

BY ELECTRONIC MAIL

Interim Commissioner Shannon Tahoe  
New York State Education Department  
89 Washington Avenue  
Albany, NY 12234

May 4, 2020

Dear Interim Commissioner Tahoe:

We write today to share our serious and growing concerns about internet access and privacy protections for children participating in remote learning. The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a nonprofit, nonpartisan organization with eight chapters and regional offices and more than 200,000 members and supporters across the state. Our mission is to defend and promote the fundamental principles, rights and constitutional values embodied in the Bill of Rights of the U.S. Constitution and the Constitution of the State of New York.



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We have a long history of vigorously defending students' rights, including access to education and privacy rights. As a member of the Data Privacy Advisory Council established by the New York State Education Department ("NYSED"), and through our leading work to address concerns with regard to the use of face surveillance in New York schools, our commitment is that civil liberties are enhanced rather than compromised by technological innovation.

Over the past several weeks, the NYCLU has collected more than 500 survey responses from across the state regarding New Yorkers' experiences with remote learning during the ongoing COVID-19 crisis.<sup>1</sup> We write to you to share some of our findings and urge action to ensure: (1) that all students have equal access to the various technologies that make effective remote learning possible, and (2) that adequate and uniform privacy safeguards are in place to protect students when they are engaged in remote learning.

Unfortunately, our survey findings confirm what we expected: inequalities are exacerbated during times of crisis. Students from low income families, students of color, students with disabilities, English Language Learners, immigrant students, undocumented students, and students who lack permanent housing are disproportionately facing barriers to remote learning, such as lack of access to remote learning devices and the internet, insufficient transportation to pick up paper packets of school work, language barriers when navigating technology and remote learning instruction, the discontinuation of special education services, and more. Every day that these issues go unaddressed, students become more disconnected from their school communities and lose critical social and emotional support and academic instruction.

While New York State has risen to the urgent and unprecedented challenge of remote learning, it is vital that solutions – which may become long-term – are designed to meet these interconnected goals: providing every student access to a quality education while also protecting their privacy. As NYSED works swiftly to narrow the digital divide

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<sup>1</sup> Education & Related Services in New York State During the Coronavirus Outbreak, [https://www.papersurvey.io/s/n\\_y\\_c\\_l\\_u\\_education](https://www.papersurvey.io/s/n_y_c_l_u_education).

and ensure access to remote learning for every student, it must also ensure adherence to students' right to privacy.

### Inequitable Access to Technology

Remote learning is not sufficient unless all students have access to the tools they need to participate fully and equitably. School district plans for conducting remote learning must include:

- Computers or tablets, with built-in or external webcams and microphones, for every student in the household;
- Internet access that is fast and reliable enough for learning via remote video;
- Hardware and related capabilities needed for high-speed internet access;
- Free access to all necessary secure remote learning and communications platforms and applications, and reliable assistance with setting them up and troubleshooting;
- Assistive technology, including hardware (such as screen readers), software, and websites that comply with Web Content Accessibility Guidelines (WCAG) 2.0 Levels AA accessibility standards<sup>2</sup>, so students with disabilities can fully participate in remote learning; and
- For all of the above, providing plain language materials and content in the parent/guardian's native language so that families understand and are able to use the remote learning technology tools provided by schools and their education partners.

For students with disabilities, access to technology is a critical tool for districts to continue to fulfill obligations to provide a free appropriate public education ("FAPE")<sup>3</sup> and the mandates of individualized education programs ("IEP"). Technology like videoconferencing must be used to provide services and supports, including one-on-one support and curricular modifications, speech and language therapy, occupational and physical therapy, mental health services, and sign language interpreters. And it can and should be used to conduct remote meetings of IEP and 504 teams with parental participation.

Getting each child an appropriate remote learning device is an enormous task that necessitates making available existing state funds and pursuing support outside of the State's own resources. Schools across New York State distributed remote learning devices to families only to discover that families could not access the internet, did not have enough devices for all children in the home to access all of their instruction, or the tablets did not

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<sup>2</sup> 28 C.F.R. § 35.160. For more information on how to comply with WCAG 2.0 AA, see [https://www.w3.org/WAI/WCAG21/quickref/?currentsidebar=%23col\\_customize&versions=2.0](https://www.w3.org/WAI/WCAG21/quickref/?currentsidebar=%23col_customize&versions=2.0).

