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Mr. Richard J. Trautwein, Esq.
Counsel and Deputy Commissioner for Legal Affairs
The State Education Department
State Education Building
89 Washington Avenue
Albany, New York 12234

Dear Mr. Trautwein:

We write in response to your letter of October 24, 2012 addressing the involvement of the New York State Education Department (SED) with the Shared Learning Collaborative (SLC).

Rather than allaying our concerns, your letter and the MOU and Service Agreement with SLC (hereafter "the agreement") confirm that SED has improperly authorized the disclosure of the personally identifiable information (PII) of millions of New York State schoolchildren, an action accurately described in our letter as "wholesale" and "unprecedented." In addition, the agreement denies parents a reasonable right to know of and consent to that disclosure, permits the disclosure of PII for commercial purposes, relies on vague and inadequate security provisions, and appears to not comply with FERPA or New York State law.

1. Parental Consent. You write: "...we disagree that "consent" is mandated, and we endorse FERPA's recognition that under circumstances such as exist for the SLC project, in order to provide educational benefits...disclosure without individual parental consent is appropriate." However, even the recently relaxed provisions of FERPA make clear that an agreement to share data without consent must specify what particular study, audit, or evaluation is being undertaken, what PII is being shared, the duration of the undertaking, and when the destruction of the PII will occur (§34 CFR 99.31(a)(6)(iii)(C)). Nothing in the agreement meets these requirements. And we refer you again to §34 CFR 99.31(a)(B)(*1*) which requires that SED or the Districts be capable of performing the "function" delegated to SLC and its vendors, and that "direct control" be maintained over the PII that is disclosed for that function (§34 CFR 99.31(a)(B)(*2*). Part 99.31(a) also requires compliance with §34 CFR 99.33(a)(1), wherein there can be no re-disclosure "without the prior consent of the parent;" and with the Directory Information exception of §34 CFR 99.32(d)(4). Finally, §34 CFR 99.37(a) and (b) provide for an explicit right of parental consent and meaningful notification before any disclosure of PII in Directory Information. It appears that the agreement fails to comply with these and other FERPA provisions governing disclosure and parental consent.

In addition, your denial of a parental right to consent appears to be contradicted by the Gates Foundation itself. On October 26, 2012 Stacey Childress, the Foundation's Deputy Director of Education, recognized that parents would have a say in whether their children's records are disclosed, stating "Under federal law, school districts must manage and honor parent requests to opt out of programs that require the use of student data." There is nothing in FERPA that distinguishes the legal obligations of states and districts in protecting student privacy.

Above all, SED has a responsibility to protect the privacy interests of children and families. As we write, a major strengthening of restrictions on the disclosure and capture of child PII is currently underway at the Federal Trade Commission and other Federal agencies. These actions reflect a widespread recognition of the danger to child privacy when commercial entities obtain digitized child PII. SED should be in the forefront of the effort to restrict access to schoolchildren's PII, and not be involved in facilitating its disclosure.

2. Commercial Use. You deny that SED intends to allow student PII to be used for commercial purposes, citing the fact that SLC is a registered 501(c)(3) organization, and that it "is not building a platform for its own independent commercial enterprises." However, SED must be aware that one of SLC's primary functions is to act as a conduit for the re-disclosure of child PII to commercial vendors. We call your attention to the "webinars" being conducted by the Gates Foundation throughout the country- including New York City in March, 2012- to recruit tech companies and start-ups to create "learning tools" for the educational products marketplace. At a May 6, 2012 "Webinar," entitled "Opportunities in the Evolving EdTech Marketplace," Stephen Coller, Senior Program Officer of the Gates Foundation, described how SLC will facilitate access to this lucrative marketplace. It is, he said, "supported by 11 million students," offers "reduced barriers to entry" and "accelerated product development," and he identifies SLC's "key benefits" as expansion of "products and services," "geographic market expansion," and "access to a unified market" with "$2 billion of the $9 billion education market."

In addition, we direct you to page one of the SED/SLC MOU: "The Shared Learning Infrastructure (SLI) is intended to allow large and small for-profit and non-profit organizations to distribute an array of choices of curriculum, digital content, and tools." Using PII provided by SED to develop educational products for profit is *prima facie* commercial use. And in your letter you admit that the agreement is intended to allow SLC to make re-disclosures of PII to its vendors. We reiterate that such disclosures are not permitted under the provisions of FERPA or New York State law.

It should be repugnant to SED to enable commercial transactions of child PII, especially when SED has failed to make even a minimally reasonable effort to inform the parents whose children's PII is being disclosed. This violates both the spirit and intent of nearly a half-century of cultural norms and legal restrictions on the disclosure of the PII of children. As we noted in our letter of October 12, 2012, SED is taking these actions although the benefits of the SLC agreement remain purely hypothetical.

