June 26, 2022

Kathleen DeCataldo
Assistant Commissioner
Office of Student Support Services
New York State Education Department
89 Washington Avenue, Room 318-M-EB
Albany, NY 12234

Re: Proposed Amendment of Sections 100.1, 155.17, and 175.5 of the Regulations of the Commissioner of Education Relating to Remote Instruction and its Delivery under Emergency Conditions, I.D. No. EDU-17-22-00007-P

Dear Assistant Commissioner DeCataldo:

The New York Civil Liberties Union (“NYCLU”) writes to offer comments in response to the New York State Education Department’s (“NYSED” or the “Department”) notice of proposed rulemaking regarding “Remote Instruction and its Delivery Under Emergency Conditions” published in the New York State Register on April 27, 2022.¹ We thank NYSED for tackling this critical issue. The state of New York has a legal obligation to provide all students access to a sound basic education, including when it is absolutely necessary to deliver instruction remotely. In-person instruction should be the baseline goal of every school district unless serious circumstances prohibit it, in which case synchronous remote instruction can be a valuable tool in ensuring students’ educations are not interrupted.

The NYCLU, an affiliate of the national American Civil Liberties Union (ACLU), is a not-for-profit, non-partisan organization with nine offices across New York state and more than 210,000 members and supporters. The NYCLU’s 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. Protecting and expanding students’ rights is a core component of our mission, and through our Education Policy Center the NYCLU advocates for positive school climate and equitable access to quality education for all young people in New York. Our work includes campaigns to improve school climate, to limit police in school, to reduce racial segregation and protect students from discrimination and harassment, to ensure

students’ privacy and due process rights, to expand access to support services, and to ensure teaching and evaluation are designed to support multiple pathways and students’ abilities.

**General Concerns Regarding Remote Instruction:**

We are pleased that NYSED has promulgated these regulations to codify the provision of remote instruction. In our comments, we urge you to consider adding language protecting equitable access to remote instruction, addressing privacy considerations, and focusing on the particular needs of special education students.

**Connectivity Concerns**

As a foundational matter, if NYSED is to allow and regulate remote instruction, it must grapple with the very real issues of access and privacy. Instruction is not sufficient unless all students have access to the tools they need to participate fully and equitably. During the pandemic, hundreds of thousands of students struggled to connect and receive instruction and were often left behind. School districts simply cannot meet their constitutional obligations to deliver a sound basic education if every child does not have a laptop and high-speed internet. NYSED should not tolerate any child being denied an education because a school district needs to operate remotely.

**Privacy Concerns**

Additionally, the technology required for remote learning, including hardware, software, internet services, and educational learning platforms, is capable of collecting, storing, and sharing massive amounts of private, personal information from students and spying on them using surveillance technologies. Please see the NYCLU’s previous letter to Interim Commissioner Tahoe regarding internet access and privacy protections for students participating in remote learning, submitted May 4, 2020 and attached as Exhibit A “Lack of Privacy.”

Any regulations on remote learning must govern data collection and protect students’ privacy from commercial, law enforcement and other inappropriate uses. 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 about a student or their family members unless doing so is directly necessary for their platforms’ remote learning functionality. None of this data should be shared with third parties unless directly required for the provision and functioning of the service. These companies should be required to remove or permanently disable any surveillance functions that accompany their products and services and consent to NYSED audits of their compliance with these privacy protections.

**Special Education Concerns**

Many students with individualized education programs (“IEPs”) lost access to their federally mandated services and supports, such as occupational therapy and one-to-one aides, during COVID-19 shutdowns. Some of these students have fallen even
further behind compared to their peers. See the NYCLU’s letter to Interim Commissioner Rosa on students with disabilities in remote learning, submitted September 21, 2020 and attached as Exhibit B. Tracking of time spent with one-on-one aides and other services mandated on a student’s IEP plan is necessary to ensure equity across all students.

Additionally, NYSED should allow immunocompromised students and/or medically vulnerable parents to elect remote instruction and participate virtually to the fullest extent possible in instruction and extracurricular activities. The existing language on homebound instruction should be updated to align with these proposed remote instruction regulations. 8 NYCRR § 175.21 describes the instruction of students unable to attend school because of physical, mental or emotional illness or injury but in the age of remote school and COVID closures it is outdated. Homebound instruction only requires a fraction of the remote opportunities that were granted to all students during COVID closures. But now that the tools are in place, they should be used to expand access to education for homebound students.

