

Background: Memo on the Shared Learning Collaborative LLC, designed to collect and provide student and teacher data to vendors and other third parties

Summary:

The Gates Foundation, in association with Wireless Generation, a subsidiary of Rupert Murdoch's News Corporation, recently formed a private LLC called the Shared Learning Collaborative. This LLC will collect confidential student and teacher data provided to them by states throughout the country, and in some form, share it with vendors and other commercial enterprises. The purpose of this project is at least in part to help vendors develop and market their educational products. NYS and NYC, along with school districts in Colorado, Illinois, Massachusetts, and North Carolina, have agreed to participate in Phase one of this project, starting in late 2012, with Delaware, Georgia, Kentucky and Louisiana participating in Phase II soon after.

This project provokes serious privacy concerns as to the security of this confidential information, and the lack of any parental consent in the decision to share it with the LLC. The concerns are intensified by the fact that News Corp has been charged with serious privacy violations, including phone and computer hacking and bribing of public officials in the UK. The NY Post, another subsidiary of News Corp, recently provoked controversy by publishing teacher data reports based on student test scores in its paper, and running inflammatory articles about teachers who received low scores.

There are also serious questions about the legality of this project. The US Dept. of Education has recently rewritten the regulations for FERPA, or the Family Educational Rights and Privacy Act, to allow more liberal sharing of student data, especially for research purposes. The new regulations went into effect in January of 2012. In response, the Electronic Privacy Information Center (EPIC) filed a lawsuit in February, claiming that the US DOE revised the regulations in a way that severely weakens student privacy protections, undermines parental rights, and violates the original language and intent of the law. Moreover, there appears to be nothing in the FERPA regulations, even as re-written, that would allow for student data to be shared and used for commercial purposes, as this project appears designed to achieve.

Background:

On May 5, 2011, [the NY State Education Department wrote a letter to the State Comptroller Di Napoli](#), asking him to approve a \$27 million no-bid contract with Wireless Generation, an educational technology company that built NYC's widely criticized student data system called ARIS, to build the state's student and teacher data system, required under the state's federal Race to the Top grant. The data system would be used for teacher evaluation, among other things.

On June 8, 2011, the [Daily News broke the story](#) of this proposed contract. Controversy ensued, primarily as a result of conflict of interest concerns.¹ Six months before, Wireless Generation had been bought by Rupert Murdoch's News Corporation, just days after Joel Klein

¹ In response to the news that the State Education Department intended to grant a no-bid contract to Wireless, Susan Lerner of Common Cause said "*It raises all kinds of red flags...It just smacks of an old-boys club, where large amounts of public money are spent based not on 'is this the best product?' but 'I know this guy and I like him and I want to be sure he makes a lot of money.'*"

announced he would resign from DOE to work at the company, heading up its new “educational” online division and “overseeing [investments in digital learning companies](#).”

Shortly thereafter, in early July 2011, News Corp was engulfed in a huge scandal, including allegations that its UK newspapers had engaged in phone hacking of celebrities, elected officials and crime victims, as well as bribing police to gain confidential information. Several advocacy groups, including Class Size Matters, the Working Families Party, and Think Progress, posted online petitions that garnered thousands of signatures, urging the Comptroller to veto the Wireless contract. In addition, several NY state legislators wrote letters to the State Comptroller in opposition to the awarding of the contract.

In their original letter to the State Comptroller, NYSED revealed that the Gates Foundation, "***in partnership with WGen ... [will] build a national non-proprietary data platform ... a Shared Learning Infrastructure ... that will integrate and store the instructional data of participating states/large cities.***"

On August 3, Vicki Phillips of the Gates Foundation [announced](#) the creation of an "amazing" new software program that would be like a "huge app store ... with the Netflix and Facebook capabilities we love the most."

Ms. Phillips also revealed that the “vendor” chosen to “build the open software that will allow states to access a shared, performance-driven marketplace ***of free and premium tools and content***” [emphasis mine] was Wireless Generation. (Note how she used the words “free” and “premium”, implying that some of the tools and content would cost money.) Though in this announcement, she claimed that the Foundation chose Wireless as their “vendor” just “a few weeks ago,” this claim conflicts with information in the NYSED letter, in which it was said that Wireless Generation had already been chosen by the Gates Foundation as far back as in May.)

