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October 12, 2012

Honorable Eric T. Schneiderman
Office of the Attorney General
The Capitol
Albany, New York 12224

Hon. Merryl H. Tisch, Chancellor
New York State Board of Regents
State Education Building
89 Washington Avenue
Albany, New York 12234

Dear Attorney General Schneiderman and Chancellor Tisch,

We write on behalf of the organizations Class Size Matters, ParentVoicesNY, and Change the Stakes, and Janice Bloom, Nancy Cauthen, Julie Cavanagh, Karen Sprowal, Tracy Piper of the Westchester-East Putnam PTA, and Patrick Sullivan, Manhattan Representative, NYC Board of Education, Panel for Educational Policy, to inform you that we believe the New York State Education Department (SED) has undertaken an unprecedented and troubling disclosure of school records that contain personally identifiable information (hereafter "student records") of the state's public school children. Moreover, we are deeply disturbed by the possibility that SED intends to allow such information to be used for commercial purposes.

Under the authority of the Family Educational and Privacy Rights Act of 1974 (FERPA),[i] the Department has entered into an agreement to disclose student records to a private entity, the Shared Learning Collaborative, LLC (hereafter designated as SLC), along with its agents and vendors.[ii] New FERPA rules published in 2011 significantly weakened the Act's privacy and disclosure protections, and allow for entities like SLC to become designated "education officials" and obtain student records. The new rules are being challenged in Federal Court as not in accordance with the law and in excess of the Federal Department of Education's statutory authority.[iii]

Despite two written requests by Ms. Leonie Haimson of Class Size Matters, the SED has not provided a copy of its agreement with SLC, nor otherwise publicly divulged its terms. The failure to disclose has raised concerns that SED contemplates a release of student records,

including for commercial purposes, and that its agreement otherwise fails to comply with FERPA. From SLC's mission statement we know that non-consensually disclosed records of school children in New York and other states will be codified in electronic databases, including Statewide and inter-operable, multi-State Longitudinal Data Systems (SLDS). As described by SLC, these systems are intended to create economies of scale in tracking and evaluating student performance and to aid in the development of learning tools for the educational and commercial marketplaces.[iv]

However laudable the goal of improving student performance, we strongly object on the following legal, ethical, and statutory grounds to SED's announced agreement to non-consensually disclose personally identifiable student records to SLC. Prior to any such disclosure, the agreement- including provisions that would allow the commercial use of student records- should undergo a full review by your office, particularly because FERPA does not appear to sanction the commercial use of student records.

Furthermore, we believe that SED's reported agreement with SLC:

- Will not conform to FERPA's requirements for non-consensual disclosure,[v] that it contradicts both the spirit and intent of settled Federal law protecting student records from disclosure,[vi] and that any such agreement must follow the guidance of the Federal courts in balancing privacy rights against a public interest.[vii]

- Must fully comply with SED's own published security standards to protect student records from misuse, loss, or harm, and with cyber-security guidelines established for all State agencies by New York statute.[viii]

- Must specify what is included within the definition of student records. The courts have held that such records may include virtually everything pertaining to a student's presence in the school environment. "Directory Information," the most limited type of student record, typically includes a child's name, address, social security number, physical characteristics, and academic performance. Broader permitted releases of student records under FERPA may include disciplinary, medical, and psychiatric records, and detailed facts about a student's friends and family.[ix]

- Should acknowledge that nothing in FERPA *requires* the SED to make wholesale disclosures of student records to SLC and its agents or to do so without adequate consent or privacy provisions.

- Should not allow the non-consensual disclosure of intimate facts about school children, families, and adult students. Denying children and their parents a right to consent is not socially or ethically neutral, and violates nearly a half-century of precedent. Traditionally and in law, parents have a right to shield a child's identity and intimate facts about that identity from unauthorized collection or exposure by private entities and the State.[x] It would be imprudent to violate these precedents in exchange for *promises* about untested, unspecified "learning tools" that may or may not be created, or, if they are, may not improve children educationally.

