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July 28, 2020

Dear Governor Herbert, State School Board Members, Superintendent Dickson, Members of the State Advisory Committee on Equity of Educational Services for Students, and School District Superintendents:

The American Civil Liberties Union of Utah, in consultation with a number of other advocacy organization and individuals involved in education, strongly urges you to swiftly address the manner in which learning is being provided to public school students during the ongoing COVID-19 crisis. We believe that students and educators need options for remote, in-person, or mixed-learning solutions, and believe that these should be implemented in a way that is equitable and safe. Reports from the end of the school year in the Spring revealed a number of troubling examples of the government falling short of its responsibilities to students; on the other hand, we have learned of resourceful troubleshooting by a number of school districts and teachers. I am writing to lend support to these positive efforts, to raise up opportunities to tackle long-standing inequities, and to highlight the Constitutional line for access to education.

Recognizing that this is a very difficult time for all, our State must identify, fund and implement solutions to this “new normal”- now and on an on-going basis. Specifically, the government is obligated to: (1) ensure that all students have equal access to the various technologies that make effective remote learning possible, and ensure that adequate and uniform privacy protections are in place to protect students when they are engaged in remote or hybrid learning, (2) ensure that schools have resources to provide safe conditions for students and teachers should they have in-person learning; and (3) ensure that the choices made by the schools do not have disproportionate negative impact on students of color, students with disabilities, and students from low income homes.

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*.”<sup>1</sup>

### **Remote learning accessibility and privacy**

While the rapid movement towards remote learning during this crisis in the spring reflected a good faith effort to educate students, in practice it also represented a significant failure to deliver such an education on equal terms.<sup>2</sup> Unfortunately, the burden of this failure has fallen unequally on students who traditionally have struggled to secure an equal, quality education, 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, a state of affairs – in which learning is fully accessible to some students, partially accessible to others, and inaccessible to many – is not only unacceptable, it is unlawful.

Addressing the disparities that 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 offered an approach to help our students overcome the closure of their schools in light of the pandemic, but remote learning is not a sufficient remedy unless students have access to the required tools they need to participate fully and equally.

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

- Computers/tablets, with built in or external webcams and microphones;

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

<sup>2</sup> 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 July 22, 2020]. Also, “During coronavirus outbreak, school buses are delivering food and homework to Utah students in rural communities,” *Salt Lake Tribune*, March 31, 2020 <https://www.sltrib.com/news/2020/03/31/during-coronavirus/> [accessed July 22, 2020].

- 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 standards<sup>3</sup>, 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 technological breakdowns for students expected to engage in remote learning are many. For example, the *Salt Lake Tribune* reported in April that 20% of students had not logged on 5 weeks after the implementation of remote learning.<sup>4</sup> Some school districts provided hotspots and lap tops as the Spring proceeded but it is clear that gaps still remained for some of the students and their families.<sup>5</sup> Equal access regarding technology must be accompanied by a well-supported, student-centered approach. This means supporting teachers and administrators in the work of making contact and problem solving when families drop off the radar.

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),<sup>6</sup> 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 sign language interpreters. And it can and should be used to conduct remote reconvenings of IEP

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<sup>3</sup> 28 C.F.R. §§ 35.160. For more information on how to comply with WCAG 2.0 AA, see [https://www.w3.org/WAI/WCAG21/quickref/?currentsidebar=%23col\\_customize&versions=2.0](https://www.w3.org/WAI/WCAG21/quickref/?currentsidebar=%23col_customize&versions=2.0)

<sup>4</sup> “It’s been 5 weeks and thousands of students still haven’t logged on for school amid the coronavirus,” *The Salt Lake Tribune*, April 21, 2020, <https://www.sltrib.com/news/2020/04/21/its-been-weeks-thousands/> [accessed July 27, 2020].

<sup>5</sup> See, e.g. “Navajo Families Without Internet Struggle To Home-School During COVID-19 Pandemic,” *Utah Public Radio*, April 22, 2020, <https://www.upr.org/post/navajo-families-without-internet-struggle-homeschool-during-covid-19-pandemic> [accessed July 27, 2020].

<sup>6</sup> The state’s obligation to ensure that students with disabilities receive a FAPE, including through specialized services as required by IEP or 504 plans, is not suspended during the COVID-19 pandemic. See Department of Education, Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 2020), <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>, page 2.

