



West Virginia

P O Box 3952
Charleston WV 25339-3952

(304) 345-9246
www.acluww.org

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Governor Jim Justice
c/o Brian Abraham, General Counsel
State Capitol, 1900 Kanawha Blvd. E
Charleston, WV 25305
sent via email to Brian.R.Abraham@wv.gov

Clayton Burch, Superintendent of Schools
c/o Darcel Vermillion, Executive Assistant
West Virginia Department of Education
1900 Kanawha Boulevard East
Charleston, West Virginia 25305
sent via email to dvermill@k12.wv.us

David Perry, President – West Virginia Board of Education
c/o Virginia Harris, Executive Assistant
Building 6, Room 351
1900 Kanawha Boulevard East,
Charleston, West Virginia 25305
Sent via email to vharris@k12.wv.us

Dear Governor Justice:

The American Civil Liberties Union of West Virginia strongly urges you to swiftly remedy the inequitable and unsafe manner in which remote learning is being provided to public school students during the ongoing COVID-19 crisis. Specifically, the government is not meeting its obligation to (1) ensure that all students have equal access to the various technologies that make effective remote learning possible, and (2) ensure that adequate and uniform privacy protections are in place to protect students when they are engaged in remote learning.

While the challenges facing our state and nation during the COVID-19 crisis are significant, they do not relieve the government, at the federal, state, or local level, of its legal obligations. In the education context, those obligations are clear: As the United States Supreme Court wrote in Brown v. Board of Education, “[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available *to all on equal terms*.”¹

While the rapid movement towards remote learning during this crisis reflects a good faith effort to educate students, in practice, it also represents a significant failure to deliver such an education on equal terms.² Unfortunately, the burden of this failure has fallen unequally on students who traditionally have struggled to secure an equal, quality education,

¹ Brown v. Board of Education of Topeka, 347 U.S. 483, 493 (1954) (emphasis added).

² See, e.g., “As School Moves Online, Many Students Stay Logged Out,” *New York Times*, April 6, 2020, <https://www.nytimes.com/2020/04/06/us/coronavirus-schools-attendance-absent.html> [accessed April 15, 2020]; “Learning from Home is Hard Enough. Try Doing it where WiFi is Illegal,” *Mother Jones*, April 2, 2020, <https://www.motherjones.com/politics/2020/04/learning-from-home-is-hard-enough-try-doing-it-where-wifi-is-illegal/> [accessed April 27, 2020].

including students from low income families, students of color, students with disabilities, and students who lack permanent housing. Further, the government's failure to implement robust privacy protections around remote learning threatens to exclude even more students from participating. To be clear, this current state of affairs – in which remote learning is fully accessible to some students, partially accessible to others, and inaccessible to many – is not only unacceptable, it is unlawful.

Corrective measures must be taken now to mitigate the inequalities that are plaguing remote learning and the dearth of privacy protections for students trying to learn from home. Every day these issues go unaddressed, countless students are denied their educational rights and, as a result, fall further and further behind.

Addressing the unlawful disparities that presently exist in remote learning will require employing every method at your disposal. Unquestionably, this will necessitate a direct, significant, and immediate investment of the government's time and resources, and likely may also involve seeking assistance from the federal government and private industry.

Inequitable Access to Technology

Computers and technology offer an approach to help our students overcome the closure of their schools, but remote learning is not a sufficient remedy unless all students have access to the tools they need to participate fully and equally. Such equal access does not presently exist and efforts to provide it have been insufficient.

The technological tools all students must receive for remote learning to be legally compliant include:

- Computers/tablets, with built in or external webcams and microphones;
- Internet access that is fast enough for learning via remote video meetings;
- Hardware and related capabilities that are needed for high-speed internet access;
- Printers, including ink;
- Free access to remote learning and communications platforms/applications; and
- Assistive technology, including hardware (such as screen readers) and software and websites that comply with Web Content Accessibility Guidelines (WCAG) 2.0 Levels AA accessibility standards³, so students with disabilities can fully participate in remote learning; and
- For all of the above, providing plain language (English written at a 4th grade reading level or below) and native language (content in the parent/guardian's native language) materials so families understand and are able to use the remote learning technology tools provided by schools and their education partners.