There is a clear potential for harm to individuals whose privacy is violated by the non-consensual disclosure of their student records to SLC and its agents. A principal risk is that even Directory Information can easily be used to aggregate other, non-disclosed records into detailed digital profiles of children and adult students. The SED can reduce this potential harm by narrowly limiting the contents of Directory Information as defined by FERPA and New York State law. In this regard, we request that the SED be required by your offices to explain why:

- The development of multi-state educational tools for millions of students should require SLC and its agents to know, among other intimate facts, the name, address, parentage, and physical characteristics of every school child in New York State
- The State's parents and children remain substantially uninformed about SED's use of these records, and the Department's decision to disclose them without their consent

In summary, we believe that SED has a fundamental responsibility to avoid harm to the privacy of school children and families. To achieve this, any agreement with SLC will require strong, explicit provisions for privacy and security. As noted above, student records include much more than anonymous attendance sheets or multiple choice exams. Their contents, once disclosed, can be readily employed to identify school children and adult students. For the SED to allow disclosures that place a child's privacy at risk would be wrong; to *authorize* such risks, irresponsible. In this respect we believe that the upbeat language accompanying SLC's announced agreement with the SED masks a profound disregard of established rights of privacy, personal autonomy, and due process.

Prior to allowing the SED to disclose student records to SLC or its agents, we request that your offices undertake a careful review of the Department's actions, its agreement with SLC, and the relationship between its contractual and statutory responsibilities. Furthermore, we strongly recommend that no student records be disclosed to SLC or its agents until the SED agrees to:

1. Publish its agreement with SLC in printed and electronic form, including a thorough explanation of its purpose and provisions, and make the agreement readily available to parents, individuals, and local school authorities state-wide;
2. Divulge the scope of the current and planned non-consensual disclosure of student records to SLC and its agents; reveal whether SLC and its agents, as designated "education officials," will be entitled to the disclosure of all student records as defined under FERPA and State law, or only to Directory Information; identify the specific facts to be included in Directory Information; and explain why they should be included and disclosed to SLC;
3. Designate a reasonable period of public comment in order to explain the basis and purpose of the agreement with SLC, including public hearings throughout the state to answer questions, obtain informed comment, and gauge public reaction;
4. Notify parents and individuals of the impending disclosure of student records; answer their questions about disclosure in a timely and specific way; and inform them of their right to consent prior to any disclosure;
5. Specify the nature of the "direct controls" required by FERPA prior to a non-consensual disclosure of student records; explain how SED's direct controls will be designed, tested, applied, and evaluated; and describe how compliance with them will be monitored;
6. Specify the security protections it has established for disclosure of student records to SLC and its agents; test their effectiveness prior to disclosing student records for use in SLC databases;

and establish procedures to, a. notify individuals or parents if a student's records have been improperly released or used; b. promptly explain what potential harm might result; c. identify the responsible parties;
7. Require SLC to, at a minimum, comply with SED's own published security standards for electronic records- including student records- and with cyber-security guidelines established for all State agencies by New York statute;
8. Define where families or individuals would turn for relief if harmed or potentially harmed by improper use or release of student records due to the agreement with SLC; what rights they would have to obtain that relief; how and where claims could be made; and under what circumstances the SED might be liable for harm caused by an improper use of student records by its designated officials;
9. Clarify that the Department has the statutory authority to disclose the student records of school children to contractors and vendors for commercial purposes; divulge if it has agreed to do so; and, if so, specify what provision of FERPA sanctions commercial uses of student records;
10. Prohibit any release of student records for commercial purposes until the Department's authority to do so has been established in law; and, if it lacks such authority, make that prohibition explicit in its agreement with SLC;
11. Ensure that SED's agreement with SLC fully complies with State law, FERPA, and the department's own rules for the protection of student records from improper disclosure and abuse.

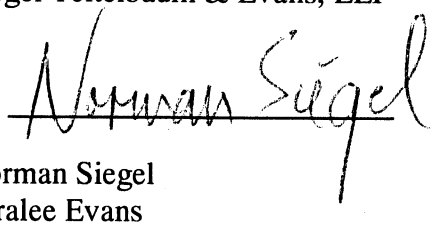
Finally, we respectfully request that your offices require the SED to:

- Fulfill its mandate to protect student records by placing the privacy interest of the children, families, and adult students in the New York State public schools above the interests of SLC and its agents;
- Cease non-consensual disclosure of all New York State public student records, including Directory Information, until your office finds the Department fully compliant with its ethical, security, and statutory responsibilities to protect such records.

Thank you.

We await your response.

Siegel Teitelbaum & Evans, LLP*

By 

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*We wish to acknowledge the assistance of Cal Snyder in the preparation of this letter.

