

Rt Hon Justine Greening MP  
Secretary of State for Education  
Department for Education  
Sanctuary Buildings  
Great Smith Street  
London SW1P 3BT

December 10, 2017

Dear Secretary of State,

### **Alternative Provision (AP) Census Expansion 2018 and confidential pupil data**

We write to you regarding the new Department for Education collection of reasons for school children's transfer from mainstream education into Alternative Provision, and the Department's broader handling of pupils' personal confidential data, its extraction, and secondary purpose uses.

The next planned AP Census collection date on January 18, 2018.<sup>1</sup> Action to ensure safeguards, and communicate well to affected families, grows increasingly urgent. We ask for your consideration of nine recommendations towards better data policy and practice, to ensure:

- the data will be safe
- children's confidentiality will be respected
- children and parents will be told how data are used and retained

We appreciate and support the need to understand the reasons for pupil AP transfers, in particular concerns about children "managed out" from mainstream school to boost league table results.<sup>2</sup>

However, the children's data are added to a growing database of 23 million named records, the National Pupil Database. Each child's individual record is extensive, from age 2-19, and stored at national level. The pupil-level data are never deleted. Children are therefore labelled for life in the database, and the new descriptions will record a range of mental and physical health, pregnancy or young offender reasons for transfer. This adds to the sensitivity of data already collected on children with Special Educational Needs and Disability (SEND). Current policy exposes these already vulnerable children to safeguarding risks, as identifying data are shared with third-parties.

We are most concerned who has access to the National Pupil Database, and that their use is insecure and without oversight in their own locations. In addition to The Telegraph newspaper for example, over 1,000 releases of identifying individual pupil-level data include BBC Newsnight, The Times, and commercial companies like private tutoring group, Tutor Hunt, and Data consultancies. The Cabinet Office Troubled Families Programme, the National Citizen Service, and researchers, all use the data without any checks for errors by the children and parents, which may result in misleading findings and poor policy.

We are concerned about failings in this, and broadly in census expansion and uses, in three areas:

- **Confidentiality and Privacy:** because the data are sensitive, they are inappropriate for third party release as identifying raw data to journalists, commercial bodies and other third parties. No Privacy Impact Assessment was done— contrary to Cabinet Office guidelines.<sup>3</sup> It should be now.
- **Fairness:** children and parents are not informed that highly sensitive data are collected, stored and distributed to third parties forever, for secondary purposes, without consent. There is no method of checking the data for accuracy, and enabling the right of children to rectify errors.
- **Process:** a negative Statutory Instrument introduced without debate<sup>4</sup>, during the school and parliamentary summer holidays is inappropriate for the sensitivity of this pupil data expansion. Census expansion changes, new legislation, and the coming Data Exchange plans for less interventionist data collections, must improve, not reduce transparency, scrutiny or human oversight and accountability.

<sup>1</sup> AP Census Guide 2018 <https://www.gov.uk/government/publications/alternative-provision-census-2018-guide>

<sup>2</sup> Education Datalab report findings <https://educationdatalab.org.uk/2017/01/whos-left-the-main-findings/>

<sup>3</sup> Privacy impact assessment a government "mandatory minimum measure" since 2008. <https://ico.org.uk/media/for-organisations/documents/1042837/trilateral-report-executive-summary.pdf> a Parliamentary question shows the impact is vastly underestimated.

<sup>4</sup> The Statutory Instrument [link]The Education (Information About Children in Alternative Provision) (England) (Amendment) Regulations 2017 (807/2017) and its deficient Explanatory Memorandum <http://www.legislation.gov.uk/uksi/2017/807/contents/made>.

# Confidentiality and Privacy: Release to third-parties of pupil-level data

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## Recommendations:

1. Commit to starting a new model of distribution of data access through "safe settings" under research conditions, and to stop distribution of identifying data through other channels.
  2. SEN, all exclusion reasons, and the new AP transfer reasons, should only be available at individual pupil-level to external third-parties for secondary uses on a consent basis.
  3. Exclusion reasons such as abuse, theft, violence, akin to criminal records, and new AP transfer reasons, should be filtered from distribution for research purposes, and expunged after a standard time period, aligned with the timeframes of the Rehabilitation of Offenders Act 1974.
  4. A review of all data collected, to assess its continued necessity and proportionality including retention periods for all sensitive or identifying pupil data. This task is recommended by the ICO in preparation for General Data Protection Regulation and UK Data Protection Act 2018.
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Public interest researchers need to have public and professional trust in safe data use, with no surprises, to maintain a social license for research<sup>5</sup>. Current uses do not meet these expectations<sup>6</sup>.