**Student Discipline Concerns**

Over the past two school years, we have seen school districts turn to asynchronous delivery of materials in nonemergency circumstances, including, most troubling, misbehavior and disorder among students. In essence, this use of remote instruction is a punishment without due process, a suspension of every student in the school. It is vital that NYSED prohibit this practice.

Additionally, strict remote learning rules often carry disciplinary consequences that are purely punitive, illogical, and arbitrary. There should be a moratorium on new suspensions during periods of remote learning. If a student is currently serving a suspension and the school moves to remote learning, they should be allowed to participate fully with that time counting towards the suspension. Across the country, there were reports of students being suspended from online instruction, having access to email and online platforms blocked, and even being remanded to the criminal legal system for breaking various rules. These kids are Black, Latinx and Native, the same kids who were disproportionately punished before the pandemic, and who have suffered the most from the disease.

**Statewide Experiences with Remote Instruction**

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In 2020, the NYCLU surveyed parents, students, and community members across the state regarding their experiences with remote learning. Through the pandemic, students who have historically grappled with less support and access, primarily students of color and students with disabilities, were doubly burdened by a remote learning education. We believe these experiences are instructive as NYSED promulgates regulations regarding the provision of remote instruction. Many of the family experiences of disconnection fell on a spectrum:

- Some students had devices, but that device was an iPhone for Zoom class, or a tablet shared between siblings.
- For some who were technically considered to have internet access, that access was dependent on driving to a parking lot to connect to free Wi-Fi. That’s not a suitable option, and it’s a tremendous burden on working parents.
- Some students went without consistent remote instruction or contact with teachers. For these students, instruction came largely in the form of paper packets that had to be picked up from schools.
- Some students with special education plans had their services discontinued or disrupted.
- For some, school attendance was based, at least in part, on appearing on camera at designated times; these policies rely on students having the equipment and internet bandwidth and stability to support live video, being in private and classroom-appropriate locations, and being emotionally and psychologically comfortable on camera.

**Recommendations for Remote Instruction:**

The NYCLU has the following recommendations for remote instruction:

1. Longer and more frequent instruction time: Many teachers spent limited if any time providing direct instruction during remote learning. Some students were instead provided with homework packets or online asynchronous lessons, which placed a disproportionate burden on parents to provide instruction and on

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5 In May 2020, the NYCLU collected more than 500 survey responses from across the state regarding New Yorkers’ experiences with remote learning during the ongoing COVID-19 crisis. Ten percent of respondents indicated that their children received no special education, occupational therapy, or speech therapy. Twenty-two percent of respondents indicated that students with disabilities were not having their needs met. [https://www.nyclu.org/sites/default/files/field_documents/nyclu_edsurvey_factsheet_5.04.2020.pdf](https://www.nyclu.org/sites/default/files/field_documents/nyclu_edsurvey_factsheet_5.04.2020.pdf).

6 Emily Oster, et. al., Disparities in Learning Mode Access Among K–12 Students During the COVID-19 Pandemic, by Race/Ethnicity, Geography, and Grade Level —United States, September 2020–April 2021, CDC Morbidity and Mortality Weekly Report, Vol. 70 No. 26, July 2, 2021, [https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7026e2-H.pdf](https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7026e2-H.pdf), (“The populations with the most access to full-time in-person learning were non-Hispanic White students, students living in the South, and those in grades K–5”).

7 *Id.* (“Thirty percent of survey respondents indicated that no interactive learning was taking place. Sixty respondents reported receiving only written assignments or calls from teachers, and 10 respondents reported receiving no instruction at all. Of those who do have interactive learning, many reported that this was only for a few hours each week,”).
students to self-educate. We recommend that teachers provide instruction more frequently and for more minutes during periods of remote learning to provide students guidance, routine, and stability.

2. Collaborative learning: Students’ social skills and engagement with schoolwork can deteriorate without interaction with their peers. We recommend that teachers provide students with more opportunities for collaborative and project-based learning, both in remote learning and in classrooms, to increase exposure to other students.

3. Concrete lesson plans: Families often felt overwhelmed by homework and instructional packets because they were not provided in advance with schedules for lectures, homework, and special education services, which made it difficult for families to plan around their work schedules. During (and where possible, prior to) periods of remote learning, families must be provided with lesson plans and schedules so they can accommodate their students’ needs.

4. Flexible schedules to meet family needs: Some families have the need for flexible class schedules to accommodate their jobs while others can accommodate regular hours. During periods of remote learning, we recommend school districts provide students the option to participate in fixed or flexible class schedules with live instructions and pre-recorded lessons.