In a [letter dated Aug. 25, 2011](#), NY State Comptroller Thomas DiNapoli informed the NYS Education Department that he was rejecting the contract with Wireless: "*in light of the significant ongoing investigations and continuing revelations with respect to News Corporation, we are returning the contract with Wireless Generation unapproved.*"

Yet four months later, in December, the NY Board of Regents approved NYSED’s sharing of student and teacher data with a new LLC, to be funded by the Gates Foundation and the Carnegie Foundation, called the [Shared Learning Collaborative LLC](#), as reported in an article the [Wall St Journal](#). The Gates Foundation [awarded \\$76.5 million](#) to this LLC, to be spent over seven months, with [\\$44 million](#) of this funding going to Wireless Generation, to design and operate the system.²

The NY State Education Department pushed forward this project, despite the NY State Comptroller’s earlier [veto](#), on the grounds that the state would not be paying any money to

² According to the WSJ article, “The New York State United Teachers... initially had strong concerns with Wireless’s involvement, urging the comptroller over the summer to cancel the contract. But in November, Randi Weingarten, president of the American Federation of Teachers, became an adviser to the project. “That leaves us in the position of monitoring the contract and monitoring the developments and watching and waiting,” NYSUT spokesman Carl Korn said. Mr. Korn said the union would monitor how the state uses the data.” New York officials said the data will help teachers figure out what’s working well on a classroom or with individual students.

participate, although [the Comptroller](#)-- and the [public as well](#)—had opposed this contract primarily because of privacy concerns and the involvement of Murdoch’s company.³

Here is an excerpt from a [Gates’ fact sheet](#) about this project:

“In addition to making instructional data more manageable and useful, this open-license technology, 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 that meet the Common Core State Standards and are interoperable with each other and the most popular student information systems.”

The Gates Foundation added that:

“Designing protections for student privacy will be addressed throughout the development of the system, and data access and usage models will be designed to support compliance with the Family Educational Rights and Privacy Act and other privacy laws,” without however any assurances of how this will be achieved.

In addition, the document said that “... As mentioned above, each state and school/district will retain sole ownership of its data. Only anonymous data will be used for SLC system development. **As in any system development project, a limited number of authorized vendors will need to access actual educational data for system operation and improvements.**” [emphasis added].

Presumably, these authorized vendors would include Wireless Generation, as the primary company involved in designing the system. The document also said that “the long-term governance model” of this national data base “is still in development.”⁴

More information has since been released on the LLC’s website. The “Pilot States” participating in Phase 1 of the pilot program, “with plans to deploy the system statewide in late 2012” include Colorado, Illinois, Massachusetts, New York and North Carolina.

“Pilot Districts” in Phase I include Jefferson County School District (CO), Unit 5 (Normal, Ill.), District 87 (Bloomington, Ill.), Everett (MA), the NYC Department of Education, and Guilford County Schools (NC).

³ Here is what [SED wrote](#) to explain their intent to share this confidential data, despite the State Comptroller’s refusal to authorize the original contract: *The cost of the development of the SLC will be the responsibility of the SLC, not New York State. Consistent with the Comptroller’s concerns regarding Wireless Generation, no New York State funds will be paid directly or indirectly to Wireless Generation or any of its subsidiaries for the development of these SLC services.*” However, more recently on the LLC website, it says the following: “States will bear some costs to integrate their existing data systems with the services and will choose their own contractors to perform this work. <http://goo.gl/65Hzk>

⁴ In Sept. 2011, in [a power point](#), presented to Software and Information Industry Association, the long-term governance of the LLC was said to be under the direction of McKinsey Partners and Stephanie Dua, former head of the NYC DOE’s Fund for Public Schools, who resigned in March 2011 to become a Partner at Student Achievement Partners, the consulting company hired by the Gates Foundation to design the Common Core standards. When Leonie Haimson of Class Size Matters emailed the secretary of the NYS Regents to ask for a copy of the agreement between NYSED and the LLC about the use of this student data and its protections, he responded on Feb. 5 that “A written agreement has not been finalized.”

The following states are participating in Phase 2 of the pilot program: Delaware, Georgia, Kentucky and Louisiana.

