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BY ELECTRONIC MAIL

Commissioner MaryEllen Elia
New York State Education Department
89 Washington Avenue
Albany, NY 12234

June 18, 2018

Dear Commissioner Elia:

We write in response to Lockport City School District's ("Lockport" or the "District") proposed use of state funds through the Smart Schools Bond Act ("SSBA") to purchase facial recognition technology for use in its schools. Facial recognition technology is not appropriate for use in schools.¹ It can have intense adverse effects on students, staff, and community members, while doing far too little to enhance safety. The New York Civil Liberties Union ("NYCLU")² is very concerned about the use of facial recognition technology in schools, the use of state funds to support these surveillance systems, and the lack of adequate safeguards within the SSBA approval process to protect school communities in Lockport and beyond. We ask that NYSED reconsider Lockport's SSBA proposal for the acquisition of facial recognition technology as it is irresponsible, dangerous, and fails to meet the standards set out by SSBA.

The SSBA, approved by voters in 2014, authorized \$2 billion in general obligation bonds for schools to upgrade their infrastructure and technology in order to "improve learning and opportunity for students throughout" New York.³ Many schools used these funds to improve their wireless internet connectivity or purchase computers, tablets, and 3D printers for use in the classroom.⁴ However, Lockport has chosen to spend almost all of the \$4 million awarded to it through the SSBA on facial recognition software, which will add no educational opportunities for its students, while presenting grave threats to their privacy and civil liberties. It is alarming that

¹ Facial recognition technology is more often employed by police, casinos, and in military installations. In fact, the Aegis software that Lockport plans to use is based on SpikeNet, a facial recognition program used by Scotland Yard and the French Ministry of Defense. See Tim Fenster, *Trying for More Secure Schools: Lockport district turning to facial recognition software* (March 4, 2018), http://www.lockportjournal.com/news/local_news/trying-for-more-secure-schools-lockport-district-turning-to-facial/article_f1cc9cfa-0898-5da0-ac5d-d600df21bed7.html; see also, Carey Wedler, *NY Schools to Install Facial Recognition Tech Used by Police and Military* (May 23, 2018), <https://www.activistpost.com/2018/05/ny-schools-to-install-facial-recognition-tech-used-by-police-and-military.html>.

² The NYCLU is a member of the New York State Education Department's Data Privacy Advisory Council.

³ Smart Schools Bond Act (2014), http://www.p12.nysed.gov/mgtserv/smart_schools/home.html; see also Smart Schools Bond Act Implementation Guidance, http://www.p12.nysed.gov/mgtserv/documents/SSBAGuidancerev_6_1_18_Final.pdf ("SSBA Implementation Guidance").

⁴ SSBA funds can also be used to update facilities to accommodate pre-kindergarten programs and to "install high-tech security features in school buildings and on school campuses, including but not limited to video surveillance, emergency notification systems, and physical access controls." SSBA Implementation Guidance at 1.

Lockport’s proposal for use of facial recognition technology was not subject to further scrutiny due to its privacy implications and other civil liberties concerns.

Smart Schools Investment Plan Process

As you know, school districts interested in obtaining funds through the SSBA must develop a Smart Schools Investment Plan. This plan must show how the SSBA funds “will be used to provide the educational tools and opportunities students throughout New York State will need to succeed in the 21st century economy.”⁵ Further, plans for security measures require a “description of the work to be done and the need it will meet.”⁶ All plans also must describe the district’s capacity to sustain the recurring costs of the use of the technology. Once adopted by the school board, districts submit their plans to the New York State Education Department (“NYSED”) to review for completeness. Certain types of proposals also require districts to submit their plans to the Office of Facilities Planning at NYSED prior to seeking other approvals. In submitting the proposals to NYSED, school districts must certify that they engaged stakeholders in the planning process for the proposed use of funds – including parents, teachers, students, and community members.⁷ This engagement must include the posting of the district’s preliminary plan on its website for at least thirty days, the collection of comments on the preliminary plan, a public hearing with adequate notice, and the posting of the final plan on the district’s website. The plan is then reviewed by the Smart Schools Review Board to determine whether it meets the SSBA requirements, including the requirement that security projects meet a particular need, and “demonstrates a sound plan to use the funds in a manner that advances the educational well-being of the district’s students.”⁸ The Review Board consists of the Chancellor of the State University of New York, NYSED’s Director of the Budget, and the Commissioner, or their designees.⁹ Once the Review Board approves the plan, the district is authorized to spend the funds and then apply for reimbursement.