Releases at national level to third parties are not anonymous, but identifiable at individual-level raw data.<sup>7</sup> Confidential highly sensitive information from the National Pupil Database, including special needs data (SEN) have been passed out since 2012 to commercial companies, charities, think tanks, newspaper and TV journalists without any small number suppression<sup>8</sup>. There is little transparency of the volume of access via ASP (EduBase) or other DfE routes to identifying data. Further, commercial and research third parties<sup>9</sup> keep copies of National Pupil Database extracts, linking it with their data<sup>10</sup>, storing and sharing data forever. This is high risk. Without any standard audit process, the Department relies on trust that recipients destroy data when they said they did.

The Department wrongly claims the change,<sup>11</sup> "*does not present any new privacy risks.*" Risks to both child safeguarding and data breach are significantly raised, through wide distribution.

In 2016 Lord Nash<sup>12</sup> agreed new nationality data were "too sensitive" to be added to the National Pupil Database. Yet the Department continues to release individual-level pupil data with indicators of Special Needs, in-care, service children and reasons for exclusion from mainstream school.

## Case Study:

In a 2013 DfE email<sup>13</sup> the Telegraph newspaper gives "cast iron assurances" not to compare the performance of individual teachers, or publish identifying data of any child, from the multiple years of Tier 2 'identifying and sensitive' pupil data they were given. In effect, the Department outsourced the management of children's privacy to ten journalists, of identifiable SEN, Free School Meals, ethnicity; attainment, school locator and more personal data for millions of children. Freedom of Information requests in 2015 show that the Telegraph had not confirmed it had destroyed the ca. 9 million children's data by the due date. How many exactly is unknown, as the volume of pupils included in distributed historic extracts is not kept. [PQ109113]

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<sup>5</sup> Carter, P., Laurie, G., Dixon-Woods, M. <http://jme.bmj.com/content/41/5/404> Why care.data ran into trouble (2014)

<sup>6</sup> ESRC Ipsos MORI: Public Dialogues on Data 2014 <https://adn.ac.uk/media/1245/sri-dialogue-on-data-2014.pdf>

<sup>7</sup> NPD User Guide see p 19 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/472700/NPD\\_user\\_guide.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472700/NPD_user_guide.pdf)

<sup>8</sup> FOI "The Daily Telegraph requested pupil-level data and so suppression was not applicable." [https://www.whatdotheyknow.com/request/pupil\\_data\\_sensitive\\_data\\_releas#comment-69968](https://www.whatdotheyknow.com/request/pupil_data_sensitive_data_releas#comment-69968)

<sup>9</sup> [https://educationendowmentfoundation.org.uk/public/files/Evaluation/Applying\\_for\\_NPD\\_Data/The\\_EEF\\_Data\\_Archive\\_-\\_advice\\_for\\_evaluators\\_\(including\\_consent\)\\_July\\_2017.pdf](https://educationendowmentfoundation.org.uk/public/files/Evaluation/Applying_for_NPD_Data/The_EEF_Data_Archive_-_advice_for_evaluators_(including_consent)_July_2017.pdf) "Fischer Family Trust is contracted to provide data management services to the EEF. FFT are the EEF's Data Processor and not a third party. EEF are the joint data controllers with the evaluator –both organisations determine the purposes for which and the manner in which any personal data are, or are to be, processed."

<sup>10</sup> "Matching with other datasets". The Telegraph made these identifying data even more revealing than they already are ( See page 10) <https://www.whatdotheyknow.com/request/293030/response/723407/attach/3/Daily%20Telegraph.pdf>

<sup>11</sup> Parliamentary question 108570 on lack of Privacy Impact Assessment for the AP expansion to national level.