5. Promoting inclusivity over punitive measures: Some schools and districts engaged in expulsion and suspension activities during the COVID-19 shutdowns. Due to the fact that there is zero physical risk to any student from another student in a virtual classroom, and that both audio and visual feeds can be controlled by teachers, districts should be prohibited from excluding students from virtual instruction or preventing students from participating in class, logging on to lectures, and participating in group projects.

Specific Feedback on Proposed Regulations:

Section 175.5

It is reasonable that school districts get credit toward the annual hour requirement for providing remote instruction. However, there must be limits at the state level on how many total remote days can be counted. Of note, prior to the pilot program, typical emergency closures would be made up in person at the end of the school year. To replace such days with asynchronous learning time that contains fewer instructional hours (perhaps just a packet of work) does students a disservice, and is

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particularly burdensome for already underserved students. Research has demonstrated “reduced access to in-person learning is associated with poorer learning outcomes and adverse mental health and behavioral effects in children...[g]rowing evidence suggests virtual learning can be a challenge for many students, leading to learning losses for children and worsening mental health for children and parents.”¹⁰

**Section 100.1**

The NYCLU cautions that the proposed regulations are vague. Section 100.1(u) describes remote instruction as including “regular and substantive daily interaction between the student and teacher.” There is no definition of “regular and substantive.” As such, a ten-minute daily check-in between teacher and students could qualify, though no one could argue that was sufficient instruction. The NYCLU also believes the regulations could be interpreted to require only weekly or biweekly teacher-student interactions for longer-term remote instruction. For instance, a ten-minute daily check-in paired with a one-hour synchronous class every week would be insufficient in our opinion to qualify as “regular and substantive,” but could meet the definition.

**Section 155.17**

1. Section 155.17(a) was modified to require school safety plans to “include plans for the provision of remote instruction during any emergency school closure,” and further details are provided in amendments to subdivision c, including subparagraph xxi. A switch to remote learning should be for emergency circumstances only, not for a lack of transportation¹¹ or other non-immediate safety concern. Remote learning cannot be used in place of due process and individualized determinations of suspension. The NYCLU supports the inclusion of remote instruction plans in districts’ safety plans and plans for students to participate in synchronous instruction via devices and broadband access to the extent that it helps provide uninterrupted learning during unforeseen circumstances. However, NYSED should require districts to provide more regular data on actual connectivity. For instance, whenever a school uses the remote instruction option, they must send an attendance report to NYSED, indicating a period-by-period attendance metric, disaggregated by student demographic data. This would help the state determine, in a timely manner, if districts are failing to provide adequate access.

2. We commend NYSED for requiring public feedback on plans for remote instruction prior to adoption and a public hearing on the matter, as described in footnote 1 on page 2 of the summary. However, it is not clear to us that this is actually reflected in the proposed language. The public hearing and solicitation for public feedback should appear in subsection (c)(1)(xxi)(a) and include the following subsections such as (c), (d), (e) and (f). The commissioner should make

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¹⁰ Oster at 955.
public the surveys of students’ access to computing devices and to the internet, disaggregated by gender, age, grade, race/national origin, and disability status.

3. 155.17(c)(1)(xxi)(a) states districts now must “ensure computing devices will be made available to students...and policies and procedures to ensure students...will access internet connectivity.” This is a welcome change. However, more guardrails should be applied to specify what proportion of students should have devices and internet access at home.

4. 155.17(c)(1)(xxi)(c) lacks information on proportions of time in synchronous versus asynchronous time. While the NYCLU supports the requirement for synchronous instruction, it is vague as to how frequently it is required. When possible, time should be in-person. When not practicable, the majority of time should be synchronous and with a teacher. The proportion of time for synchronous learning should be maximized to the extent practicable.

5. 155.17(c)(1)(xxi)(d) is vague. It states instruction be modified for those who cannot access full remote instruction. If instruction is simply “weekly work packets” this would not meet the needs of many students. Please see the recommendations in Exhibit A “Inequitable Access to Technology”.

6. 155.17(c)(1)(xxi)(e) only mandates that schools describe how special education and related services be administered and should have mandatory safeguards for schools to implement.

   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 212-607-3344 or rshih@nyclu.org.

Sincerely,

Rae Shih
Education Counsel
BY ELECTRONIC MAIL

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

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.

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.1 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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1 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\(^2\), 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”)\(^3\) 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

\(^2\) 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.