<sup>3</sup> The state's obligation to ensure that students with disabilities receive a FAPE, including through specialized services as required by IEP or 504 plans, is not suspended during the COVID-19 pandemic. See Department of Education, Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 2020), <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>.



have the capability to run remote learning platforms for general education and special education services.<sup>4</sup>

New York’s Smart Schools Bond Act provides a ready source of funding to use for remote learning solutions. NYSED, along with other members of the Smart Schools Review Board, should fast-track school district applications for funds to be used for remote learning technology equipment, including laptops, Wi-Fi hotspots and tablets.<sup>5</sup> In addition to state funds, the United States Department of Education (“USDOE”) is making nearly \$3 billion available in grants to help states “address student needs arising from the COVID-19 related disruption of the current academic year”<sup>6</sup> through its Governor’s Emergency Education Relief Fund.<sup>7</sup> The USDOE has also created a \$13.2 billion Elementary and Secondary School Emergency Relief Fund to provide “local educational agencies... with emergency relief funds to address the impact that COVID-19 has had, and continues to have, on elementary and secondary schools across the Nation.”<sup>8</sup> Grant funds like these should be vigorously pursued and used to help close the technology gaps.

With respect to private industry, NYSED should immediately call on computer hardware, software, Internet Service Providers (“ISP”), and EdTech companies to help provide the above-listed technologies to schools still in need of devices, for free or on loan, so they can be distributed to students in need.

In the case of services like internet access, those can and should be provided directly to students for free until the COVID-19 crisis subsides.<sup>9</sup> New York’s government must play a role in the provision of broadband services. Offers of free internet by private providers presented additional barriers to families who were initially denied this service due to outstanding fees owed.<sup>10</sup> Rural families have struggled with limited access to broadband, with students using school buses as hotspots.<sup>11</sup> And undocumented families



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<sup>4</sup> Alarming, some schools filed complaints with child welfare agencies alleging educational neglect, after there were delays in obtaining free devices or children failed to sign into online classes. Eileen Grench, *Parents Expecting iPad Deliveries Got Knock on Door From Child Welfare Workers*, The City, April 28, 2020, <https://thecity.nyc/2020/04/some-parents-awaiting-ipads-got-visit-from-child-welfare.html>.

<sup>5</sup> Smart Schools Bond Act Implementation Guidance, [http://www.p12.nysed.gov/mgtserv/documents/SSBAGuidancerev\\_10\\_24\\_18\\_Final.pdf](http://www.p12.nysed.gov/mgtserv/documents/SSBAGuidancerev_10_24_18_Final.pdf).

<sup>6</sup> Notice Announcing Availability of Funds and Deadline for the Governor’s Emergency Education Relief Fund (GEER Fund); Coronavirus Aid, Relief and Economic Security Act (CARES Act), <https://oese.ed.gov/files/2020/04/GEER-Notice-of-Funds-1.pdf>.

<sup>7</sup> Governor’s Emergency Education Relief Fund, <https://oese.ed.gov/offices/education-stabilization-fund/governors-emergency-education-relief-fund/>.

<sup>8</sup> Elementary and Secondary School Emergency Relief Fund, <https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/>.

<sup>9</sup> Where school districts or other government agencies partner with companies in the private sector to make remote learning technologies available to students, NYSED should publish these agreements online or make them publicly available so as to educate the public on supports they can access during remote learning periods, in compliance with Education Law § 2-d.

<sup>10</sup> Reema Amin, *Internet service providers blocked NYC families with unpaid bills from remote learning deals. De Blasio plans to crack down.*, Chalkbeat, March 26, 2020, <https://ny.chalkbeat.org/2020/3/26/21225367/internet-service-providers-blocked-nyc-families-with-unpaid-bills-from-remote-learning-deals-de-blas>.

<sup>11</sup> Danielle Muoio, Nick Nidzwadek, and Marie J. French, *Rural areas struggle with remote learning as broadband remains elusive*, Politico New York, April 22, 2020, <https://www.politico.com/states/new->

without internet may be wary of providing their contact information to ISPs and may be unable to take advantage of free internet offers if they are not provided in the parent/guardian’s native language. Now more than ever, it is clear that the internet is a public utility and states must not rely solely on an inequitable patchwork of private internet service providers.<sup>12</sup>

We strongly urge you to tap into every available resource, including federal funding and the private sector, to address the technological inequities in remote learning.

### Lack of Privacy

Many of the technologies needed for remote learning, including hardware, software, internet services, and educational learning platforms, are capable of collecting massive amounts of private, personal information from students and spying on them using surveillance technologies. In fact, for some “free” platforms, collecting and even selling user data is an integral part of the business model. Students must not be required to consent to being spied upon or surrender their privacy as a condition of receiving a remote education during the COVID-19 crisis.

It is important to note that for some students and their families, privacy is not just a preference; it is a necessity. Undocumented and immigrant students may feel the need to forego the use of educational technologies and services if they believe the technology’s information gathering or surveillance capabilities will place them and their families at risk. All students must feel safe to learn remotely, and that simply cannot happen if the tools used for remote learning are allowed to collect information to generate future income or for other non-instructional purposes.<sup>13</sup>

To that end, in addition to ensuring all students have full and equitable access to remote learning, NYSED and school districts must ensure every remote learning tool used by students fully protects their privacy and that of their families. Based on our survey results, students across New York are using a number of different platforms including Zoom<sup>14</sup>, Google Classroom, Google Meet, Google Hangouts, Seesaw, Edpuzzle, Flipgrid,

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[york/albany/story/2020/04/22/rural-areas-struggle-with-remote-learning-as-broadband-remains-elusive-1278788](https://www.nytimes.com/2020/04/22/rural-areas-struggle-with-remote-learning-as-broadband-remains-elusive-1278788).