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Hon. Meryl H. Tisch
Senator Charles E. Schumer
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NOTES

[i] The Family Educational and Privacy Rights Act (FERPA) (20 U.S.C. §1232g: 34 CFR Part 99) (1974). Known as the Buckley Amendment, the Act was created to protect P-16 school children and students in post-graduate studies from the non-consensual disclosure of personally identifiable information in school records (except in situations involving school discipline, law enforcement, or judicial proceedings). FERPA now allows State education authorities to designate a private entity like SLC as an "education official" for the purpose of disclosing to it student records without parental or individual consent. Furthermore, as an "education official," SLC is allowed to designate still other private sector contractors as "officials" and to re-disclose student records to them for "educational purposes" that remain vaguely defined at best.

[ii] SLC is a joint venture of the Gates Foundation and Wireless Generation LLC, a Brooklyn-based educational software developer owned by News Corporation and headed by former New York City Commissioner of Education Joel Klein. An earlier, no-bid $27 million contract between the SED and Wireless Generation was returned "unapproved" by Comptroller Di Napoli in August, 2011, "in light of the significant ongoing investigations and continuing revelations with respect to News Corporation...." The venture was promptly re-funded by the Gates Foundation using no public money, and approved by the State Board of Regents in December, 2011.

[iii] The changes to FERPA were strongly opposed by privacy advocates. See World Privacy Foundation (WPF) NPRM, RIN 1880-AA86, Docket ED-2011-OM-0002-0001 p 2; and the Center for Law and Information Policy (CLIP) NPRM dated May 23, 2011, RIN 1880-AA86, Docket ED-2011-OM-0002-0010 p 2. DE's rule changes are being challenged in Federal court by the Electronic Privacy Information Center (EPIC); see Epic v. US Department of Education, DC.D.C. No. 12-0037, filed Feb. 29, 2011.

[iv] See http://www.slcedu.org, and http://www.slcedu/technology/privacy-and-security According to the Gates Foundation FAQ about its participation in SLC, "...(the) open-license software, provisionally called the Shared Learning Infrastructure (SLI), will also support a large market for vendors of learning materials and application developers to deliver content and tools...;" and Gates Foundation spokesperson Vicki Phillips described SLC as "a new software program that would be like a huge app store...with the Netflix and Face book capabilities we love...."

[v] The agreement fails to comply with FERPA §34 CFR 99.31(a)(B)(*1*), which requires that the SED be capable of performing the "institutional function" that it delegates to a designated "education official" such as SLC. However, the SED cannot create the large, multi-state, interoperable Longitudinal Data System (LDS) and develop custom algorithms and products that utilize the data within it as SLC proposes to do. If SED employees were capable of performing these functions, there would be no need to partner with SLC. Similarly, the agreement fails the "direct control" requirement of §34 CFR 99.31(a)(B)(*2*). The design of SLC's multi-state, interoperable LDS requires that student records be removed from SED's "direct control." As normally defined, "direct" means "without intermediary," "hands-on," or "under the immediate auspices of"; "control" here refers to direct guidance and responsibility for student records. Once SLC re-purposes student records for use within its system, and re-discloses it to agents with their own systems at a fourth and fifth-remove from SED's oversight, the SED will be unable to exercise the required "direct control" over student records. Finally, under the requirement of §34 CFR 99.31(a)(B)(*3*), the SED is directed for compliance to the terms of section §99.33. This part allows the disclosure of student records "only on the condition that the party to whom the information is disclosed (SLC) will not disclose the information to any other party *without the prior consent of the parent or eligible student*" (§99.33(a)(1)) (italics ours). Its companion part, §99.33(b)(1), adds that (a)(1) "does not prevent an educational agency...from disclosing (student) records with the understanding that the party receiving the information (SLC) may make further disclosures...on behalf of the educational agency...;" note, however, that *nothing in this part says or implies* that those further disclosures can be made *without* consent. Finally, §99.33 also states that "...the disclosures (must) meet the requirements of §34 CFR 99.31." However, as shown above, SED's agreement does not meet the functionality and control provisions of §34 CFR 99.31, and thus fails to comply with FERPA's requirements for the non-consensual disclosure of student records.

