idea is that the State (upper case) should know everything there is to know about a student, so that he can be better directed toward his proper slot in the economic machine.

We are told not to worry about this, because any sharing of data will comply with the Family Educational Rights and Privacy Act (FERPA). But as of January 2012, FERPA has been gutted, and no longer protects our children's data from almost unlimited sharing.[11] Under the new regulatory interpretation, the U.S. Department of Education (USED) (and in fact state departments of education) may disclose personally identifiable student data to literally anyone in the world, as long as the disclosing agency uses the correct language to justify its action.[12]

Pursuant to this enthusiasm for sharing student data, where might that data end up? One illustrative example (and an obvious one, in this workforce-development model) is departments of labor. In fact, USED and the U. S. Department of Labor have a joint venture called the

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[8] National Education Data Model, National Center for Education Statistics, *available at* http://nces.ed.gov/forum/datamodel/.

[9] Cooperative Agreement Between the U. S. Department of Education and the Partnership for Assessment of Readiness for College and Careers (Jan. 7, 2011), *available at* http://www2.ed.gov/programs/racetothetop-assessment/parcc-cooperative-agreement.pdf; Cooperative Agreement Between the U. S. Department of Education and the SMARTER Balanced Assessment Consortium (Jan. 7, 2011), *available at* http://www2.ed.gov/programs/racetothetop-assessment/sbac-cooperative-agreement.pdf.

[10] *See* U. S. Department of Labor, "Workforce Data Quality Initiative," *available at* http://www.doleta.gov/performance/workforcedatagrant09.cfm; Race to the Top Executive Summary, *supra,* at p. 4.

[11] http://www.gpo.gov/fdsys/pkg/FR-2011-12-02/pdf/2011-30683.pdf

[12] Comments of American Association of Collegiate Registrars and Admissions Officers (May 23, 2011), *available at* http://www.nacua.org/documents/FERPA_AACRAOLetterMay2011.pdf.

Workforce Data Quality Initiative,[13] the purpose of which is "developing or improving state workforce data systems with individual-level information and enabling workforce data to be matched with education data." Student education data are to be shared, to the extent possible, with labor agencies to promote the goal of workforce development. Kentucky is participating in this program.[14]

Of course, under the new regulations that gutted federal student-privacy law, data can now be shared with literally any agency if the correct enabling language is used: the Department of Health and Human Services, Homeland Security . . . the IRS?

USED is supporting a plethora of other programs that encourage states to build ever bigger and ever more "useful" data systems on students. It's funding something called "Common Education Data Standards"[15] to help states develop a common vocabulary for their data – the better to enable interstate sharing. It's funding "Digital Passport,"[16] which will allow interstate sharing of data on students who move across state lines. It's funding the "Assessment Interoperability Framework" to "allow for the transfer of assessment-related data across applications within a district, between a district and a state agency, and across state lines."[17]

So although the federal government assures us it is not building a *de facto* national student database, *everything* it is doing in the area of technology is designed to allow for just that.

Both USED and state education officials further insist that privacy concerns are overblown, because student-level data will be anonymized. In the first place, this is simply not true – the data coming from the Common Core assessment consortia, and the workforce tracking data showing which students participated in which education programs and then earned which salaries, are necessarily student-specific.

In the second place, in the era of Big Data, there really is no such thing as anonymization. When there are multiple, perhaps hundreds, of items in the database, the absence of a name or a Social Security number becomes a mere inconvenience, not an obstacle to identifying the student.

There are many examples of data re-identification, including some from Kentucky schools. In Kentucky in 1999, a researcher was able to match over 2,300 students who appeared on

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[13] *See* fn. 12.
[14] *See* http://cte.ed.gov/docs/NSWG/SLDS_TA_and_WDQI_Partnership.pdf.
[15] Common Education Data Standards Initiative, *available at* http://commoneddatastandards.org/.
[16] Digital Promise, *available at* http://www.digitalpromise.org/about-us/.
[17] Common Education Data Standards, "Assessment Interoperability Framework," *available at* https://ceds.ed.gov/aif.aspx.

anonymized lists of test-takers – and the match had 100% accuracy.[18] And this was almost 15 years ago – long before education bureaucracies were collecting the myriad data they are now.

One scholar who has studied this problem has explained that "[u]tility and privacy [of data] are . . . two goals at war with one another. . . . [A]t least for useful databases, perfect anonymization is impossible."[19] And USED fully intends for student data to be enormously useful to the Progressive machine. Anonymization will be impossible.

Where are we headed with all this? It is instructive to look at what USED itself is working on and writing about.