3. Data Security. We cite the following concerns:

A. On October 26, weeks after the agreement was signed, Stacey Childress of the Gates Foundation revealed on the SLC website that the Privacy and Information Security Policy was not yet finalized.[1] In addition, under the agreement, SLI is planning to use a "cloud service" to store PII. Among the many risks posed by cloud storage, the US Department of Education has held that "cloud services are an increasingly attractive target for hackers. Some clouds have experienced direct malicious attacks, potentially exposing any information stored there...." It adds that "detection and response can be more complicated in a cloud-based environment."[2]

B. The agreement includes no protocol for management of a data breach, and it requires only that the customer be informed. As we stipulated in our letter of October 12, the agreement must define where families or individuals would turn for relief if harmed or potentially harmed by improper use or release of student records; what rights they would have to obtain that relief; how and where claims could be made; and under what circumstances SED (and the Districts) would be liable for harm caused by improper disclosures by their "designated officials."

C. The agreement requires SED to protect confidential information from unauthorized disclosure according to a "reasonable standard of care." Yet this standard is left undefined, and the "care and measures" SED must employ are not stipulated (see Agreement, 10.2(a)). Vague language and standards for the protection of PII recur in Attachment E, item 6, of the agreement.

D. You assert that the agreement places "strict limitations" on access to student data. In fact, these limitations refer to District-level internal controls on local use, and only to interactions between the Districts or SED and the SLI data store. They do not cover disclosures by Districts to third-party vendors. The agreement makes Districts *explicitly responsible* for all uses and re-disclosures of PII by third parties developing applications for them (see Agreement, 3.2(b) and 7.1), and SLC is warranted to have no liability for "acts and omissions" (i.e. improper uses) of PII by such third parties (supra, 7.1). Once in the hands of such third-party vendors, and outside the direct control of local school authorities, the idea of "strict limitations" on access to or oversight of PII is a mirage. We refer you again to FERPA §34 CFR Part 99.31(a)(B)(2).

More disturbingly, the agreement does not require SLC to have "Third Party Authorized Users" comply with Data Privacy and Security Laws or FERPA (supra, 7.1). Although you assert that "SLC is responsible for the actions of its own vendors," the agreement states that SLC "does not warrant that...customer data are not susceptible to intrusion (or) attack...;" SED and the Districts are made wholly responsible for damages resulting from loss of data through fraudulent or other means (see Agreement, 11.3); SLC and its subcontractors are held harmless (see Agreement, 14.4).

E. The security provisions in the Data Privacy and Security Plan to which you directed us are in fact the internal security protocols of Wireless Generation, LLC, as outlined in Exhibit C, Part 4 of the MOU. They do not appear to apply to third party vendors in their agreements with local Districts, and it is profoundly unlikely that any District could implement or manage such

[1] http:///slcedu.org/blog/how-schools-use-data-power-personalized-learning-0
[2] http://www2.ed.gov/policy/gen/guid/ptac/pdf/cloud-computing.pdf

security protocols in its oversight of third-party vendors. Again, we refer you to §34 CFR Part 99.31(a)(B)(*1*) and (*2*).

F. You assert that the services provided by SLC and its vendors are "in compliance with law and with agreements that mandate appropriate confidentiality and security." However, the agreement does not include the security standards set forth in NYS Technology Law Articles 2-§206 and §208, revised Sept. 16, 2011. Article 2-§208 requires that all electronic transfers of student records be encrypted. And 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-§206 would prohibit the identification of any child through the disclosure of their PII by SED or by the Districts to SLC or to the vendors in the SLI ecosystem. These are minimum standards that State law requires SED to abide by.

G. Finally, the agreement lacks a defined audit procedure. Here Federal guidance is explicit: States should "maintain the right to audit: Make sure that you regularly review...standards and use of PII to ensure compliance with...the written agreement." However, the language of the agreement states only that SED *may* conduct an "independent...security review" every six months, or every three months if it believes SLC is not in compliance (see Agreement, 14.2(a)).

In light of these uncertainties, deficiencies, and risks, SED must cease all disclosure of PII under the agreement until SLC's security and audit policy has been completed, reviewed by independent security experts, is fully tested, and certified to meet the highest industry standards. In closing, we again ask that prior to any disclosure of PII you abide by the eleven points stipulated in our letter of October 12, 2012, and that the agreement specifically include:

1. A requirement for actual parental consent prior to disclosure of student PII
2. An explicit prohibition on the use of PII for commercial purposes
3. A precise definition of exactly what PII is being disclosed under the agreement, what is included in "directory information," what it will be used for, who will have access to it, and why
4. A complete explanation of who will be legally responsible for the unauthorized use of PII

Thank you.

Siegel Teitelbaum & Evans, LLP*

By Norman Siegel

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

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