



Via Electronic Mail Only

May 19, 2020

The Honorable Tony Thurmond
State Superintendent of Public Instruction
1430 N Street, Suite 5602
Sacramento, CA 95814-5901

The Hon. Senator Connie Levya
Education Committee Chair
California Senate
State Capitol, Room 4061
Sacramento, CA 95814

Dear Superintendent Thurmond and Senator Levya:

We appreciate your leadership in responding to the COVID-19 pandemic and students' needs. In particular, we applaud your efforts to address the needs of California's students to access devices and internet connectivity for distance learning.

We write today to express equity and civil liberties concerns that relate to the transition to online learning and ask that the California Department of Education (CDE), with support from the CDE's Task Force on Closing the Digital Divide, take appropriate action to address these concerns. While some of these concerns existed prior to the pandemic, the reliance on remote learning to provide instruction to students requires that these issues be immediately addressed and remedied.

The CDE's Task Force on Closing the Digital Divide Should Include Civil Society Groups

Last month, the CDE convened a Task Force on Closing the Digital Divide and held hearings on April 20, 2020 and May 4, 2020. We applaud your efforts to convene the task force to address the challenges associated with distance learning, including access to devices and internet connectivity.

Notably missing from the Task Force, however, are the voices of civil society groups and impacted communities, such as student groups, parent organizations, and advocacy organizations, some of whom have long worked on digital inclusion concerns. We recently signed on to a letter with several other organizations and spearheaded by the Partnership for Los Angeles Schools urging (1) the resourcing and expedited implementation of proposals intended to ensure that all preK-16 students are able to get online in order to begin to meet their basic learning and developmental needs and (2) partnership with families and communities to address this issue. In the spirit of partnership, we write to reiterate our ask that you consider expanding the Task Force members to include representatives from organizations that work on education equity, civil liberties, and digital inclusion and work in

close proximity with students and families impacted by the digital divide. We are happy to meet to discuss options or provide you with a list of possible members.

The April 20th and May 4th hearings also were devoid of any mention of students' rights to privacy and free speech with respect to technology for education-related purposes. Consequently, we ask that you also consider expanding the Task Force's focus to include student and family privacy and free speech concerns in the digital space, as outlined below.

Access to devices and internet connectivity at home for remote learning are of paramount importance during this time. Where internet connectivity is not readily available, districts must explore other options to ensure students have access to instructional materials; for example, districts can provide devices with pre-loaded instructional materials or provide printed materials to students and find ways to supplement their education to avoid further gaps in learning. In addition, efforts to protect the privacy of the students and families who are using technology and online services to receive instruction and other educational services is also critically important.

The Transition to Remote Learning Requires a Commitment to Equity

Consistent with prior guidance issued by the CDE to local educational agencies,¹ we ask that the CDE and the CDE Task Force on Closing the Digital Divide approach digital inclusion solutions through an equity lens. To achieve equity in the remote learning environment, public-private agreements to provide free or subsidized broadband access should include proposals to ensure providers offer internet services in the home and prioritize access for communities with the greatest unmet need.

The CDE should continue to remind local education agencies ("LEAs") to ensure that historically under-served student groups or vulnerable student populations are prioritized in the distribution of devices, internet connectivity, and learning assistance tools to engage in remote learning. Schools must employ solutions and practices to ensure that students experiencing homelessness, foster youth, English Learners, low-income students, immigrant and refugee students, students in rural areas, Native American students, and students with disabilities are not disadvantaged as a result of the transition to online learning.

Given the need for school districts to adapt and develop new curriculum for distance education, now is the time to ensure that all content is culturally-responsive and that school district and county staff are trained in culturally-responsive practices. California is a diverse state and culturally-responsive content is necessary for school districts to meet their obligations under the California Education Code to create a safe and welcoming environment for all students.

Moreover, the McKinney-Vento Act and guidance from the U.S. Department of Education require that homeless² children and youth have access to the same public education as other

¹ See California Department of Education, "Distance Learning: Considerations to Ensure Equity and Access for All Students," (March 17, 2020) available online at <https://www.cde.ca.gov/ls/he/hn/distancelearning.asp>.

