



Post Office Box 540774
Orlando, FL 32854-0774
Telephone: 407•875•1776
Facsimile: 407•875•0770
www.LC.org

122 C St. N.W., Ste. 360
Washington, DC 20005
Telephone: 202•289•1776
Facsimile: 202•216•9656

Post Office Box 11108
Lynchburg, VA 24506-1108
Telephone: 407•875•1776
Facsimile: 407•875•0770
liberty@LC.org

Reply to: Virginia

June 27, 2016

Via Electronic Mail Only

The Honorable Senator Lamar Alexander
Chairman, Senate HELP Committee
455 Dirksen Office Building
Washington, D.C. 20510

The Honorable Senator Patty Murray,
Ranking Member,
Senate HELP Committee
154 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Rep. John Paul Kline,
Chairman,
House Education and Workforce
Committee
2439 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Rep. Robert C. Scott,
Ranking Member,
House Education and Workforce
Committee
1201 Longworth House Office Building
Washington, D.C. 20515

The Honorable Rep. Jason Chaffetz,
Chairman,
House Oversight and Government Reform
Committee
2462 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Rep. Elijah E. Cummings
Ranking Member,
House Oversight and Government Reform
Committee
2230 Rayburn House Office Building
Washington, D.C. 20515

RE: Proposed changes to National Assessment of Educational Progress and potential student/parental rights violations

Dear Senators and Representatives:

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, including those represented by the attached allied policy organizations. Liberty Counsel advocates on behalf of parents' rights to raise their children consistent with their religious beliefs.

In light of this, I write regarding recent proposals by the National Assessment Governing Board (“NAGB”), 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 and gender confusion (“transgender status” or “gender identity and expression”). 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 Vol. 34, Issue 32, Page 15 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).¹

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, **parents, not the state and its functionaries, are the ones possessed with the ultimate authority over the parents’ own children.**² The Court reaffirmed 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.

¹ <http://www.edweek.org/ew/articles/2015/06/03/nations-report-card-to-gather-data-on.html>, Published Online: June 2, 2015; Published in Print: June 3, 2015, as NAEP to Gather Data on Grit, Mindset

² Most recently in *Troxel v. Granville*, 530 U.S. 57 (2000).

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 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 nongovernmental 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 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.) See Title 34(A) §99.31(a)(6)(ii).

In light of the plain text of these statutes and regulations, Liberty Counsel finds these foregoing concerns (originally raised by one parent policy analyst) well-founded, as do the attached policy group representatives speaking on behalf of thousands of parents across the country: **1) the NAEP is poised to violate federal law by collecting extremely sensitive psychological/socioemotional data on children; 2) it will do so in a necessarily subjective manner; 3) it contains a substantial risk of exposing the subject children to possible negative consequences in their later schooling and employment careers, to the extent that even supporters of such assessments are concerned; and 4) it will entrust extremely sensitive 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.**

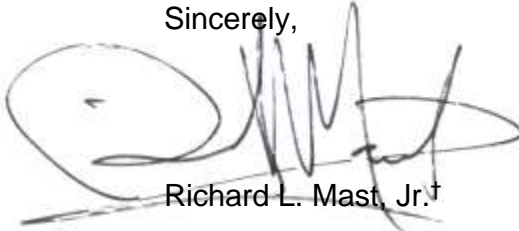
These proposed changes constitute potential parental rights violations, and expose the children to a litany of harms in the present and in the future. Thus, any efforts to ask questions concerning mindsets and other socioemotional parameters and to collect that data via the NAEP should be halted immediately.

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Liberty Counsel, and the signatories below, urge you to oppose these harms by voting against this overreaching expansion of the powers of the NAEP. 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

Members, House Oversight & Government Reform Committee

Rep. Addison Graves Wilson
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Rep. Duncan D. Hunter
Rep. Phil Roe
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Rep. Tim Walberg
Rep. Matt Salmon
Rep. Steven Brett Guthrie
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Rep. Jared Polis
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[†]Licensed in Virginia
RLM/vab

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Sen. Pat Roberts	

Organizations and Education Leaders Opposing the Assessment of Mindsets in the National Assessment of Educational Progress

NATIONAL ORGANIZATIONS AND EDUCATION ACTIVIST LEADERS

Dr. Karen Effrem, President – Education Liberty Watch
Emmett McGroarty, Director of Education and Jane Robbins, Senior Fellow - American Principles Project
Eunie Smith, Vice-President – Eagle Forum
Donna Garner, Education Policy Commentator – EdViews.org
Joy Pullman – The Heartland Institute, signing as an individual
Shane Vander Hart, Managing Editor - TruthinAmericanEducation.com & Founder - CaffeinatedThoughts.com
Sheri Few, President – US Parents Involved in Education
Alice Linahan, Vice-President – Women on the Wall

STATE ORGANIZATIONS

Alabama

Deborah Love, Executive Director - Eagle Forum of Alabama
Betty Peters – Alabama State School Board, as an individual

Alaska

Dr. Barbara Haney, President – Alaska Parents Involved in Education

Arkansas

Jennifer Helms, PhD, RN, President & Karen Lamoreaux, Board Member - Arkansans for Education Freedom
Grace Lewis, Founder - Arkansas Against Common Core