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) made nearly \$3 billion available in grants to help states "address student needs arising from the COVID-19 related disruption of the current academic year" through its "Governor's Emergency Education Relief Fund."<sup>7</sup> Likewise, the USDOE created a \$13.2 billion "Elementary and Secondary School Emergency Relief Fund" to provide "local educational agencies... with emergency relief funds to address the impact that COVID-19 has had, and continues to have, on elementary and secondary schools across the Nation."<sup>8</sup> There are likely to be similar opportunities in the relief efforts currently being drafted and debated at the Federal level. 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 or mixed remote and in-person 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.<sup>9</sup> We are uniquely situated to do this in Utah where an established tech industry has indicated interest in helping and with which our State and local educational leadership already has ties.<sup>10</sup> 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.

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<sup>7</sup> <https://oese.ed.gov/governors-emergency-education-relief-fund/> [accessed July 27, 2020].

<sup>8</sup> <https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/> [accessed July 27, 2020].

<sup>9</sup> Where school districts or other government agencies partner with companies in the private sector to make remote learning technologies available to students, 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.

<sup>10</sup> "Utah's governor partners with Silicon Slopes for expanded COVID-19 testing", *Fox 13 Salt Lake City*, April 2, 2020, <https://www.fox13now.com/news/coronavirus/local-coronavirus-news/gov-herbert-local-partners-announce-testutah-campaign-to-improve-testing-limit-covid-19-spread> [access July 28, 2020].

## 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 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 relied upon by schools.

### **Safe in-person learning conditions for students and teachers**

The State must also mobilize its resources to facilitate the strengths of various governmental and private organizations to make it as safe as possible when schools begin in person learning.

The American Academy of Pediatrics recently released their “Guidance for School Re-entry”<sup>11</sup> In it they spell out safety precautions they recommend be in place for various grade levels. They include having on-site school-based healthcare service. They further elaborated on their position on July 10, 2020. In that release, they state:

“Local school leaders, public health experts, educators and parents must be at the center of decisions about how and when to reopen schools, taking into account the spread of COVID-19 in their communities and the capacities of school districts to adapt safety protocols to make in-person learning safe and feasible. For instance, schools in areas with high levels of COVID-19 community spread should not be compelled to reopen against the judgment of local experts. A one-size-fits-all approach is not appropriate for return to school decisions.”<sup>12</sup>

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<sup>11</sup> COVID-19 Planning Considerations: Guidance for School Re-entry, American Academy of Pediatrics, June 25, 2020, <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/> [accessed July 27, 2020].

<sup>12</sup>Pediatricians, Educators and Superintendents Urge a Safe Return to School This Fall, July 10, 2020 <https://services.aap.org/en/news-room/news-releases/aap/2020/pediatricians-educators-and-superintendents-urge-a-safe-return-to-school-this-fall/> [accessed July 27, 2020].

As school districts make these localized decisions, they need to have resources and flexibility to meet the needs of their students and community.

Further, teachers must be supported in the tremendous role we ask them to play. Support for extended sick leave, including to care for a dependent family member, easily available testing, and access to mental health support must be coupled with a robust line of conversation to individual teachers, unions and other teacher associations. There must be flexibility to change and adapt through these unknowable times and teachers must be leading voices in the on-going decision making.

**Impact on students of color, students with disabilities, and students from low income homes or experience housing instability**

We are at a unique conflux of issues right now, hearing from Black, Indigenous and people of color in our community who are highlighting inequity long inherent in our systems while also facing an on-going global pandemic that lays bare those injustices and the life and death consequences.

The State Board of Education has the benefit of the ACEESS Committee to help evaluate issues of equity in schools on the statewide level. We believe the following is an important start to state and local conversations:

- 1) Reevaluate the role or need for permanent police presence in school, known as School Resource Officers.