²The McKinney-Vento Act defines homeless at 42 USC § 11434a(2). The term "homeless children and youths" —

children and youth, including the necessary educational and related services. The McKinney-Vento Act remains in full force and effect, even when schools are closed.³ At this point, many districts have not rolled out specific plans to ensure that unhoused youth are receiving equitable access to resources. This means that districts must dedicate efforts to ensure that students who qualify for McKinney-Vento have the means to participate in distance learning, including having access to the Internet, the necessary device(s), and nutrition.⁴

During this unprecedented time, a commitment to equity requires several considerations, including⁵:

- **Technology Funding:** Is there increased technology funding to ensure that youth in foster care and the juvenile justice system and youth that are low-income receive priority access to Chromebooks (or other devices) and Wi-Fi hotspots as gifts (not loans), and without liability to pay for the device if it is damaged, stolen or lost? What accountability mechanisms are being put in place to ensure these youth are receiving these tools?
- **Digital Deserts:** Are there dedicated efforts to provide students who live in digital deserts or areas where internet connectivity is slow with (1) free, at-home internet

(A) means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 11302(a)(1) of this title); and

(B) includes—

- (i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; or are abandoned in hospitals;
- (ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of section 11302(a)(2)(C) ¹ of this title);
- (iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
- (iv) migratory children (as such term is defined in section 6399 of title 20) who qualify as homeless for the purposes of this part because the children are living in circumstances described in clauses (i) through (iii).

³See for example the United States Interagency Council on Homelessness, “Supporting Children and Youth Experiencing Homelessness during the Covid-19 Outbreak: Questions to Consider,” (March 16, 2020), available online at <https://www.usich.gov/tools-for-action/supporting-children-and-youth-experiencing-homelessness-during-the-covid-19-outbreak-questions-to-consider/>; SchoolHouse Connection, “FAQ on COVID-19 and Homelessness,” (March 19, 2020), available online at <https://docs.google.com/document/d/1TlteU6XatUxuX-kUlhk2BLDystQ3IlwrvBrj-qkgmS0/edit>.

⁴ SchoolHouse Connection, “FAQ COVID-19 and Homelessness,” (March 19, 2020), pgs. 1-3, available online at <https://docs.google.com/document/d/1TlteU6XatUxuX-kUlhk2BLDystQ3IlwrvBrj-qkgmS0/edit>.

⁵ Please consider each of these questions and/or requests in this letter as a Public Record Act Request to the California Department of Education pursuant to the California Public Record Act. If portions of any documents are exempt from disclosure, please provide the non-exempt portions. Gov’t Code 6253(a). Also, please provide complete documents, even if portions of the documents do not appear to be responsive to this request. When possible, please provide records in electronic format to avoid copying costs. If you have any questions regarding the scope of this request or anticipate these costs will exceed \$50, or that the time needed to copy the records will delay their release, please contact Ana Mendoza at amendoza@aclusocal.org or at (213) 977-5206 so that we can arrange to inspect the documents or that we can decide which documents we would like copied. Gov’t Code 6253.1.

connectivity; (2) devices that are pre-loaded with instructional materials; or (3) printed materials to access the learning curriculum? If so, what are they?

- **Community Supports:** Are education agencies partnering with community organizations to support (1) low-income families and (2) households where the caregiver has limited English proficiency to sign-up for no-cost internet services?
- **Addressing Critical Issues:** Where the community is speaking out about gaps in services, tools, or the problems with digital inclusion, what steps are being taken and processes put in place to immediately address the concerns?

Education Agencies Must Honor Students' Civil Liberties

With the transition to remote learning, it is critical for local education agencies and the state to ensure there are protections in place to secure students' information, while upholding the privacy and free speech rights of students and their families.

As educators find themselves relying on technology to communicate with and teach their students, several privacy-related concerns arise:

- **Education-Specific User Agreements:** Are educators using online or mobile products tailored for education purposes with user agreement terms that comply with student privacy laws?
- **Data Collection:** Are technology vendors collecting data from students who use the vendors' service or product? If so, what data is collected? How is the data stored? Who owns the data? Is the data shared with others, such as law enforcement or other vendors?
- **Data Security:** Do technology vendors take the proper and necessary precautions to safeguard student data from disclosure? Do the terms assign responsibilities to each party (vendor and school/district) in the event of a data breach?
- **Auditing:** What auditing mechanisms exist to ensure that each vendor is collecting and storing data pursuant to its own privacy policies? Are the results of such audits shared with the public?
- **Parent/Caregiver Notification:** Are parents/caregivers and students given clear and accessible notices about what data is collected and how? Are families given the option to opt-in to any data collection practices without being precluded from using the online and mobile products for education purposes? Are families given the opportunity to easily request that their student/family data be deleted?