\(^3\) 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.⁴

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.⁵ 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”⁶ through its Governor’s Emergency Education Relief Fund.⁷ 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.”⁸ 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.⁹ 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.¹⁰ Rural families have struggled with limited access to broadband, with students using school buses as hotspots.¹¹ And undocumented families

⁴ Alarmingly, 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.


⁹ 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.


¹¹ Danielle Muoio, Nick Nidziwiedek, 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.12

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.13

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 Zoom14, Google Classroom, Google Meet, Google Hangouts, Seesaw, Edpuzzle, Flipgrid,

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12 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.

13 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.”).

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 and the Children’s Online Privacy Protection Act.

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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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.\textsuperscript{17}

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 unchartered 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.

Sincerely,

\[\text{Signature}\]

Johanna E. Miller, Esq.
Director
Education Policy Center

\[\text{Signature}\]

Stefanie D. Coyle, Esq.
Deputy Director
Education Policy Center

\textsuperscript{17} 8 NYCRR 121.3(d).
BY ELECTRONIC MAIL

Exhibit B

Dr. Betty A. Rosa
Interim Commissioner
New York State Education Department
89 Washington Avenue
Albany, NY 12234

September 21, 2020

Dear Interim Commissioner Rosa,

We appreciate your new leadership of the New York State Education Department (“NYSED”) in this time of unprecedented crisis and your expressed commitment to ensuring the health and well-being of all the residents of the state, including those who are most vulnerable to the effects of COVID-19.

As school districts start the new academic year, NYSED must plan with great care how to support students with disabilities and to meet their unique and urgent needs. Other states have recognized that their students with disabilities need additional services during this time, and have the right to those services.1 We urge you to follow their lead to ensure that students with disabilities do not fall behind any further.

This letter outlines the foundational principles for disability education and recounts challenges students with disabilities experienced during remote learning in the spring. It closes with policy recommendations to address the most urgent needs facing students with disabilities as they transition back to school.

Principles Governing Education for Students with Disabilities

Enshrined in Brown v. Board of Education and codified in the Americans with Disabilities Act is the idea that every student must have an equal opportunity to get an education. Under the Individuals with Disabilities Education Act (“IDEA”), school districts have a duty to undertake the following affirmative steps to best serve this under-resourced population:

- Identify students with disabilities and appropriately assess them to determine the best services to support their education;
- Create Individualized Educational Programs (“IEP”) to ensure that students with disabilities receive an education that meets their educational needs;

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• Strive to place students with disabilities in a general education classroom with the appropriate supports, and avoid placement in alternate settings unless absolutely necessary for their educational progress;
• Provide related services so that students with disabilities can obtain a meaningful educational benefit from their schooling;
• Involve parents in the process of planning an education for their child that complies with federal requirements; and
• Provide procedural safeguards to allow parents to enforce their and their children’s rights under the law.

Disappointingly, several of these bedrock principles were violated during remote instruction in the spring.  

**Children with Disabilities and Their Experience During Distance Learning**

Over 467,000 children with disabilities live in New York State. Under ordinary circumstances, disabled students are a vulnerable population. However, the challenges they face have multiplied during the pandemic. Many students with disabilities have other lived experiences that exacerbate the inequities they already experience. Many are students of color, English Language Learners, immigrants, undocumented, from low-income families, in the foster care or juvenile justice systems, or lack permanent housing. These intersectional identities have exacerbated their vulnerabilities during the pandemic, as COVID-19 has ravaged these underserved communities.

Students with disabilities faced unique challenges during the COVID-19 pandemic. During the initial school closures and subsequent remote learning, they lost access to many of their federally-mandated services and supports, such as occupational therapy or one-to-one aides. With the absence of speech and language therapy, children with communication delays have regressed in their language development and ability to interact with other children. As a result, many have fallen even further behind compared to their nondisabled peers.

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3 In May 2020, the NYCLU collected more than 500 survey responses from across the state regarding New Yorkers’ experiences with remote learning during the ongoing COVID-19 crisis. Ten percent of respondents indicated that their children received no special education, occupational therapy, or speech therapy. Twenty-two percent of respondents indicated that students with disabilities were not having their needs met. https://www.nyclu.org/sites/default/files/field_documents/nyclu_edsurvey_factsheet_5.04.2020.pdf.