Across the country, school districts have elected to alter or end their contracts with police department because they no longer wish to have a permanent police presence within their schools. This includes Denver School District whose School Board voted unanimously to phase out their SRO program. In the words of one school board member, Tay Anderson:

“(We did this) to alleviate the trauma and triggering presence of law enforcement to many people in our community,” Bacon said. “A majority of the students who have been ticketed, or arrested, are students of color. And, between the ages of just 10 and 15 years old.”<sup>13</sup>

In Utah, we have a history of litigation and legislation in response to concerns about the disparate impact of police in schools and the role they

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<sup>13</sup> “Denver Public Schools To Remove School Resource Officers” 4CBS Denver, June 12, 2020, <https://denver.cbslocal.com/2020/06/12/denver-public-schools-school-resource-officers-denver-police/> [accessed July 25, 2020].

play in the school-to-prison-pipeline.<sup>14</sup> However, there are still unfunded aspects of the state statute and calls to question the basic assumptions that put an adult with the ability to arrest into a school rather than an adult who is purely there to support the education of that student.

- 2) Adopt clear administrative policies about when to call the SROs/police and monitor adherence within each school.
- 3) Make Anti-Bias, Anti-Racist training for teachers, students, administrators and any police mandatory with an emphasis on the current moment. There are a number of ineffective and even damaging trainings under the guise of anti-bias training. The ACEESS Committee should be given resources to identify or create and disperse an effective training fit for this moment in time.
- 4) Communicate to all staff and police in schools and agencies patrolling adjacent neighborhoods the trauma or fear seeing a police officer may trigger in students or their family members.
- 5) Integrate restorative justice training and models as the basis for addressing behavioral or other disruptions to school education; one that rejects the school-to-prison pipeline, where elevated levels of punishment in school leads to the school facilitating contact with the criminal justice system. This system as it exists in Utah is known to disproportionately harms students of color.<sup>15</sup>
- 6) Dress code: Any dress code, including the necessary allowance of masks for in person learning, must be clearly laid out and cultural informed and include training for teachers and administrators. Further, any dress policy must reflect 1<sup>st</sup> Amendment protections.

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<sup>14</sup> See, Utah State Code “School Resource Officers,” <https://le.utah.gov/xcode/Title53G/Chapter8/53G-8-P7.html> [accesses July 27, 2020]. See also, “ACLU, Salt Lake Police and Salt Lake School District Settle Suit over ‘Gang Operation’ at West High School,” ACLU of Utah Press Release, March 17, 2016, <https://acluutah.org/images/PDFs-docs/PR-160317-Winston-web.pdf> [accesses July 27, 2020].

<sup>15</sup> “From Finger paints to Fingerprints: The School-to-Prison Pipeline in Utah”, released Fall 2014 by the S.J. Quinney College of Law’s Public Policy Clinic, [http://myuea.org/sites/utahedu/Uploads/files/Members%20Only/Events%20Activities/SLA/2017/Social\\_Justice/Misbehavior%20or%20Misdemeanor/From%20Fingerpaint%20to%20Fingerprints%202014%20-%20STPP.pdf](http://myuea.org/sites/utahedu/Uploads/files/Members%20Only/Events%20Activities/SLA/2017/Social_Justice/Misbehavior%20or%20Misdemeanor/From%20Fingerpaint%20to%20Fingerprints%202014%20-%20STPP.pdf) [accessed July 27, 2020].

- 7) In the first few weeks of school there needs to be space in the schedule to check in with students and teachers' well-being and basic needs. There should be resources for all that reinforce a trauma informed approach.
- 8) Consult with tribal governments in those school district that are adjacent or share land with First Nations to integrate the needs of indigenous communities. Dialogue with the education departments within those tribal governments.
- 9) With respect to students with disabilities returning, be as flexible and accommodating as is feasible, including in determining if/how they return to the classroom or another option. Ensure that students are provided compensatory education as needed. Also, however students with IEPs or 504 Plans return, make sure they are provided FAPE and other appropriate accommodations while in-school, distance, hybrid, or home-learning to the maximum extent possible.

The existence of a public health crisis, no matter how daunting, does not suspend students' legal and constitutional rights. This moment also requires a renewed commitment to a student-centered approach that helps teachers and administrators understand the needs and barriers that cause a student to detach from the education system. This will surely be needed whether school is remote, in-person or a hybrid, as students and families navigate this new reality. You must act now – quickly, decisively, and with every resource at your disposal – to ensure our students and their families receive the equal educational to which they are entitled. Thank you very much for your on-going work on behalf of students, teachers, and their communities.

Sincerely,

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