Private and sensitive information, such as personally identifying student and family information, that is shared with, or through, third-party products and services must comply with all student privacy laws, including, but not limited to, the Family Educational Rights and Privacy Act ("FERPA"), the Protection of Pupil Rights Amendment ("PPRA"), the Children's Online Privacy Protection Act of 1998 ("COPPA"), and the California Student Online Personal Information Protection Act ("SOPIPA"). In California, online technology sites and vendors must also comply with the California Consumer Privacy Act.⁶

⁶ The California Consumer Privacy Act (CCPA) grants consumers the right to know what personal information is collected, used, shared, or sold; the right to delete personal information held by businesses and by extension, a

To protect student and family data and privacy, the CDE should also issue guidance to local educational agencies providing 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 requirements to protect student privacy and that of their families:

1. All computer hardware, software, Internet Service Providers (ISP), or EdTech companies (collectively, “online service providers”) who provide or sell remote learning technologies should be prohibited from collecting, using, retaining, and sharing any private, personally identifying information about a student or their family members, consistent with FERPA and SOPIPA requirements, unless doing so is directly necessary for their platforms’ remote learning functionality⁷ and the districts comply with the notice and opt-out requirements of the PPRa to the extent online service providers gather information through the students’ interaction with the providers’ service.
2. Online service providers are required to expunge all the personal information they gather during this health crisis when it resolves, consistent with FERPA and SOPIPA requirements.
3. Because of this unprecedented time, LEAs should re-send their FERPA-related notices to families about the categories of information deemed directory information that may be disclosed to third parties, including online service providers. Districts should also allow parents/caregivers the opportunity to exercise their right to “opt of” disclosures of their directory information. Also, districts should remind parents/caregivers of their right to access their student’s educational records, which may include records maintained or created by an online service provider.
4. All online service providers should be required to remove or permanently disable any surveillance functions that accompany their products/services, including communications and social media monitoring, search term and browsing history monitoring, keyword alerts, surreptitious access capabilities including video and audio surveillance, 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 schools to spy on them.

business’s service provider; and the right to opt-out of sale of personal information and to direct a business to stop selling information. Children under the age of 16 must provide opt in consent, while a parent or guardian must consent for children under the age of 13. See Cal. Civ. Code §1798.100 - 1798.199; California Department of Justice Office of the Attorney General, *CCPA Fact Sheet*, available at https://www.oag.ca.gov/system/files/attachments/press_releases/CCPA%20Fact%20Sheet%20%2800000002%29.pdf.

⁷ For example, a provider may need access to personally identifiable information, such as names and email addresses, to provide each student access to a virtual classroom.

5. To ensure online service providers abide by these mandates, LEAs should create auditing processes to ensure the online service providers comply with the terms of their contracts, with the above privacy and security conditions,⁸ and with California Education Code section 49073.1. Contracts between local education agencies and online service providers should include terms that require the provider to cooperate with any auditing processes.
6. The CDE and LEAs should make sure that when LEAs or the state arrange for private companies to provide services and/or devices, whether purchased or donated, the agreements include privacy protections and that they be evaluated to ensure they fully comply with student privacy laws, as recommended by the US Department of Education.⁹

In addition to protecting students' and families' data and privacy rights, contracts governing broadband access should also honor their free speech rights, which are safeguarded under the First Amendment to the U.S. Constitution and Article I, Section 2 of the California Constitution.¹⁰ Enacting the aforementioned privacy safeguards can reduce consumer concerns around being tracked and recorded, thereby increasing the likelihood that people feel safe and confident expressing opinions, finding information, and making purchases online. Furthermore, students and their families should be free to access all *lawful* content and applications equally without interference by Internet Service Providers against specific online services or websites. Contracts and agreements between local government bodies and internet service providers to supply families with free or subsidized broadband access, and any related individual contracts between broadband providers and consumers, should comply with net neutrality principles by prohibiting providers from controlling what students and families choose to do on the internet. Complying with net neutrality principles includes the enactment of strict anti-censorship rules prohibiting the provider from blocking, slowing, or monitoring traffic to any websites or services. Families who cannot otherwise afford to pay the full price for broadband services should not be forced to sacrifice their privacy and free speech rights as a condition of internet access.