What will occur in the pilot districts? It is not clear. The LLC portrays itself as "building a set of shared technology services to "allow states and districts to connect student data and education materials that currently exist in different formats and locations, in order to integrate them effectively for educators, parents and students." Yet it also seems clear that the data system is being explicitly designed [for commercial purposes](#);

[The Shared Learning Collaborative](#) (SLC) is building a set of shared technology services that will make it easier for a wide range of content developers and publishers, regardless of location or size, to reach educators.... The Shared Learning Collaborative will offer educational publishers and content creators an opportunity to expand their customer base and differentiate their offerings in the marketplace.

What else will the project accomplish? It is quite possible that another possible use of this national database would allow for the sharing of teachers with low value-added student test scores, which could follow them and prevent their being hired, even if they moved out of district or out of state.

Issues of concern include protection of privacy, parental consent, and use for commercial purposes

What are the primary issues of concern for parents? First, there is the question of privacy. Should any non-governmental corporation be entrusted with such confidential information, especially since there are no specific privacy protections provided in any of the publicly available materials?⁵ Privacy concerns are exacerbated in this case by the involvement of News Corporation and its subsidiary, Wireless Gen, which is being allowed to collect this confidential data, and provide it to vendors, information which could easily be stolen, sold or misused.

As of April 2012, in connection with the investigations into the activities of the paper News of the World, owned by Murdoch's NewsCorp, at least thirty individuals, including journalists and police officers, have been arrested in the UK for phone-hacking celebrities, elected officials, and private individuals, as well as bribing police officers . On Feb. 7, 2012, [Reuters reported](#) that the FBI is "stepping up" its investigation as to whether NewsCorp may have violated the U.S. Foreign Corrupt Practices Act (FCPA), a law intended to curb payment of bribes by U.S. companies to foreign officials. If Newscorp is found guilty, it could be fined up to \$2 million, and the company, along with all its subsidiaries, barred from U.S. government contracts. On April

⁵ In addition, the Shared Learning Collaborative LLC website says: "Specific privacy and security obligations will be addressed through data sharing agreements between the SLC and an adopting organization before any education records are uploaded to the SLC technology by the adopting organization. While the SLC technology will provide the privacy and security functionality required by FERPA, it will remain the responsibility of each adopting organization to ensure that their deployment of the technology is compliant with FERPA and other applicable data privacy and security laws and regulations."

12, a [detective in the UK](#) filed a lawsuit against *The Times*, another paper owned by News Corp, for hacking into his email account.

More recently, in March, the NY Post, a NYC newspaper owned by News Corp, has faced considerable criticism in the US as the only paper to include in their printed newspapers teachers names along with their “teacher data reports”, based on student test score data, and pursuing teachers who received low scores to their homes and schools, essentially “staking” them out.⁶ News Corp has also been sued for breach of privacy that occurred when it owned My Space.⁷

Another important question is whether it is legal for states and districts to provide confidential student data to a third party, without asking the permission of their parents. FERPA has been recently rewritten to loosen the strings on this sort of data to make it available for “research” purposes, but commercial purposes appears to go beyond what is allowed. (See Appendix A).

Moreover, FERPA allows an educational agency or institution to redisclose information “**only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.**”

Yet there appears to be no allowance in this case for parents to be given the opportunity to provide or withhold their consent to have their children’s confidential information provided to the Gates LLC, Wireless Generation, or any other “vendor” or commercial enterprise that they in turn might share it with.

There is also the question of whether the US Department of Education’s recent rewriting of the FERPA regulations was lawful. On Feb. 8, 2012, the Electronic Privacy Information Center sued the US DOE in US District Court, alleging that the Dept. “exceeded its lawful authority in enacting the 2011 rules” by, among other things, redefining any external contractor as an “authorized representative” of a school, as well as broadening the meaning of “educational program.” The lawsuit argues that the new rules unlawfully permit student records to be provided to non-governmental agencies without obtaining parents’ written consent, expands the permissible purposes for which records can be accessed without parental notification, and fails to safeguard students from the risk of identification. The lawsuit also alleges that by expanding the definition of authorized representative, it unlawfully removes the legal duty for state and local educational facilities to protect private student data.

The lawsuit is posted here: <http://epic.org/apa/ferpa/EPIC-FERPA-Complaint.pdf>

⁶ In addition, Joel Klein, now head of NewsCorp’s educational division, encouraged the press to file FOILs for these data reports when he was Chancellor, although the DOE had pledged the UFT to fight to keep these reports private. In court papers, DOE also argued for the TDR releases.

⁷ Thom Weidlich, “News Corp.’s MySpace Settles Suit Claiming It Breached Users’ Data Privacy,” Bloomberg News, June 28, 2011.