Lockport City School District Utilization of SSBA Funds for High Tech Security

In 2016, the Lockport City School District proposed to use \$3,810,833 of SSBA funds for high-tech security features, including “new cameras and wiring...to provide viewing and **automated facial and object recognition of live and recorded surveillance video**,” as well as “additional surveillance servers...to provide enhanced storage of recorded video and processing.”¹⁰ The District held a public hearing on the proposal on August 17, 2016; however, there were zero public comments likely because this hearing happened over summer break.¹¹

⁵ SSBA Implementation Guidance at 1.

⁶ *Id.*

⁷ *Id.* at 19.

⁸ *Id.* at 1, 7.

⁹ N.Y. Educ. Law § 3641(16)(a)(2).

¹⁰ Lockport City School District, Smart Schools Investment Plan (2016-2017), <http://p1232.nysed.gov/mgtserv/documents/LOCKPORTCITYSD.pdf> (last modified October 23, 2017)(*emphasis added*)(“Lockport SSBA Plan”).

¹¹ Lockport City School District, August 17, 2016 Proceedings of the Board of Education, <https://www.lockportschools.org/site/handlers/filedownload.ashx?moduleinstanceid=11244&dataid=21438&FileName=August%202016%20Regular%20Board%20Meeting%20Minutes%208%2017%2016.pdf>. Despite the lack of comment at the hearing, the District certified on its application that it had engaged all four categories of stakeholders

Lockport’s proposal was last modified on October 23, 2017 and was approved by the Smart Schools Review Board in November 2017.¹² In January 2018, Lockport’s school board passed Resolution 440, which authorized the transfer of funding from the District’s capital reserve fund to provide interim financial support for its SSBA project.¹³ On March 28, 2018, the board voted to award a bid to an electrical company to install the technology.¹⁴

Implications of Facial Recognition Technology Deployed in School Settings

First, there are well-documented issues with the accuracy of facial recognition technology, particularly when used to identify women and people of color.¹⁵ Furthermore, the databases to which the images are paired are also unreliable, and because they are provided by law enforcement, often disproportionately include young men of color.¹⁶ This creates an unfair and undue risk of false identification for students of color, who are already far more likely to be unfairly targeted by the criminal justice and school discipline systems.

Second, these systems infringe on the privacy rights of students, parents, and staff. The use of facial recognition technology in schools in New York should be particularly concerning to NYSED’s Chief Privacy Officer, as that office has a mandate to “ensure the privacy and confidentiality of student, teacher and principal data.”¹⁷ Student images are clearly a protected part of a student’s biometric record which is included in the definition of “personally identifiable information” under the Family Educational Rights and Privacy Act (“FERPA”) and New York Education Law §2-d.¹⁸ NYSED has an obligation to protect this student data and ensure that students’ rights are not being trampled. In the system Lockport purchased, once individuals’ photos are uploaded to the facial recognition system, it will track that person’s movements around the school and with whom they interacted during school hours over the previous 60 days.¹⁹ These systems could potentially turn students’ and staff members’ every step into evidence of an

– parents, teachers, students, and community members. *See* Lockport SSBA Plan, at 1. In addition, the president of the Lockport Education Association stated that teachers were not consulted in a discussion of how to use the funding, as is required. *See* Fenster, *supra*, note 1.

¹² Fenster, *supra*, note 1; *see also*, Lockport SSBA Plan.

