

Before the
Federal Communications Commission
Washington, DC

In the Matter of:)
)
Addressing the Homework Gap through) WC Docket No. 21-31
the E-Rate Program)
)
)

**REPLY COMMENT OF THE ATTORNEYS GENERAL OF THE STATES OF
COLORADO, NEBRASKA, ALASKA, CONNECTICUT, DELAWARE, DISTRICT OF
COLUMBIA, GUAM, HAWAII, IDAHO, ILLINOIS, IOWA, MAINE, MARYLAND,
MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW HAMPSHIRE, NEW
JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON,
PENNSYLVANIA, RHODE ISLAND, UTAH, VERMONT, VIRGINIA,
WASHINGTON, AND WISCONSIN**

via electronic filing
February 23, 2021

The Attorneys General of the States of Colorado, Nebraska, Alaska, Connecticut, Delaware, District of Columbia, Guam, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, and Wisconsin submit this comment in response to the Federal Communications Commission’s public notice, DA 21-98 (“Wireline Competition Bureau seeks comment on petitions for emergency relief to allow the use of E-Rate funds to support remote learning during the COVID-19 pandemic”). We urge the Commission to promptly use its authority to fund connectivity and equipment to K-12 students whose schools are closed as a result of the pandemic and who, therefore, must “attend” school from remote locations. Such action by the Commission would meet the statutory requirements and further the essential purpose of the Schools and Libraries Universal Service Program (commonly known as “E-Rate”).

The E-Rate program was designed and has been successfully implemented to provide funding to better connect schools and libraries in all parts of the nation – urban, suburban and rural. And now all parts of the nation are struggling with the best means to educating K-12 students during the successive waves of a pandemic. Different school systems in different states have adopted diverse approaches – some have largely stayed open, some have adopted hybrid approaches, some have focused heavily on online learning. But, whatever the local decision, the simple fact is that at least 55 million K-12 students have, at one time or another, been forced to rely on online learning when their classrooms were

closed.¹ When schools are closed, the living room, or bedroom or basement becomes the functional equivalent of a classroom – and deserves the same, albeit temporary, E-Rate support.²

We urge the Commission to authorize for this purpose the use of “reserve” funds that are already designated for E-Rate support but have not been committed for the current funding year.³ Consistent with its statutory authority and prior actions, the Commission can issue declaratory rulings, waive rules, and otherwise act to ensure that, during the pandemic, schools can use E-Rate funds and E-Rate-funded services and equipment to provide high-speed Internet connectivity to students at home or at other off-campus locations for remote schooling, if no other adequate federal funds are immediately available for this purpose. Such temporary actions are necessary to ensure that elementary and secondary school students in our states and territories can access the virtual classrooms where teaching, learning, and peer-to-peer interactions are occurring during this public health emergency.

I. To close the COVID-19 “Schooling Gap” and enable remote learning for millions of students while schools are closed to in-person learning, the Commission should allow schools to use E-Rate support mechanisms to provide high-speed Internet connectivity to students at home or other safe off-campus locations.

COVID-19 has disrupted nearly all aspects of economic, civic, and social life in our respective states and territories; K-12 education systems are no exception. We agree with the Commission that the lack of access to adequate, affordable home Internet for school-aged children and their teachers is an urgent matter of educational equity – and never more so than during the COVID-19 pandemic. As the Commission’s request for comment acknowledges:

The COVID-19 pandemic has underscored the critical need for broadband connections for millions of Americans, including students and teachers across the country. To mitigate the spread of the disease, schools and libraries have shut their doors and transitioned to remote learning and virtual services, either in whole or in part, leaving those students who found themselves caught in the

¹ *Map: Coronavirus and School Closures*, EDUC. WEEK (last updated Sept. 16, 2020) (“At their peak, the closures affected at least 55.1 million students in 124,000 U.S. public and private schools.”), <https://www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html>.

² We hope that the combination of effective vaccine distribution, COVID testing, mask wearing, physical distancing, and other measures will enable schools across the nation to safely resume in-person teaching and learning at pre-pandemic levels in the coming months. But we must plan for the real possibility that, at least for the duration of the current school year and into the 2021-2022 school year, community spread of COVID-19 will remain at levels that prevent some schools from safely reopening, or that new outbreaks of the virus will require schools that reopen to shift back to virtual schooling on short notice.