The obligation of districts to provide services to students with disabilities, as discussed above, is not lessened by the pandemic. In the spring, some districts across the country mistakenly believed that COVID-19 lessened their obligations under federal law, or allowed them to unilaterally modify student plans without notice to parents.\(^6\) Parents have not received their right to meaningful parental participation in deciding what services, technology, and accommodations their children with disabilities required in order to access their education. As a result, children with behavioral, medical, and communication needs have been denied access to specialized instruction and related services, adaptive equipment, assistive technology, and effective communication. Pandemic or no pandemic, students with disabilities have the right to an education that is reasonably calculated to enable them to make progress in light of their own individual and unique needs.\(^7\)

**Recommendations for the Upcoming Academic Year**

Children with disabilities have fallen behind and continue to experience regression.\(^8\) We must learn from the lessons of the spring and do better this fall. These below recommendations—formed with input from students, parents, special educators, and advocates across the country—are described in more detail in the attached document. It would not be only in the best interests of these children, but also administratively and economically wise, for NYSED to take the following steps to support children with disabilities as they transition back to schools:

1. Take proactive steps to provide compensatory education for all students with disabilities.
2. Ensure continued access to special education and related services during school breaks and next summer for all students with disabilities.
3. Suspend expulsion and suspension policies and implement mechanisms to support reintegration of students with behavioral, emotional, and mental health disabilities.\(^9\)
4. Require districts to temporarily set aside age eligibility limits in continuing to provide special education services to all children with disabilities, and to continue their obligation to locate, identify, and serve students with disabilities.

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\(^8\) Even without COVID-19, children with disabilities are so vulnerable to regression that there are regulatory and statutory rights in New York and federal law to extended school year services designed to attempt to prevent it. See 34 C.F.R. 300.106; 8 NYCRR § 200.6(k).


\(^10\) We appreciate that NYSED issued a guidance letter in June 2020 encouraging school districts to allow students who aged out of school to continue to attend school during the 2020-21 school year. However, we
5. Toll and extend administrative statute of limitations for special education complaints.
6. Protect all students by implementing rigorous safety and hygiene protocols for in-person instruction.
7. Ensure effective virtual participation for students remaining in distance learning if in-person instruction resumes.

We also attach in a second document key recommendations for remote learning that will benefit all students—but especially those who were left behind during districts’ first attempts at online instruction during the spring.

**Moving Forward**

The existence of a public health crisis, no matter how daunting, does not suspend students’ civil rights. We urge you to act now—quickly, decisively, and with every resource at your disposal—to ensure our students receive the equal access to education to which they are entitled.

The New York Civil Liberties Union and the American Civil Liberties Union jointly urge NYSED to adopt the attached recommendations as part of New York State’s COVID-19 response and relief efforts to ensure that children with disabilities fall no further behind.

Sincerely,

Stefanie D. Coyle  
Deputy Director  
Education Policy Center  
NYCLU

West Resendes  
Skadden Fellow  
Disability Rights Program  
American Civil Liberties Union

ATTACHMENT A: Detailed Recommendations to Support Children with Disabilities

Recommendation No. 1: Take affirmative steps to provide compensatory education for all students with disabilities (with IEPs and IFSPs)

Because many Individualized Education Program (IEP)/Individualized Family Service Plan (IFSP) services were unavailable, difficult to provide, or of a lesser quality1 during distance learning in the spring, NYSED must make affirmative efforts to protect the rights of these children to compensatory services and to make up for these losses.

Under federal law, children with disabilities are eligible for compensatory services to make up for any failures to provide an appropriate education. But, the burden falls to the parent to demonstrate regression or lost skills – which not only takes time, but also presents a significant barrier for many parents who are already stressed, who rely on schools for necessary data, may have language barriers, and who are not experts on the IEP/IFSP system. Continuing such an approach creates costs and delays, and often results in unnecessary conflict between the district and families.

In order to prevent this harm, we recommend that state officials take the following actions:

1. Direct school districts to offer compensatory services to all children with disabilities, including those children whose districts did not provide distance learning opportunities to any students at any point during COVID-related school closures. These compensatory services should be:
   a. Automatic for any parent who opts in for their child. Parents should not have to file a complaint and prove denial of educational progress. This denial should be presumed.
   b. Extended into a second year, should one year of services be insufficient.
   c. Extended past age 21 if the student needs it—as already recognized in recent guidance issued by NYSED’s Office of Special Education.2
   d. Provided at flexible times—during the regular school day, before or after school, over the summer, and during holiday breaks.3

1 Special day class programs and center-based programs were unavailable; physical or occupational therapy were difficult to provide; social skills programs were of a lesser quality.
3 Some parents may want a full range of options for their students to receive compensatory services while others may prefer to have services delivered during the regular school day.
2. Require school districts and regional centers to develop uniform assessment procedures to determine the type and extent of compensatory services to which disabled students are entitled, including:

   a. A structured interview with parents and teachers within 30 days of school reopening to determine the extent of regression. The interview questions for parents should be in plain language and should be sent to the parent ahead of time, together with the contact information for each parent’s local Parent Training and Information Center (“PTI”).

   b. A review of the child’s current level of performance within 30 days of school reopening, using a variety of assessment tools to gather relevant functional, developmental, and academic information about the child. Such tools include: parent and teacher input; brief observation of the student; and measuring of each child’s progress toward their IEP goals (with comparison to their progress prior to the start of distance learning, and their anticipated progress had there been no distance learning).

   c. For children who demonstrate significant regression, a full re-evaluation in all areas of eligibility.