California

Darcy Brandon - Citizens for Quality Education
Sandy Torosian, President – California Parents Involved in Education
Cheryl Risch - National Day of Prayer Task Force, Fresno County
Darcy Brandon - Californians United Against Common Core
Joel Mottishaw - Amador County, School Board Trustee, as an individual
Mark L. Bennett - former college instructor, Pine Grove

Colorado

Anita Stapleton – Stop Common Core in Colorado
Deb Marks, State Director - Colorado Parents Involved in Education

Florida

Dr. Karen Effrem, Executive Director and Deb Herbage, Parent Advocate – The Florida Stop Common Core Coalition
Meredith Mears, Stacie Clark, Deborah Higgenbotham – Florida Parents RISE
Rick Stevens – Diplomat Wesleyan Church
Greg Harper, President – Inspired Learning Center, Inc.
Charlotte Greenburg – Independent Voices for Better Education
Rolando Perez, Founder & President, and the Directors – Bear Witness Central
John Nelson, Chairman and Robert Gilmore, Vice Chairman - The Highlands Tea Party
Heide Marvin Janshon – Common Core Discussion Group Florida
Laura Oosse McCrary and Megan Hendrix – United for Florida Children
Heide Marvin Janshon – Pasco Education Support Communities

Idaho

Stephanie Zimmerman – Idahoans for Local Control

Indiana

Erin Tuttle and Heather Crossin – Hoosiers Against Common Core

Kansas

Courtney Rankin, Lisa Huesers, and Rosy Schmidt – Kansans Against Common Core

Louisiana

Beth Meyers, Terri Timcke, Sara Wood – Stop Common Core in Louisiana

Massachusetts

Michael Gendre, President – Massachusetts Parents Involved in Education

Michigan

Deborah Debacker, Tamara Carlone, & Melanie Kurdys – Stop Common Core in Michigan, Inc.

Missouri

Dr. Mary Byrne, Ed.D, Anne Gassel and Gretchen Logue – Missouri Coalition Against Common Core

Montana

Debra Lamm - Montanans Against Common Core

Nebraska

Naomi Brummond, President and Kathy Wilmot, Vice-President – Nebraska Eagle Forum

Brenda Vosik – Nebraska Family Forum

New Jersey

Deb Yoa & Janice Lenox, Co-Presidents - New Jersey Parents Involved in Education

New York

Anne Lavallo - New York Grassroots Against the Common Core

Michelle Earle, President and Angela Nolan, Trevor & Heather Palmasano, Devin & Tara Fricano, Parent Advocates - New York Parents Involved in Education

Cathy Sapeta and Kathy Zebzda - New Yorkers United for Kids

Michelle Earle – Fingerlakes Against Common Core

Alphonsine Englerth, Founder - Flo's Advocacy for Better Education

Michelle Earle, President and William & Eleanor Moore, Grandparent Advocates – Fingerlakes Against Common Core

Alethea Marsh - Randolph NY Parents against Common Core

Elaine Coleman - Stop Common Core in Yonkers, NY

Christine Tamke Barbara, Valerie DiCaprio, Patricia Villella - Stop Common Core in Long Island

Don Earle-Former Seneca Falls Town Supervisor and Parent Advocate

Michael Panessa - Parent Advocate

Denis Ian - Retired Teacher and Parent Advocate

North Carolina

Andrea Dillon – Stop Common Core North Carolina
Kim Fink, Public Education Chairman - Coastal Carolina Taxpayers Association
Lynne Taylor, Common Core Diva & President, North Carolina Parents Involved in Education

North Dakota

Stacey Castleman and Ida Frueh, President - North Dakota Parents Involved in Education

Ohio

Heidi Huber – Ohioans for Local Control
Mary Capella, Founder - Stop Common Core in Ohio

Oklahoma

Jenni White - Reclaim Oklahoma Parent Empowerment

Pennsylvania

Richard Felice, President – Pennsylvania Parents Involved in Education
Cheryl Boise, Founder - Pennsylvanians Restoring Education

Rhode Island

Laura Larrivee & Jean Lehane - Stop Common Core in RI
Jean Lehane - Collapse The Core, Portsmouth RI

South Dakota

Mary Scheel-Buysse, Co-Founder - South Dakotans Against Common Core
Brian Wieck, Hillary Wieck, Roger Russell II, Martha Masgai, Megan Tschetter - Refuse the Test South Dakota

Texas

Meg Bakich and Aubrey & Brian Flaherty, Co-founders Truth in Texas Education

Utah

Wendy Hart - Member, Alpine School District Board of Education, ASD2, as an individual
Gary Thompson, PsyD, Co-Founder - Early Life Child Psychology & Education Center, Inc.
Christel Lynne Swasey, Teacher – Freedom Project in Education

West Virginia

Angela Summers and Laura Kimble – West Virginia Against Common Core
Fred Dailey and Dave Flinn - West Virginia Constitutional Advocates

Washington

J.R. Wilson – Stop Common Core in Washington State
Mike Leuzzi, President – Washington Parents Involved in Education

Wisconsin

Jeffrey Horn – Stop Common Core in Wisconsin
Jeffrey Horn – Resounding Books PAC