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March 19, 2015

BEFORE THE SENATE COMMITTEE ON EDUCATION

THE NEVADA LEGISLATURE

TESTIMONY OF WILLIAM A. ESTRADA, ESQ.

HOME SCHOOL LEGAL DEFENSE ASSOCIATION

ON SB 228

SB 228 will ensure that the privacy and safety of the Personally Identifiable Information of school children in Nevada is protected.

The Family Educational Rights and Privacy Act of 1974 (FERPA), was intended by Congress to do two things: protect the Personally Identifiable Information (“PII”) of students, and allow parents to access their children’s education records. Unfortunately, the first intent, protecting the privacy of students, has been virtually eliminated through the actions of two Administrations, Republican and Democrat, in the last 7 years. As a result, the protections once established under FERPA have been virtually eliminated.

In 2008, the Department of Education under President George W. Bush quietly rewrote the regulations governing FERPA. These new regulations reinterpreted FERPA to allow states, school districts, and schools themselves to share Personally Identifiable Information from student records without parental notice or consent. Any third party or company designated by the school as a “school official,” including “contractors, consultants, volunteers, and other parties to whom an educational agency or institution has outsourced institutional services or functions it would otherwise use employees to perform” could receive this Personally Identifiable Information on students. This regulation was finalized at 73 FR 74806.

It gets worse. In 2011, the Department of Education under President Barack Obama also rewrote the regulations governing FERPA. These new regulations further allowed for the disclosure of Personally Identifiable Information, without parental consent, to any outside organizations for the purpose of conducting studies or audits of the effectiveness of an educational program. In addition, the new regulations allowed non-governmental actors to be defined as “authorized representatives” so that they could have access to students’ Personally Identifiable Data.

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Previously, “authorized representatives” were entities over which educational authorities had “direct control,” such as an employee or a contractor. Now, an authorized representative could be any individual or organization to whom a school district wanted to assign that term. Finally, the Obama Administration’s new regulations redefined “education programs” to encompass programs not only focused on improving academic outcomes, but also those related to behavioral improvements. The ACLU called this regulatory change a “significant new privacy invasion.” This regulation was finalized at 76 FR 75604.

As a result of these regulations, FERPA no longer protects the privacy and safety of student data. With the rise of longitudinal databases, which are databases that can track the same type of information on the same students at multiple points in time, and data sharing across school district and even state lines, the safety and privacy of our children are at risk.

SB 228 will fix this problem. By creating protections for Personally Identifiable Information of school children within the Nevada Code, by creating a privacy right for Personally Identifiable Information that belongs to that child, and by uncoupling data protection from a now weakened FERPA, SB 228 restores our school children’s safety and privacy.

I encourage the members of this committee to read the documentation that is attached to my testimony. You will read from organizations on the left and right warning about how the Department of Education’s 2008 and 2011 FERPA regulations would threaten student privacy. None of the concerns raised in these numerous letters were ever addressed by the Department of Education, which ignored the concerns and finalized the regulations.

These letters show why SB 228 is so important. The Nevada legislature has the opportunity to be a leader in our nation in the effort to protect our children from being used as profit generating data creators in the hands of big business and big government.

#### APPENDIX:

- i. Letter from the American Association of Collegiate Registrars and Admissions Officers, May 23, 2011
- ii. Letter from the Home School Legal Defense Association, May 17, 2011
- iii. Letter from the American Civil Liberties Union, May 23, 2011
- iv. Letter from the Electronic Privacy Information Center, May 23, 2011
- v. Letter from the National Association of Independent Colleges and Universities, May 19, 2011
- vi. Letter from the American Association of Collegiate Registrars and Admissions Officers, May 8, 2008
- vii. Letter from the World Privacy Forum, May 6, 2008