During this time, we need to remove all barriers the classroom and the school community, even as schools adapt to distance learning. To encourage student participation in extracurricular activities, the CDE should discourage school districts from *requiring* students to turn on their video cameras to participate in extracurricular activities from home and *recording* these online activities. Whether a student uses a camera, which captures images of their biometrics and home, should be a choice when exercising their freedom of association and students should not

⁸ See, e.g., Privacy Technical Assistance Center, "Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices," US Department of Education (Feb. 2014) p.9, available online at https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Student%20Privacy%20and%20Online%20Educational%20Services%20%28February%202014%29_0.pdf.

⁹ Privacy Technical Assistance Center, "Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices," US Department of Education (Feb. 2014) p.8 available online at https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Student%20Privacy%20and%20Online%20Educational%20Services%20%28February%202014%29_0.pdf.

¹⁰ CAL. CONST. art. 1, § 2.

be penalized for refusing to turn on their cameras.¹¹ To the extent that schools choose to record these sessions, the recordings should be protected as educational records pursuant to FERPA.

While the aforementioned privacy and free speech protections should be applicable to student information whether we are amid 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.

Districts Must Update Their Technology-Related Policies to Respect Students' Rights

Currently, some school districts in California require students and their parent/caregivers to consent to agreements or policies with respect to district-issued devices, software, or online accounts that include terms that are overbroad, contrary to public policy, and violate students' rights to privacy and free speech. Examples of problematic district policies include, but are not limited to, policies that:

- Permit random searches of the contents of school-issued Chromebooks;
- Permit searches of student-owned or district-issued digital devices, such as cellular phones or other electronic communication devices, under a reasonable suspicion standard or no standard at all; or
- Permit the district to monitor and access student use of technology, including computer files, email, text messages, instant message, and other electronic communications, without advance notice or consent.

To protect the digital privacy and free speech rights of students and their families, schools should refrain from searching through stored files, electronic mail, online communications, or network usage on district-issued devices or district-issued online accounts pursuant to the California Electronic Communications Privacy Act (CalECPA), Penal Code 1546 et seq.. CalECPA bars a school from searching a student's electronic device or online account, or demand access to information stored on an electronic device or online account, except under specific enumerated conditions. Students should not be required to give up their rights and consent to being monitored before receiving education-related technology, accounts, or services.

Furthermore, school districts should not monitor, collect, or store student information gathered from online accounts and services, like Zoom accounts, or and other social media unless the school complies with California Education Code section 49073.6. Section 49073.6 provides that local educational agencies may monitor student social media when the district or education agency (1) notifies families of the intent to monitor social media, (2) provides families an

¹¹ To safeguard students' socio-emotional well-being, schools should be mindful to provide students the flexibility to decide whether to turn on their cameras when video-conferencing. The reliance on remote conferencing tools is leading to the rise of "Zoom fatigue" and other effects which can cause stress on users who engage in frequent video-conferencing. See, e.g., Molly Callahan, "Zoom Fatigue" Is Real. Here's Why You're Feeling It, and What You Can Do About It," Northeastern University (May 11, 2020), available online at <https://news.northeastern.edu/2020/05/11/zoom-fatigue-is-real-heres-why-youre-feeling-it-and-what-you-can-do-about-it/>; Manyu Jiang, "The reason Zoom calls drain your energy," BBC (Apr. 22, 2020), available online at <https://www.bbc.com/worklife/article/20200421-why-zoom-video-chats-are-so-exhausting>.

opportunity to provide public comment at a hearing before the adoption of a social media monitoring program, (3) gathers information that pertains directly to school or student safety, and (4) provides families with access to the records gathered in monitoring efforts and a process to expunge these records from a student's file.

Now more than ever, we need to protect students who rely on their electronic devices to research, connect and communicate about their schooling, immigration issues, religion, health and sexuality, or political and social protests by preventing invasive searches of their devices and online accounts.¹²

Districts Should Refrain from Imposing Improper Pupil Fees Associated with Using a School-Issued Device

At this critical time, the CDE should also provide guidance to LEAs to remind them of their obligations under the California Constitution and related statutes to provide a free education to its students.