3. Encourage school districts to begin providing compensatory services that need to be provided in person as soon as it is safe to do so, even if school buildings have not fully reopened. Necessary compensatory services should be prioritized in terms of services that will be provided in person, and only with the agreement of the student and their parents.

Recommendation No. 2: Ensure continued access to special education and related services during school breaks and next summer (Extended School Year) for all students with disabilities (with IEPs and IFSPs)

Because IEP/IFSP services have been unavailable or sharply diminished during the pandemic, NYSED must take affirmative steps to prevent further regression by ensuring access to special education and related services during school breaks and next summer.

Students are entitled to these Extended School Year (ESY) services under federal law if necessary for their receipt of an appropriate education. ESY services differ from compensatory education services as IEP teams must implement ESY services outside of the school day or school year to prevent likely regression that students would experience when school is out of session. This is in contrast to compensatory education services, which are typically provided after the district has failed in its obligation to appropriately educate a child with an IEP. Where there is a dispute with the school district with regard to ESY services, the need to demonstrate necessity places a significant burden upon the parent, takes time, and requires parents to undertake legal action, causing further delays.

4 34 C.F.R. § 300.106.
In order to prevent this unnecessary harm, we recommend that NYSED take the following action:

1. Direct school districts to offer ESY services to all children with disabilities, including those children whose districts did not provide distance learning opportunities to any students.
   a. Any parent who opts in should be entitled to ESY services.
   b. The number of minutes and the services that will be provided may be reached through an individualized fact-specific determination similar to the assessment plan in Recommendation No. 1, element 2.

**Recommendation No. 3: Suspend expulsion and suspension policies and implement mechanisms to support reintegration of students with behavioral, emotional, and mental health disabilities.**

All students, especially students with disabilities, will struggle to return to the educational environment. Students with behavioral and mental health issues will struggle with this transition and students previously without such issues may develop them. Attending school with the stress of social distancing protocols and the fear of COVID-19 will likely further exacerbate behavior and mental health struggles. In order to smooth this transition for all students, including students with disabilities, we recommend that state officials take the following action:

1. Permanently withdraw all suspensions pending at the time remote instruction began. There is no value in having students return to school this fall serving a suspension, only extended harm.

2. Impose a moratorium on new suspensions during the 2020-2021 school year, except where inconsistent with Section 4141 of the Gun Free Schools Act. While schools work to minimize chronic absenteeism, it is equally important that policies and procedures focus on the academic consequences of lost instructional time due to exclusionary discipline.

3. Suspend districts’ ability to discipline students during virtual instruction by excluding students from virtual instruction or prohibiting students from participating in class discussion, logging on to lectures, and participating in group projects.

4. Direct school districts to hold Committee on Preschool Special Education (CPSE) and Committee on Special Education (CSE) meetings and offer special education assessments and behavior intervention plans (BIPs) for students without IEPs and 504 plans who exhibit aggressive behaviors.

5. Direct school districts to develop and utilize evidence-based approaches in lieu of suspensions and expulsions, such as restorative justice, positive behavioral interventions and supports (PBIS), evidence-based therapy modalities, Dialectical Behavior Therapy, Trauma-Focused Cognitive Behavior Therapy, trauma-sensitive plans for students, and mindfulness.
6. Suspend districts’ ability to place students with disabilities into interim alternative educational settings (IAES) for the 2020-2021 school year.