Stories regarding students' lack of access to the tools needed for remote learning are many, but each is uniquely heartbreaking. For example, the *New York Times* reported that on a cold and rainy day last month in Phoenix, a high school principal found three students huddled under a blanket outside the school building. They were there trying to complete their remote learning assignments using the school's WiFi network, because they lacked internet access at home⁴. Stories like this are not rare, and they will continue to proliferate as long as governments fail to meet their legal obligations to our students.

For students with disabilities, access to technology is not just a mechanism for enabling remote learning, but a critical tool in continuing to fulfill obligations to provide a Free and Appropriate Education (FAPE)⁵, and continuing the work of special education plans. Technology like videoconferencing must be used to provide services and supports, including one-on-one support and curricular modifications, speech and language therapy, mental health services, and

³ 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

⁴ "The America We Need," *New York Times*, April 10, 2020, <https://nyti.ms/3aV0qBb> (referencing <https://twitter.com/StephParra08/status/1240644206512594949>) [accessed April 15, 2020].

⁵ 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>, page 2.

sign language interpreters. And it can and should be used to conduct remote reconvenings of IEP and 504 teams to modify plans and identify how goals can be revised given the constraints of COVID-19 and school closures.

Help may be available beyond the state's own resources. For example, 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. Likewise, the USDOE has created a \$13.2 billion "Elementary and Secondary School Emergency Relief Fund"⁷ 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 "digital divide" technology gaps that have produced systemic inequalities in remote learning.

With respect to private industry, you should immediately call on computer hardware/software/ISP/EdTech companies to help provide the above-listed technologies to schools, 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 Appropriate government agencies could coordinate the distribution of physical technology to ensure the students who need the devices receive them, and to safeguard against certain schools/districts being inadvertently overloaded with free technology while others go without.

We strongly urge you to tap into every available resource, including federal funding and the private sector, to address the existing technological inequities in remote learning. However, we must underscore that the state itself has legal responsibility for ensuring equity in education during 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 on students and/or spying on students using surveillance technologies. Students must not be required to surrender their privacy or consent to being spied upon 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. For example, undocumented and first-generation immigrant students may feel the need to forego the use of educational technologies and services if they believe the tech'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 simply so those who provide them can use the data to generate future income or for other non-instructional purposes.

To that end, in addition to ensuring all student have full and equitable access to remote learning, the state and school districts must ensure every remote learning tool used by students fully protects their privacy and that of their families. Specifically, you 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:

- *One:* All computer hardware/software/ISP/EdTech companies who 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. Moreover, these companies should be required to expunge all the personal

⁶ <https://oese.ed.gov/files/2020/04/GEER-Notice-of-Funds-1.pdf> [accessed April 15, 2020].

⁷ <https://oese.ed.gov/offices/education-stabilization-fund/governors-emergency-education-relief-fund/> [accessed April 24, 2020].

⁸ <https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/> [accessed April 24, 2020].

⁹ Where school districts or other government agencies partner with companies in the private sector to make remote learning technologies available to students, we encourage the agency to publish these agreements online or make them publicly available so as to educate the public on supports they can access during remote learning periods.

information they gather 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).

- *Two:* All computer hardware/software/ISP/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/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 school districts to spy on them.
- *Three:* To ensure the computer hardware/software/ISP/EdTech companies abide by these mandates, each should be required to consent to government auditing of their compliance with the above privacy conditions.

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 existence of a public health crisis, no matter how daunting, does not suspend students' legal and constitutional rights. You must act now – quickly, decisively, and with every resource at your disposal – to ensure our students and their families receive the equal educational and privacy rights to which they are entitled.

Sincerely,

Joseph Cohen
Executive Director
American Civil Liberties Union of West Virginia
jcohen@acluwv.org

Cc:

Fred Albert, President – American Federation of Teachers – West Virginia
1615 Washington St E, Ste 300
Charleston, WV 25311-2126
sent via email to falbert@aftwv.org

Dale Lee, President – West Virginia Education Association
1558 Quarrier Street
Charleston, WV 25311
Sent via email to dlee@wvea.org