<sup>12</sup> These providers also must respect our constitutional values of free speech and privacy and codify necessary protections as part of any rollout. See JAY STANLEY, *The Public Internet Option - How Local Governments Can Provide Network Neutrality, Privacy, and Access for All* (2018), <https://www.aclu.org/report/public-internet-option>.

<sup>13</sup> The use of student personally identifiable information for financial gain would also directly violate New York State’s student privacy law, Education Law § 2-d. N.Y. Educ. Law § 2-d(3)(b)(1) (“(1) A student’s personally identifiable information cannot be sold or released for any commercial purposes.”); 8 NYCRR § 121.2(a) (“Educational agencies shall not sell personally identifiable information nor use or disclose it for any marketing or commercial purpose or facilitate its use or disclosure by any other party for any marketing or commercial purpose or permit another party to do so.”).

<sup>14</sup> After learning of countless privacy and security concerns, the New York City Department of Education banned the use of Zoom for remote learning. Alex Zimmerman, *NYC forbids schools from using Zoom for remote learning due to privacy and security concerns*, Chalkbeat, April 5, 2020, <https://ny.chalkbeat.org/2020/4/4/21225416/nyc-forbids-schools-from-using-zoom-for-remote-learning-due-to-privacy-and-security-concerns>.



Schoology, WebEx, Blackboard, Microsoft Teams, and ClassDojo, among others. Each platform has its own unique features and settings, which may be difficult for families to navigate. NYSED must review the use of each of these tools and their myriad privacy policies to ensure compliance with Education Law §2-d and its student data privacy protections, as well as the Family Educational Rights Privacy Act<sup>15</sup> and the Children’s Online Privacy Protection Act.<sup>16</sup> NYSED should not leave the protection of student privacy up to overburdened school districts attempting to provide high-quality remote instruction.

Specifically, NYSED should mandate that all contracts and agreements governing products and services used for remote learning, whether they are provided to the government or directly to students and their families, include the following enforceable requirements, in addition to those already mandated by New York law:

1. All computer hardware, software, ISP, and EdTech companies that provide or sell any of the above-listed remote learning technologies should be prohibited from collecting, using, and retaining any private, personal information (including, but not limited to personally identifiable information (“PII”)) about a student or their family members unless doing so is directly necessary for their platforms’ remote learning functionality. Moreover, these companies should be required to promptly expunge all the PII and any other information they gather, generate, or derive from the use of these technologies during this health crisis when it resolves, unless a student’s parent or legal guardian specifically opts-in to it being retained (via a clear, post-crisis request, and not as part of a broad user agreement they sign now under pressure). None of this data should be shared with third parties unless directly required for the provision and functioning of the service.
2. All computer hardware, software, ISP, and EdTech companies who provide or sell any of above-listed remote learning technologies should be required to remove or permanently disable any surveillance functions that accompany their products and services, including communications and social media monitoring, search term and browsing history monitoring, keyword alerts, surreptitious access capabilities including video and audio surveillance, keyloggers, location tracking, facial recognition and other biometric identifying capabilities, and web filtering functions. Students and their families need these technologies to learn at home, not to enable companies and school districts to spy on them.
3. To ensure the computer hardware, software, ISP, and EdTech companies abide by these mandates, each should be required to consent to NYSED audits of their compliance with the above privacy conditions. These audits



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<sup>15</sup> 20 U.S.C. § 1232g; 34 C.F.R. Part 99.

<sup>16</sup> 15 U.S.C. § 6501; 16 C.F.R. Part 312.

should also encompass compliance with Education Law § 2-d, including the provisions regarding the publication of supplements to the parent bill of rights for each contract or agreement with a third-party contractor.<sup>17</sup>

While the aforementioned privacy protections should be applicable to student information whether we are in the midst of a public health crisis or not, at a minimum, they should be made mandatory while the use of remote learning tools is, for all practical purposes, compulsory.

The COVID-19 public health crisis has catapulted us all into uncharted territory. As New York State creates its remote learning infrastructure, there is an opportunity to build a strong and equitable digital foundation that will affirm students' rights in this moment and prepare us for the increasingly digital future ahead. To follow up with questions or to schedule a meeting, please contact Johanna Miller at [jmiller@nyclu.org](mailto:jmiller@nyclu.org).



Sincerely,

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<sup>17</sup> 8 NYCRR 121.3(d).