

THE RUTHERFORD INSTITUTE

Post Office Box 7482
Charlottesville, Virginia 22906-7482

JOHN W. WHITEHEAD
Founder and President

TELEPHONE 434 / 978 - 3888
FACSIMILE 434/ 978 - 1789
www.rutherford.org

April 28, 2011

Via E-mail and U.S. Mail

The Fitchburg School Committee
376 South Street
Fitchburg, MA 01420

Re: Highly Intrusive School Surveys and "Passive Consent"

Dear Committee Members:

The Rutherford Institute¹ has been contacted by Arlene Tessitore, whose seventh- and eighth-grade daughters attend Memorial Middle School in the City of Fitchburg. Ms. Tessitore advises us that on two separate occasions this year surveys asking overtly intimate and sexually suggestive questions were administered in her daughters' public school classes without her knowledge or consent.

On one occasion, both of Ms. Tessitore's daughters were required to complete the Youth Risk Behavior Survey (YRBS), which was administered in the school by LUK, Inc., a local social services agency. Thereafter, the eighth grader was asked to participate in the Youth Program Survey in her health class, which was administered by a representative of ProHealth who had been invited into the school. In neither case did Ms. Tessitore provide consent to these outside agencies prior to their seeking to administer these surveys to her daughters, even though parental consent is mandated by federal law. Moreover, it appears that the school mistakenly considers "passive consent" by a parent to be an acceptable substitute for active, written consent.

After reviewing Ms. Tessitore's complaint in its entirety, it is clear that school officials, in exposing students to inappropriate and highly intrusive questionnaires without their parents' knowledge or consent, have been complicit in evading the

¹ The Rutherford Institute is a civil liberties organization that provides free legal representation to those whose civil rights are threatened or infringed.

requirement of parental consent and violating the privacy rights of families with students in the Fitchburg schools. This unlawful practice must cease immediately.

The school district's policy and/or practice of allowing the administration of surveys or questionnaires designed to elicit personal information from students is a violation of the Protection of Pupil Rights Amendment (PPRA), a federal law intended to protect the privacy of students and the rights of parents such as Ms. Tessitore to control the circumstances under which their children are exploited for information-gathering. The PPRA, which covers educational entities that receive federal funds, applies whenever students are asked to submit to any survey, analysis or evaluation that seeks private information about the student, such as political affiliations, sexual activity, illegal activities, or religious beliefs. Whenever such a survey is administered in a covered school, the school must obtain the prior consent of the student (if the student is an adult or emancipated minor) or in the case of an unemancipated minor, the prior written consent of the parent.²

The YRBS is unquestionably a survey covered by the PPRA. It asks highly intrusive questions such as the student's contemplation of suicide ("Have you ever tried to kill yourself?"), drug use ("Have you ever sniffed glue, or breathed the contents of spray cans, or inhaled any paints?"), and sexual behaviors ("With how many people have you had sexual intercourse?"). Moreover, Ms. Tessitore was provided information showing that LUK Inc.'s administration of the YRBS was under a grant of federal money and was subject to the PPRA.³ Additionally, the Youth Program Survey asks true/false questions about a student's beliefs about contraception ("I feel comfortable talking with any partner I have about using a condom") and sexual activity ("I have had oral sex at some point in my life").

Despite the fact that these surveys are clearly within the purview of the PPRA's mandate of prior written parental consent, they were administered without the "written consent" of parents. In the case of the Youth Program Survey, no parental consent in any form was sought. With respect to the YRBS administered by LUK, Inc., consent was purportedly sought and obtained through the use of a "passive consent" form students were asked to present to their parents. The form provided that "[i]f you **do not** want your child to take part in this survey, please sign and return the form to your child's homeroom teacher[.]" Thus, parents were *presumed* to have consented to the administration of the YRBS if they *did not* return the form. But this kind of "passive consent" form does not satisfy the requirements of the PPRA. The federal law mandates that surveys be

² 20 U.S.C. § 1232h(b).

³ See "Breaking News: Fitchburg Public Schools receive grant to combat drug and alcohol use," available at http://fitchburgpride.our-hometown.com/news/2009-09-25/Front_page/00001.html.

administered to unemancipated students only if the “prior *written* consent of the parent” is obtained.

Under no reasonable construction of the PPRA can the fact that a form was not returned be considered affirmative written consent. There are any number of reasons why a form might not be returned, such as a forgetful student, the form getting lost in transmission, or the form not being distributed in the first place. Indeed, Ms. Tessitore tells us that after consulting with other students and parents, she concluded that one teacher did not pass out the passive consent form at all. These examples only underscore the need for written parental consent.

Additionally, while the YRBS was purportedly made optional for students, in practice it was mandated. According to Ms. Tessitore, her seventh-grade daughter, after attempting to be excused from the test and bringing the “voluntary” nature of it to the attention of the administrator, was told to sit down and take the survey. Her eighth-grade daughter similarly told the administrator that her mother would not approve of her taking the survey, but was handed the YRBS and told to take it up with the school counselor. Thus, it appears that not only were students coerced and intimidated into completing the survey but their reservations about a lack of parental knowledge or consent were ignored.

Equally disturbing is the fact that students are being exposed to these highly inappropriate questionnaires and individual and parental rights are being sabotaged, all in the alleged pursuit of government grant money. According to Ms. Tessitore, she was told by a representative of LUK, Inc., that the reason the “passive consent” system was adopted and why the method of obtaining consent would not be changed is that LUK needs a 98% participation rate in the YRBS in order to qualify for future government grants. Recognizing that the participation rate would be 30% or less if a system requiring actual written parental consent were employed, test administrators adopt the fiction that a failure to respond is tantamount to parental consent in order to achieve the numbers needed to qualify for grant funding for their activities.

No government official, whether it be a school official or a welfare agency, has the authority to usurp the rights of parents or the right of students to not be exposed to inappropriate, intrusive and sexually suggestive material. As set forth in the PPRA and as they exist under fundamental constitutional principles, these rights should certainly not be sacrificed in the quest, no matter how supposedly important, to mine students for information about their personal thoughts, beliefs or practices. Moreover, you should be aware that school districts that fail to voluntarily comply with the requirements of the PPRA risk a termination of assistance from the federal government.⁴

⁴ 20 U.S.C. § 1232h(e) and (f).

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At this time, by allowing these surveys to be administered to students without written parental consent, the Fitchburg Public Schools are acting in contravention to the rights of parents and the requirements of federal law. Thus, we urge you to immediately adopt and make public a policy that affirms the rights of parents and students and the school district's commitment to not subject any student to surveys seeking personal information unless their parents provide actual written consent.

In order to advise Ms. Tessitore about her legal rights in this matter, we must have a response to this letter by the close of business May 9, 2011.

Sincerely yours,



John W. Whitehead
President

cc: Francis G. Thomas, Principal, Memorial Middle School
Arlene Tessitore