¹³ Lockport City School District, January 24, 2018 Proceedings of the Board of Education, <https://www.lockportschools.org/site/handlers/filedownload.ashx?moduleinstanceid=11844&dataid=27790&FileName=regular%20meeting%20January%2024%202018.pdf>.

¹⁴ Lockport City School District, March 28, 2018 Proceedings of the Board of Education, <https://www.lockportschools.org/site/handlers/filedownload.ashx?moduleinstanceid=11844&dataid=27915&FileName=regular%20meeting%20March%2028%202018.pdf>.

¹⁵ Sidney Fussell, *Schools are Spending Millions on High Tech Surveillance of Kids* (March 16, 2018), <https://gizmodo.com/schools-are-spending-millions-on-high-tech-surveillance-1823811050>.

¹⁶ *Id.*; *see also*, Sidney Fussell, *School Districts can Hardly Wait to Start Tracking Kids with Police State-Style Face Recognition* (May 21, 2018), <https://gizmodo.com/school-districts-can-hardly-wait-to-start-tracking-kids-1826197713>.

¹⁷ *State Education Department Appoints Temitope Akinyemi as Chief Privacy Officer* (August 24, 2016), <http://www.nysed.gov/news/2016/state-education-department-appoints-temitope-akinyemi-chief-privacy-officer>.

¹⁸ “Biometric record, as used in the definition of personally identifiable information, means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.” 34 C.F.R. § 99.3.

¹⁹ Wedler, *supra*, note 3.

infraction or crime and could criminalize ordinary child misbehavior and personal interactions.²⁰ It could lead to unfair interrogations of students based on which classmates they associate with, a potential infringement of their First Amendment rights. This \$4 million purchase will inevitably need to be justified by being used against students, parents, and possibly school staff.

Third, the use of this technology raises concerns about how this information will be maintained, who will have access to it, and how it will be shared, including any connection to law enforcement databases. Lockport indicated in its approved facial recognition technology proposal that it was seeking funds for “interfaces to local state and federal crime databases.”²¹ These databases could include those used for immigration enforcement, which may intimidate families and have a chilling effect on their engagement with school. NYSED has been clear in its commitment to ensuring that immigrant students and their families are safe and comfortable in New York’s public schools—this presents a real threat to that effort. There is also a real threat of hacking, putting anyone who enters the school building at risk.²²

Finally, the implications of this purchase on the health and climate of our public schools are dire. Lockport plans to utilize this technology in each school in the District, including elementary schools, resulting in *facial imaging of four- and five-year-old children*. That fact should shock the conscience of any person who cares about education. We are concerned that no one at the District or on the NYSED review panel questioned the wisdom of this purchase from the perspective of school climate, or the message it sends to our young people about their futures, their relationships with adults, or their sense of belonging in their school. Rather than protecting them, the District is treating every child as a threat; rather than human relationships, the District is relying on machines to do its job.

SSBA Funds Could Be Better Utilized for Instructional Purposes by Lockport

Lockport should spend its funding on actual educational programs.²³ In the upcoming school year, the District may be confronted with a budget deficit nearing \$1 million. If the District does not receive additional state aid, it plans to cut “transportation and sports programs, reduce kindergarten to a half days, and close elementary school libraries.”²⁴ It is a moral outrage to appropriate this amount of money to unnecessary and potentially harmful technologies when such cuts are on the table.

²⁰ Fussell, *supra*, note 16.

²¹ Lockport SSBA Plan, at 16.

²² In February 2018, CCTV systems were hacked at four schools in the UK and aired online in real time. *ACLU of Arkansas Warns Schools of Privacy Risks of Biometric Surveillance Systems* (March 16, 2018), <https://www.acluarkansas.org/en/press-releases/aclu-arkansas-warns-schools-privacy-risks-biometric-surveillance-systems>.

²³ There are limitations on the use of funds under the SSBA. See SSBA Implementation Guidance.

²⁴ Fenster, *supra*, note 1.