7. Direct districts to conduct assessments and provide appropriate services and supports for children with behavior difficulties and mental health issues who need extra support to transition back to school.

   a. Such assessments should be conducted at least twice—once before the district reopens, to develop a plan for reintroducing the student to the educational environment, and again 30 days after school has started to address ongoing behavior and mental health struggles.

   b. The assessment prior to reopening should include a structured interview with parents similar to that described in Recommendation No.1, element 2, and a review of the student’s Behavior Intervention Plan (“BIP”). The assessment should consider and implement additional behavior services and mental health services and supports, including additional counseling. The interview questions for parents should be in plain language, in a language the parent understands, and should be sent to the parent ahead of time, together with the BIP.

   c. The assessment following reopening and reintegration of the student into the school environment should determine additional supports and services students need to address ongoing problem behaviors and mental health struggles. The district should use a variety of assessment tools to gather relevant functional, developmental, and academic information about the child, including: parent and teacher input, brief observation of the student, and other informal measurements to develop present levels of performance.

   d. Where behaviors and mental health struggles are severe, the district should conduct a Functional Behavioral Assessment and/or Educationally Related Mental Health Services assessment.

Recommendation No. 4: Require districts to temporarily set aside age eligibility limits in continuing to provide special education services to all children with disabilities5, and to continue their obligation to locate, identify, and serve students with disabilities.

During the State’s distance learning period, some children with disabilities have aged out of eligibility for special education services provided under the IDEA. In New York State, districts must provide services under Part B of the IDEA to students through the academic year when students turn 21. But pandemic-related school closures during the spring prevented students who

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5 We appreciate that NYSED issued a guidance letter in June 2020 encouraging school districts to allow students who aged out of school to continue to attend school during the 2020-21 school year. However, we encourage NYSED to explicitly require and authorize districts to provide special education services to these students. June 18, 2020 Letter from John L. D’Agati on Providing Over-Age Students the Opportunity to Return to School in the 2020-21 School Year Due to the COVID-19 Pandemic, http://www.nysed.gov/common/nysed/files/programs/coronavirus/nysed-covid-19-memo-over-age-students.pdf.
aged out of Part B services this past year from meeting their IEP goals and/or gaining critical life skills necessary for independent living.

Part C of the IDEA provides services for children with disabilities from birth until age 3. The IDEA requires districts to ensure that all of the children enrolled in Part C and eligible for Part B have Part B services in place by each child’s third birthday. Because of the State’s quarantine orders, districts may not have conducted initial evaluations by the child’s third birthday to determine Part B eligibility and develop a transition plan. Districts may have also not conducted activities required to comply with Child Find obligations.

In order to ensure uninterrupted services for eligible children with disabilities and to ensure that these students have the tools they need to successfully transition out of schools, we recommend that state officials take the following additional actions:

1. Extend for 6 months the IDEA Part B eligibility of students who age out this academic year to ensure that they are able to meet their IEP goals.

2. Require districts to work as quickly as possible to provide services to students who received early intervention services under Part C of the IDEA, but who aged out of these services during state and county shelter in place orders.
   a. Presume eligibility for Part B services for these students until the district can conduct a comprehensive in-person assessment when in-person instruction resumes.
   b. In determining which services to provide these students, districts should conduct a preliminary assessment of the student’s needs using a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent and the student’s regional center.

3. Emphasize that districts must still abide by their Child Find duty to locate, identify and provide services to children who may be disabled and may need special education and related services, including children who did not previously receive services under Part C of the IDEA.⁶
   a. In complying with Child Find, districts must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child during the shelter in place orders, including information provided by the parent, virtual observation sessions, and social distance friendly home visits.

b. Once educational services are allowed to continue in person, parents must have the option of either requesting an independent educational evaluation or allowing the district to reassess students to gain more accurate information about students’ needs.

**Recommendation No. 5: Toll and extend administrative statute of limitations for special education complaints.**

Even if New York State has implemented best educational practices, students have experienced disruptions or barriers to their education, including access to special education services. One of the most cost-effective and powerful tools that parents of children with disabilities have to protect their children’s rights is a due process complaint. Although administrative due process cases and mediations may still be occurring, there are many reasons why a parent may choose not to seek these dispute resolution options during the pandemic, including their inability to access records in a timely manner, their inability to gain appropriate assessments requiring face-to-face testing, the general unavailability of witnesses, or the demands on parents of child care and distance learning during the pandemic.

While the IDEA sets default limitations periods for due process complaints and court complaints, states are permitted to change them. Specifically, we urge you to suspend all timelines for filing a special education complaint and toll the statute of limitations for such actions for the duration of the pandemic.

**Recommendation No. 6: Protect all students by implementing rigorous safety and hygiene protocols for in-person instruction.**

While many families may prefer distance learning during the pandemic, there are students who need to return to school in order to learn effectively. They may come from families who are unable to provide home instruction due to work obligations, language barriers, educational experience, disability, daycare expenses, or family care duties. During distance learning, students with disabilities have exhibited academic and behavioral regression and the need for more guided instruction, 1:1 aides, para-educators, more attentive case managers, routine and structure to access learning, socialization, and better technology.