[vi] The Privacy Act of 1974 (5 U.S.C. § 552a (Pub.L. 93-579, 88 Stat. 1896)) (1998); The Video Privacy Protection Act of 1988 (codified at 18 U.S.C. §2710 (2002)); The Fair Credit Reporting Act (FCRA), 15 U.S.C. §1681 (1970); The Children's Online Privacy Protection Act (COPPA) (15 U.S.C. §§6501-6506 (Pub. L. 105-277, 112 Stat. 2581-

728)) (1998) and The Children's Internet Protection Act (CIPA) (47 U.S.C. § 254(1)(B)) (2000) regulate web operators and online service providers who seek to obtain the personal information of children under 13 years of age, and require verifiable consent from a parent before collecting it. Enforcement actions by the FTC have levied large fines against violators; see U.S. v. Hershey Foods Corp., Civ. Action No. 4:03cv350 (M.D. Penn. 2003); and see FTC v. Echometrix, Inc. No. CV10-5516 (E.D.N.Y Nov. 30, 2010) (consent order), that stopped a commercial entity from obtaining and using children's personal information divulged by them during visits to a website.

[vii] See U.S. v. Westinghouse Corporation, C.A. Pa. 638F2d. 570 (1980), wherein the court ruled that a limited disclosure of individual medical histories was required to protect the public health. In balancing privacy rights against a compelling public interest, the court carefully weighed "the type of record (to be released), ...the information it does or might contain, ...the potential for harm in any subsequent nonconsensual disclosure, ...the adequacy of safeguards to prevent unauthorized disclosure, (and)...whether there is an express statutory mandate, articulated public policy, or recognizable public interest *militating* toward access" (italics ours)." And see Whalen v. Roe, 429 U.S. 589 (1977), in which the Court looked favorably on measures adopted by New York State to guard against unauthorized disclosure of personally identifiable information; those measures resemble SED's own security provisions for the protection of student records under its direct control; and see a related case, Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979), wherein security provisions for personal test scores were found inadequate.

[viii] These include SED requirements that student files be locked and accessible only by designated Department personnel, and that student records be encrypted and password protected for all electronic transfers. In addition, NYS Cyber Security Policy PO3-002 V3.4, revised July 30, 2010, pp.28-29 specifies requirements for system monitoring, audit logs, security standards, measures, threat assessments, testing, and compliance, among others. Also see NYS Technology Law Articles 2-§206 and §208, revised Sept. 16, 2011. Article 2 - §206 states: "a state agency may collect or disclose records if the information is used solely for statistical purposes and is in a form that cannot be used to identify any particular person." Article 2 - §208a defines the limits of "personal information." And see NYS General Business Law §899-aa, revised Sept. 18, 2011, regarding the notification requirements for improperly disclosed personal information. None of these stipulations have been published as part of SED's agreement with SLC.

[ix] Under FERPA (34 CFR §99.3) the broadest category of school records includes "any information recorded in any way, including but not limited to handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." In practice, all the information accumulated by a school about a student and their family is eligible for release, including: grades and evaluations, test and quiz scores; classroom activities; all written and spoken work such as student reports, theses, speeches, testimony, and interviews; theatrical and sports performances, celebrations, and all other extra-curricular activities; benefits, scholarships, awards, and financial aid; records of attendance; disciplinary and law enforcement proceedings; counseling and psychotherapeutic records, including session notes and findings; school employment history; health records, including records of mental and physical disability; and the identity of parents and care-givers. In effect, all aspects of a student's school and family life are defined as "school records," including parental status, and the personal histories, activities, State and Federal agency files, and financial records of parents and guardians. For precedents, see: Zaal v. Maryland, 326 Md. 54, 602 A.2d 1247 (1992); Belanger v. Nashua, N.H., Sch. Dist., 856 F. Supp. 40 (D.N.H. 1994); Connoisseur Communication of Flint v. University of Mich., 230 Mich. App. 732, 584 N.W.2d 647 (1998); John K. v. Board of Educ. for Sch. Dist. # 65, Cook County, 152 Ill. App. 3d 543, 504 N.E.2d 797 (1987); Falvo v. Owasso Independent School District, 233 F.3d 1203 (2000); Warner v. St. Bernard Parish Sch. Bd., 99 F. Supp. 2d 748, 749 (2000); D.T.H. v. University of N.C., 128 N.C. App. 534, 496 S.E.2d 8, 348 N.C. 496, 510 S.E.2d 381 (1998); U.S. v. Miami University, 91 F. Supp. 1132 (2000).

[x] See note vii, supra