Aegis Facial Recognition Software is Being Actively Marketed to Other New York School Districts

If NYSED does not take concrete action to limit the use of facial recognition technology, other schools across the State will undoubtedly attempt to obtain these problematic technologies, and to use them without any standards, regulations or limitations. The firm that created Aegis, the software sought by Lockport, advertises pointedly to schools²⁵ and it is reported that representatives from forty New York school districts attended a demonstration of this technology at the Erie BOCES.²⁶ Indeed, the Depew Union Free School District in New York is alleged to have spent \$41,006 on Aegis facial recognition technology in July 2016, though it is unclear whether they are using it.

NYSED Must Prevent Districts from Deploying School Surveillance Systems that Present Significant Privacy Concerns

We urge NYSED to act immediately, to ensure that districts across New York State do not employ these types of surveillance systems. Facial recognition software does not belong in schools and has serious privacy and educational implications for students and teachers, especially students of color and undocumented students and families. The use of state funds for this technology takes away resources that could be better utilized on education technologies. This sends a message to students that they must be continuously monitored, and their access to educational resources is less important than their constant surveillance.

In order to safeguard students, staff, and community members, we urge NYSED to review and reconsider the approval of Lockport's SSBA proposal for the acquisition of facial recognition technology. The Smart Schools Review Board's mandate includes ensuring that proposals under the SSBA "advance the educational well-being of the district's students." It is clear that facial recognition technology does not meet this objective. NYSED should review the approval of state funds for Lockport's project to ensure compliance with SSBA's requirements and with state and federal privacy laws, including the requirements of stakeholder engagement and sustainability.²⁷ As the state has not yet reimbursed Lockport for its expenses related to the acquisition of facial recognition technology, it is appropriate for NYSED to implement this review to ensure proper stewardship of taxpayer funds.

Going forward, we request that the Chief Privacy Officer or her designee be appointed to the SSBA Review Board. Given the obvious potential for this funding stream to have privacy

²⁵ Ava Kofman, *Face Recognition is Now Being Used in Schools, But It Won't Stop Mass Shootings* (May 30, 2018), <https://theintercept.com/2018/05/30/face-recognition-schools-school-shootings/>.

²⁶ Fenster, *supra*, note 1.

²⁷ NYSED should also audit Lockport's compliance with the stakeholder engagement process required under the SSBA. It appears that there was only one public comment in March 2018 on the proposal. NYSED should also review the process through which Lockport obtained the technology, as there may be a conflict of interest between the district, a school district consultant, and the software company. *This Upstate NY school district is adding facial recognition that can track students*, Tribune News Service (May 20, 2018), https://www.syracuse.com/schools/index.ssf/2018/05/this_upstate_ny_school_district_is_adding_facial_recognition_that_can_track_stud.html.

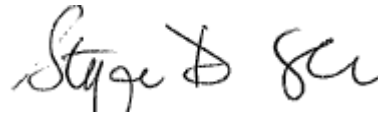
implications, it seems obvious that she would play a role. Participation on the Review Board is squarely within the mandate of the Chief Privacy Officer, as the Education Law gives her the power to “review and comment upon any department program, proposal, grant, or contract that involves the processing of student data or teacher or principal data before the commissioner begins or awards the program, proposal, grant or contract.”²⁸ NYSED should act quickly to add the Chief Privacy Officer or her designee to the Review Board, as private vendors of surveillance products are actively marketing to school districts, and NYSED has issued no regulations governing the use of these systems.

We welcome the opportunity to discuss this further with you. Please do not hesitate to contact us with further questions. I can be reached at 212-607-3315 or scoble@nyclu.org.

Sincerely,



John A. Curr III
Western Regional Office Director



Stefanie D. Coyle
Education Counsel

cc: Tope Akinyemi, Chief Privacy Officer, NYSED
Michelle Bradley, Superintendent of Schools, Lockport City School District
Kathleen DeCataldo, Assistant Commissioner for the Office of Student Support Services,
NYSED

²⁸ N.Y. Educ. Law § 2-d (c)(2).