<sup>12</sup> Schools Week Oct 28, 2016 <https://schoolsweek.co.uk/nationality-data-wont-be-included-in-national-pupil-database-says-minister/>

<sup>13</sup> DfE email on the Telegraph assurances <https://www.whatdotheyknow.com/request/293030/response/738135/attach/2/Annex.pdf>

## Fairness: Communication to pupils and parents

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### Recommendations:

5. All pupils past and present need to be informed of national data uses. Consider a national e-letter.
  6. Communications and Information Commissioner scrutiny must be built into any future process.
  7. Subject Access requests should be met, to show people what data are held, how their data are used, and enable rectification of mistakes to improve data quality and reduce intervention error rate.
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This AP change was approved by the same [Board](#) that signed off the [controversial](#) collection of country of birth and nationality data [added to the School Census last year](#). The Information Commissioner already [intervened very recently](#)<sup>14</sup>, when the guidance to parents about their rights to refuse and withdraw nationality data in that school census, was not made clear enough. We wish to avoid a repetition of that failing in this collection<sup>15</sup>, and in any future data expansions.

The AP [Census Guidance 2018](#) must tell schools and LAs explicitly how to inform parents and children about their rights in this sensitive data collection, who will use the data and for how long. There is a Data Protection requirement to give clear reasons to individuals about data use, in a manner understandable by children, when the information are collected. This does not happen.

Most children and parents are unaware named data are collected at national level. The same is true for the 15 million pupils who had left school pre-2012 when the law changed on releases<sup>16</sup>.

Children have a UNCRC right to be involved in decisions about them. The UNCRC, and the Human Rights Act 1998 also support children's fundamental right to privacy. The General Data Protection Regulation recognises children's personal data "merit special protections". Communications must take capacity as well as age-appropriate design into fair communications, and in a manner that is "easily understood by a child."

Your department has a duty to explain national data uses in full. It cannot rely on school administrators<sup>17</sup> knowing a website exists with templates, and interpretation of an obscure privacy notice. Its links are buried three clicks deep and don't say, 'your child's personal data are given to commercial companies and press'. The Department has placed the census collections on a statutory footing, but cannot ignore its obligations under Section 7 of the DPA. These are more demanding under the General Data Protection Regulation.

While you currently rely on S33 exemptions, school census data are now used for operational purposes, by the Home Office, as well as direct and covert behavioural research interventions<sup>18</sup>, and given to companies that use the data in product development.<sup>19</sup> This leaves the "research" reliance open to challenge. These data may carry lifelong stigma and implications for life chances when used inside and outside government for interventions, in particular by police, Home Office and Troubled Families, with high risks of negative effects on children and families if the data are inaccurate or misused.

Meanwhile, pupils and parents are refused<sup>20</sup> access to view or to correct their own records held by the Department although Subject Access is good standard practice and recommended by the ICO.<sup>21</sup>

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<sup>14</sup> Information Commissioner cracks down on pupil nationality data collection <https://schoolsweek.co.uk/information-commissioner-cracks-down-on-pupil-nationality-data-collection/>

<sup>15</sup> Parliamentary question 108574 there has been no consultation with parents or schools, from which the children transfer

<sup>16</sup> defenddigitalme summary of changes in pupil data legislation 2012-13 <http://defenddigitalme.com/call-to-review-relevant-legislation/>

<sup>17</sup> Parliamentary Question 108559 on AP census communication. This current process has not worked effectively since it began in 1996.

<sup>18</sup> p16 [http://38r8om2xjhh125mw24492dir.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/Evaluating-Youth-Social-Action\\_An-Interim-Report\\_0.pdf](http://38r8om2xjhh125mw24492dir.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/Evaluating-Youth-Social-Action_An-Interim-Report_0.pdf)

<sup>19</sup> Private tutoring website Tutor Hunt [http://defenddigitalme.com/wp-content/uploads/2017/05/Tutor\\_Hunt.pdf](http://defenddigitalme.com/wp-content/uploads/2017/05/Tutor_Hunt.pdf)

<sup>20</sup> PQ criteria for refusing current and former school pupils subject access requests for personal confidential data in the National Pupil Database 108573 18 October 2017

<sup>21</sup> ICO Subject Access Rights <https://ico.org.uk/for-organisations/guide-to-data-protection/principle-6-rights/subject-access-request/>

## Process: changes of law and policy without transparency and scrutiny

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### Recommendations:

8. Consultations on all future data expansions, to make plans open to transparent scrutiny.
  9. Privacy Impact Assessments must be standard practice for every expansion or change.
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We are concerned that your Department chooses not to do any Privacy Impact Assessment, which is astonishing given the sensitivity and risk of the data. You should be able to evidence that the collection meets a three-step test: *“that the interest is legitimate, that the processing is necessary (there is no less intrusive way to achieve the interest) and that the risk to individuals is less than the benefit to the organisation. Unless all three steps are satisfied, the processing can’t proceed”*.<sup>22</sup>

The scrutiny by the Star Chamber Board is clearly inadequate for decisions on privacy and data protection compliance. And if not informed about data policy changes, as in the case of the Home Office use of school census<sup>23</sup>, the members are prevented from assessing full risk implications of data expansions. The General Data Protection Regulation and UK Data Protection Act in 2018 will mean greater attention is needed than has been afforded to such decision making in the past.