One report that appeared on the Department's website last February is called *Promoting Grit, Tenacity, and Perseverance.* The thesis is that education must inculcate these qualities in students, and that their presence or absence must be measured in some way. How? The report suggests assessment of physiological reactions that a student exhibits to stimuli such as stress, anxiety, or frustration. These reactions could be measured through posture analysis, skin-conductance sensors, EEG brain-wave patterns, and eye-tracking.[20] And the report barely mentions the appalling invasion of privacy this kind of physiological measurement would entail; rather, it focuses on the "problem" that this isn't practical for the classroom – yet.[21]

The *Grit, Tenacity, and Perseverance* authors also drew a direct line to the Common Core Standards, noting that the math standards expressly require perseverance in struggling through problems.[22] If it is in the Standards, they reason, it must be measured.

Another USED report that came out around the same time focused on the enormous windfall of student data that will result from digital-learning technologies and digital assessment.[23] This report was authored primarily by Karen Cator, who now heads up another federal data-development project. The type of digital learning that the Cator report promotes is not simply an alternative means of accessing text or lectures. Rather, it's the type of computerized products that work by stimulus-response – the student sees something on the screen and has

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[18] Lauress Wise, "Impact of Exclusion Rates on NAEP 1994 to 1998 Grade 4 Reading Gains in Kentucky," Human Resources Research Organization (Sept. 27, 1999), *available at* http://nces.ed.gov/whatsnew/commissioner/remarks99/9_27_99pt2.asp.

[19] Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization,* 57 UCLA LAW REV. 1701, 1752 (2010).

[20] U. S. Department of Education, Office of Educational Technology, "Promoting Grit, Tenacity, and Perseverance: Critical Factors for Success in the 21st Century" (Feb. 2013), pp. 41-45, *available at* http://www.ed.gov/edblogs/technology/files/2013/02/OET-Draft-Grit-Report-2-17-13.pdf.

[21] *Id.* at p. 45.

[22] *Id.* at p. 6.

[23] U. S. Department of Education, Office of Educational Techonology, "Expanding Evidence Approaches for Learning in a Digital World" (Feb. 2013), *available at* http://www.ed.gov/edblogs/technology/files/2013/02/Expanding-Evidence-Approaches.pdf.

to choose a response, which leads to another prompt, and so on. Think Pavlov. This type of technological interplay generates enormous amounts of data on each student's behaviors and dispositions; the term for it is "data exhaust."

The Cator report urges that this data exhaust be used to develop individual profiles on students, that it be shared with various institutions and other stakeholders who may have an interest, and that it be used "for studying the noncognitive aspects of 21st-century skills, namely, interpersonal skills (such as communication, collaboration, and leadership) and intrapersonal skills (such as persistence and self-regulation)."[24] USED also emphasizes that the gathering of this "extremely fine-grained information" on students will help with the implementation of the Common Core Standards, which promote "deeper learning objectives" rather than acquisition of academic knowledge.

In October 2013, USED hosted a conference to explore the possibilities of implementing Common Core with the help of this intrusive digital learning. They called this conference "Datapalooza." The CEO of one educational technology company waxed enthusiastic about the future. He said, "We are collecting billions of records of data . . . pulling data from everywhere . . . tens of thousands of places." This data, he said, will help students develop the "21st-century skills" that the government has determined students will need.

And how are these "21st-century skills" being promoted in the classroom? Through Common Core. "Common Core," he said, "is the glue that ties everything together."[25]

I haven't even mentioned the ever-present problem of data-security. Hacking into student databases will occur, and in fact has already occurred. The wealth of data collected on students and their families is a hugely tempting target for people with malicious motives. But as serious as this problem is, the deeper problem is that the government has deemed our children little machines to be programmed, "human capital" to be exploited. Progressives have yearned to do this for at least 100 years – now they have the technology to do it. And the Common Core Standards, which diminish academic knowledge in favor of the "21st-century skills" that are developed and measured by this technology, are their passport to the Progressive future.

The legislation before you attempts to rein in at least the worst excesses of the data-collection and data-sharing machine. It is not perfect, and doesn't cover all the potential problems. For one thing, it relies too much on the no-longer-existent protections of FERPA, and it allows inter-agency data-sharing. But it's a worthy first step. Given the evisceration of federal student-

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[24] *Id.* at p. xii.
[25] "White House Hosts 'Datapalooza' Built on Common Core Tests," *available at* http://whatiscommoncore.wordpress.com/2013/03/20/white-house-hosts-datapalooza-built-on-common-core-tests/.

privacy law, it is critical that every state take steps such as this to prevent the "data free-for-all" that governments and private corporations are eager to exploit.