Just as schools cannot charge students for required textbooks,¹³ school districts may not require students to purchase devices or Internet access, to provide their own devices, or otherwise pay a fee as a condition of accessing required course materials under the free schools guarantee.¹⁴ Accordingly, LEAs must assess whether they can assure that all students will be able to access electronic devices at home without requiring students to purchase them; otherwise, districts should provide such devices. Additionally, unless the district can assure that all students have Internet access at home, districts must also ensure that students will be able to access the digital content without an Internet connection.

Furthermore, as summarized on the CDE's webpage regarding "Lost or Damaged Instructional Material Liability,"¹⁵ schools should not charge families for "wear and tear" or accidental damage to instructional materials, which includes school-issued technology devices, pursuant to Education Code section 48904(a)(1). To the extent that LEAs are partnering with private companies to issue devices to students, LEAs should continue to follow the Education Code and CDE guidance to ensure that low-income students are not disadvantaged when they borrow devices or other instructional materials for remote learning.

Government Transparency and Accountability

The CDE should also remind local educational agencies that they must be transparent in their efforts to remove barriers to access for students and families with the greatest unmet need while ensuring digital privacy and free speech rights. Local educational agencies must also hold themselves and partner-providers accountable for administering remote learning in a manner that promotes equity and upholds civil rights and civil liberties.

¹² For a model policy with respect to students' digital privacy, see, e.g., the ACLU's Model School Policy for Cell Phones, available at <https://www.aclusocal.org/en/campaigns/campus-police-toolkit>.

¹³ See Education Code section 60070.

¹⁴ CAL. CONST. art. 9, § 5; see also, Education Code § 49010(b)(3).

¹⁵ California Department of Education, "Lost or Damaged Instructional Material Liability," (Last reviewed June 14, 2019), available online at <https://www.cde.ca.gov/ci/cr/cf/instrmatliable.asp>.

When school districts or the state arrange for private companies to provide services and/or devices, whether purchased or donated, those agreements should be made available to the public. This level of transparency is necessary to ensure that students and their families understand the full range of services that they are eligible to receive under public-private agreements, and that they are not being charged improper fees as a condition of access to remote learning. As explained above, families should not have to incur fees—such as paying for new internet services—to participate in distance learning efforts. It will also help ensure that civil society groups and other members of the Digital Divide Task Force have the information necessary to evaluate programs and policies and therefore be better equipped to make recommendations for improvement.

Government accountability is also necessary to ensure that local educational agencies and contractors honor their commitment to equitable internet access while protecting users' privacy and free speech rights. In addition to expanding the Digital Divide Task Force to include civil society groups and impacted families, the CDE and local educational agencies should develop and implement an oversight and review process to ensure that the aforementioned rules and guidelines are followed and enforced by internet providers. Each of these meetings should be accessible for students and parents in different languages as well as options for those meetings that are accessibility compliant pursuant to the Americans with Disabilities Act. This process should include a public ombudsman or other meaningful complaint process for users, and the imposition of penalties for contractors who violate privacy, free speech rights, and/or other protections.

Again, we thank you for your commitment in responding to the educational needs of students and families during this unprecedented health crisis. In the process, we must remember that all Californians, including students, need additional supports to fully access their education while their civil liberties are safeguarded. Thank you for considering the civil liberties, inclusion, and equity concerns raised above. We welcome an opportunity to discuss these matters. To that end, please contact Ana Mendoza at the ACLU of Southern California at amendoza@aclusocal.org or 213-977-5206 to schedule a meeting at your earliest convenience.

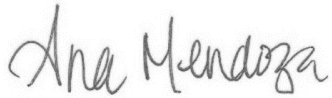
Sincerely,



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CC (via electronic mail):

The Honorable Senator Mike McGuire (D-Healdsburg)
The Honorable Assemblymember Cecilia Aguiar-Curry (D-Winters)
The Honorable Assemblymember Autumn Burke (D-Inglewood)
The Honorable Assemblymember Eduardo Garcia (D-Coachella)
The Honorable Assemblymember Miguel Santiago (D-Los Angeles)
The Honorable Assemblymember Jim Wood (D-Santa Rosa)
Lynn Lorber, Chief Consultant, Senate Committee on Education
Tanya Lieberman, Chief Consultant, Assembly Committee on Education
Dr. Stephanie Gregson, Chief Deputy Superintendent of Public Instruction