A negative Statutory Instrument introduced without debate<sup>24</sup>, during school and parliamentary holidays fails to build public and professional trust in data expansion processes. Future changes, including the Data Exchange programme impacts on data collection for schools, parents and children, should be made after public consultation open to the education sector and children themselves.

An increase in the uses to which children’s data are put is an ever present risk without oversight. Rejected uses today<sup>25</sup>, may be accepted tomorrow. As researchers and applied uses continue to push the boundaries of reasonable expectations, the Department must not forget that the data are provided solely for the purpose of a child’s schooling. It is vital to restore parent and child involvement if new processes are to be trusted, and data collection is a safe foundation for future.

We call on you and your Department to respect and strengthen the digital wellbeing of children across England, to restore<sup>26</sup> public and professional trust in the school census handling, through a commitment to safe, privacy preserving solutions and transparent expansion decisions, :

- in the best interest of children and with respect to their rights under the UNCRC,
- to provide a stable basis for data collected in schools and classroom in practice,
- to underpin the use of quality education data in public interest research
- as a strong foundation for growth in the edTech market anticipated in the UK Digital Strategy<sup>27</sup>.

We ask for your support of these nine recommendations towards safe and transparent education data, and a step-change in data handling by the Department, suitable for 2018 and beyond.

**If the Department of Education cannot end the distribution of identifying data for indirect and commercial re-use purposes, and commit to children’s confidentiality; we believe the government should not collect the data at all.**

Thank you for your consideration, and we look forward to your view and next steps.

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<sup>22</sup> Andrew Cormack, Chief Regulatory Adviser at Jisc <http://edtechnology.co.uk/Article/the-gdpr-and-what-it-means-for-cyber-security>

<sup>23</sup> Star Chamber 2016 [http://defenddigitalme.com/wp-content/uploads/2017/10/Star-Chamber-Minutes-Extracts-from-Jan-2015-to-July-2016\\_Redacted.pdf](http://defenddigitalme.com/wp-content/uploads/2017/10/Star-Chamber-Minutes-Extracts-from-Jan-2015-to-July-2016_Redacted.pdf)

<sup>24</sup> The Statutory Instrument [link]The Education (Information About Children in Alternative Provision) (England) (Amendment) Regulations 2017 (807/2017) and its deficient Explanatory Memorandum .

<sup>25</sup> Including research “to help police forces in this country predict day-to-day changes in adolescent crime, and in turn will provide insights on the potential impacts of policy initiatives”, UCL research data request, Jan-May 2017 third party register <https://www.gov.uk/government/publications/national-pupil-database-requests-received>

<sup>26</sup> Parents boycott school census nationality collection <http://news.sky.com/story/school-census-boycott-over-child-deportation-fear-11067557>

<sup>27</sup> UK Digital Strategy <https://www.gov.uk/government/publications/uk-digital-strategy>

Sincerely,

**Alliance for Inclusive Education (ALLFIE)**

**Biometrics in Schools**

**The Campaign for State Education (CASE)**

**John Carr OBE, Secretary, Children's Charities' Coalition on Internet Safety (CHIS)**

**defenddigitalme**

**Driver Youth Trust**

**Dr Pam Jarvis, Chartered Psychologist, social media researcher, teacher and grandparent**

**Dr. Ansgar Koene, Senior Research Fellow: UnBias, CaSMA & Horizon Policy Impact**

**Professor Sonia Livingstone OBE, London School of Economics and Political Science**

**medConfidential**

**Royal Mencap Society**

**Professor Berry Mayall, Professor of Childhood Studies, UCL**

**The National Education Union (NUT section)**

**The Parents Union**

**Parent Zone**

**Rescue our Schools**

**Joseph Savirimuthu, Senior Lecturer in Law at the School of Law and Social Justice, University of Liverpool**

**Teenage Pregnancy Knowledge Exchange**

**Trailblazers (Mentoring Young Offenders)**