To ensure the continued safety of students who elect to return to in-person learning, we recommend that state officials implement the following safety and hygiene protocols and practices at schools to prevent the spread of COVID-19:

1. Provision of separate supplies to each student with no shared supplies;
2. Regular testing of staff;
3. Limiting staff interactions to a core group of students;
4. Adequate staffing of nurses at every school site; and
5. Clear guidance for situations where students with disabilities cannot tolerate wearing a mask.

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7 For example, California has adopted two years and 90 days, respectively.
Recommendation No. 7: Ensure effective virtual participation for students remaining in distance learning if in-person instruction resumes.

As districts restart in-person instruction—either on a full-time basis or as a blended option—there are families who will choose to have their children remain home. Some students may be immunocompromised, and medically vulnerable parents may fear contracting COVID-19 from their children, especially if there are concerns about the district’s ability to enforce social distancing and other safety protocols. To accommodate the needs of families and students who choose fully remote learning, we recommend that state officials:

1. Require school districts that offer in-person learning to maintain, refine, and incorporate distance learning policies and practices that enable students to virtually participate to the fullest extent possible in instruction and extracurricular activities.

2. Ensure that if before- and after-school program are resumed, they are accessible to all students, regardless of which educational option they participate in.
ATTACHMENT B: Recommendations for Distance Learning

Districts proceeding with in-person instruction must be prepared to transition back to distance learning, this time with improved supports, especially if a school is forced to do so after a positive COVID-19 test in their community. The following recommendations are based on challenges that some students experienced during distance learning in the spring, and should be implemented in either blended learning or full remote learning situations.

Recommendation No. 1: Instructional changes

1. Longer and more frequent instruction time: Many teachers spent limited time providing direct instruction during distance learning. Some students were instead provided with homework packets, which placed a disproportionate burden on parents to provide instruction and on students to self-educate. We recommend that teachers provide instruction more frequently and for more minutes to provide students guidance, routine, and stability.

2. Collaborative learning: Students’ social skills and engagement with schoolwork can deteriorate without interaction with their peers. We recommend that teachers provide students with more opportunities for collaborative and project-based learning to increase exposure to other students.

3. Concrete lesson plans: Families often felt overwhelmed by homework and instructional packets because they were not provided in advance with schedules for lectures, homework, and special education services, which made it difficult for families to plan around their work schedules. We recommend that teachers develop concrete and comprehensive lesson plans before the Fall semester to help families plan for the semester.

4. Diverse schedules to meet family needs: Some families have the need for flexible class schedules to accommodate their jobs while others need routine and stability. We recommend school districts provide students the option to participate in fixed and flexible class schedules with live instructions and pre-recorded lessons.

5. Better tracking of student progress: There were reports that districts did not track their students’ progress toward IEP goals and grade-level curriculum. This made it difficult for some families to track their students’ regression and provide support. We recommend that districts resume tracking students’ progress and communicate that progress more frequently with families.

Recommendation No. 2: Individual support and communication

1. More individual support and check-ins: Some students who require one-on-one instruction and guidance experienced a lack of individual supports during distance learning. We recommend that teachers and other educational providers schedule more frequent check-ins with both parents and students, especially during lessons.
2. Use of instructional aides: In some instances, the absence or severely limited interaction with 1:1 aides and para-educators during distance learning destabilized students who relied on their services. We recommend that instructional aides and para-educators provide individual support virtually and in-person, especially during instructional time.

Recommendation No. 3: Technological support

1. Better internet connectivity: Many families have poor internet connections, which made receiving special education services impractical. We recommend school districts contract with internet providers if they have not already done so to ensure all families can access services.

2. More accessible technology: Some students found it difficult to use certain technology or technology at all because of their disability. We recommend districts conduct assistive technology assessments on all students with IEPs to provide them with technology or alternatives to technology that meets their disability-related needs.

3. Consistent online platforms: Families felt overwhelmed by having to navigate multiple online platforms to access lectures, homework, and special education services. We recommend districts limit the number of platforms to deliver services and ensure that there are proper safeguards in place to protect student and family privacy on the platforms and devices.

4. Training: Families experienced difficulty navigating technology and unfamiliar online platforms. We recommend districts provide trainings tailored to students’ disability-related needs directly or through third-party providers such as the Center for Assistive Technology, and computer programs such as Computing Without Tears for parents and students to improve computer literacy skills.