Appendix A

33 FERPA's current regulations: CFR 99.31 and 99.33.

Contractor, consultant, volunteer whom the educational agency or institution has outsourced institutional services.

Such an entity can be considered a school official if it fulfills the following conditions:

- (1) Performs an institutional service or function for which the agency or institution would otherwise use employees;
- (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
- (3) Is subject to the requirements of §99.33(a) governing the use and redisclosure of personally identifiable information from education records.

[33 CFR 99.31(a)(1)(B)]

There is a requirement that school officials obtain access to only those records in which they have "legitimate educational interests."

Redisclosing

Under CFR 99.33, an educational agency or institution can redisclose information "only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student."

The person to whom the disclosure is made can only use the information for the purpose it was disclosed. They all must comply with the record keeping requirements of 33 CFR 99.32.

Educational agencies and institutions can also disclose pii to researchers. Here are those requirements: (also 33 CFR 99.31)

Researcher

Under 99.31, the educational agency can disclose personally identifiable information to organizations conducting studies for on or behalf of educational agencies or institutions under to:

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

- (A) Develop, validate, or administer predictive tests;
- (B) Administer student aid programs; or
- (C) Improve instruction.

(ii) Nothing in the Act or this part 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).

(iii) An educational agency or institution may disclose personally identifiable information under paragraph (a)(6)(i) of this section, and a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section may redisclose personally identifiable information under paragraph (a)(6)(i) and (a)(6)(ii) of this section, only if—

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization that have legitimate interests in the information;

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted; and

(C) The educational agency or institution or the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section enters into a written agreement with the organization that—

(1) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;

(2) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement;

(3) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the organization with legitimate interests;

and

(4) Requires the organization to destroy all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be destroyed.

(iv) An educational agency or institution or State or local educational authority or Federal agency headed by an official listed in paragraph (a)(3) of this section is not required to initiate a study or agree with or endorse the conclusions or results of the study.

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(v) For the purposes of paragraph (a)(6) of this section, the term *organization* includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

Appendix B:

In a [complaint filed Feb. 29](#) with the U.S. District Court for the District of Columbia, the Electronic Privacy Information Center and four of its individual board members allege that the DOE exceeded its lawful authority in enacting the 2011 rules.

Under federal law (the Administrative Procedure Act), an agency such as the DOE can exercise only the power that Congress has delegated it. If an agency adopts a rule contradicting instructions given by Congress, then the rule is void under the APA.

That, in essence, is what EPIC contends the Department did by attempting to loosen FERPA’s concept of who is an “authorized representative” of a school, to include not just school employees but also external regulators or contractors. Under FERPA, only an “authorized representative” can have access to confidential student information.

EPIC's lawsuit argues that the agency's December 2011 [regulations](#) amending the [Family Educational Rights and Privacy Act](#) exceed the agency's statutory authority, and are contrary to

law. In 2011, the Education Department [requested](#) public comments regarding the proposed changes. In response, EPIC submitted [extensive comments](#), addressing the student privacy risks and the agency's lack of legal authority to make changes to the privacy law without explicit Congressional intent.

The agency issued the revised regulations despite the fact that "numerous commenters . . . believe the Department lacks the statutory authority to promulgate the proposed regulations." EPIC is joined in the lawsuit by co-plaintiffs Grayson Barber, Pablo Molina, Peter G. Neumann, and Dr. Deborah Peel. The case is EPIC v. US Department of Education, No. 12-00327. For more information, see [EPIC: Student Privacy](#). (Feb. 29, 2012)

From EPIC: Department of Education Issues Unlawful Regulations that Harm Student Privacy: The Department of Education has released [final regulations](#) concerning the Family Educational Rights and Privacy Act (FERPA). These regulations exceed the agency's legal authority and expose students to new privacy risks.

The new rules permit educational institutions to release student records to non-governmental agencies without first obtaining parents' written consent. The new rules also broaden the permissible purposes for which third parties can access student records without first notifying parents. The agency rules also fail to appropriately safeguard students from the risk of re-identification. In response to the Department of Education's request for public comments, EPIC submitted [extensive comments](#) to the agency in May 2011, addressing the student privacy risks and the agency's lack of legal authority to make changes to FERPA without explicit Congressional intent. For more information, see [EPIC: Student Privacy](#). (Dec. 5, 2011)

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