³ See Petition for Expedited Declaratory Ruling and Waivers filed by Schools, Health & Libraries Broadband Coalition et al. 14-15, WC Docket No. 13-184 (filed Jan. 26, 2021), <https://www.fcc.gov/ecfs/filing/101260036427898> (SHLB Petition).

“Homework Gap” before the pandemic facing extraordinary hardship and at risk of being unable to participate in any virtual studies.⁴

As one petitioner stated, “students who lack high-speed Internet and Internet-enabled devices at home cannot participate in the virtual classroom and, consequently, do not receive the same education as their Internet-connected peers. . . . In short, during the pandemic, the Homework Gap is temporarily a Schooling Gap.”⁵ A report published last year by the Alliance for Excellent Education and its partners found that “16.9 million children remain logged out from instruction because their families lack the home Internet access necessary to support online learning.”⁶

The lack of Internet connectivity affects students in each of our states and territories; even among states with best connectivity, more than 20 percent of students lack adequate home Internet.⁷ Traditionally underserved students – including students living in rural communities; students from low-income households; and Black, Latino/a, and Native American students – are disproportionately likely to be without adequate home Internet needed for remote schooling.⁸

Since March 2020, school districts throughout the country – often in collaboration with state and local governments and civic organizations – took extraordinary steps to address the online learning gap.⁹ Consider, for example, that one school district in Colorado used bond-funded fiber infrastructure and a public-private partnership to extend high-speed

⁴ FCC, Wireline Competition Bureau Seeks Comment on Petitions for Emergency Relief to Allow the Use of E-Rate Funds to Support Remote Learning During the COVID-19 Pandemic, DA 21-98, WC Docket No. 21-31 (rel. Feb. 1, 2021), <https://docs.fcc.gov/public/attachments/DA-21-98A1.pdf>.

⁵ Petition for Waiver on behalf of the State of Colorado 2, WC Docket No. 13-184 (filed Sept. 2, 2020), <https://www.fcc.gov/ecfs/filing/10902218280692> (Colorado Petition).

⁶ ALL. FOR EXCELLENT EDUC. (ALL4ED) ET AL., STUDENTS OF COLOR CAUGHT IN THE HOMEWORK GAP 1 (July 2020), https://futureready.org/wp-content/uploads/2020/08/HomeworkGap_FINAL8.06.2020.pdf.

A different report by Common Sense Media found similar results for students and found that “approximately 300,000 to 400,000 public school teachers (8 percent) lack access to adequate connectivity.” SUMIT CHANDRA ET AL., COMMON SENSE MEDIA & BOSTON CONSULTING GROUP, CLOSING THE K-12 DIGITAL DIVIDE IN THE AGE OF DISTANCE LEARNING 6 (2020), https://www.common Sense Media.org/sites/default/files/uploads/pdfs/common_sense_media_report_final_7_1_3pm_web.pdf.⁷ CHANDRA ET AL., *supra* note 6, at 13, fig. 5.

⁷ CHANDRA ET AL., *supra* note 6, at 13, fig. 5.

⁸ ALL4ED ET AL., *supra* note 6, at 1-3. Approximately 36 percent of student households in rural communities lack high-speed home Internet, as do 31.2 percent of Latino/a, 30.6 percent of Black, and 34.2 percent of American Indian/Alaska Native student households. *Id* at 2. This data may underestimate the size of the remote learning gap during the pandemic. The Common Sense Media/BCG report, for instance, considers Internet speeds of 25/3 Mbps (download/upload speeds) to be “high-speed” Internet. But 25/3 Mbps often cannot support interactive multiparty video communications by multiple users or on multiple devices, simultaneously, within a household. *See* FCC, Household Broadband Guide (last reviewed Feb. 2, 2020), https://www.fcc.gov/sites/default/files/household_broadband_guide.pdf. Therefore, connectivity at the 25/3 Mbps standard may be insufficient to meet the remote schooling needs of families with multiple school-aged children.

⁹ *See* SHLB Petition, nn. 17-23 and accompanying text.

Internet to low-income students living within a few miles of school facilities.¹⁰ Another Colorado district partnered with a private telecommunications company and tapped into the municipal fiber infrastructure to connect dozens of students in a rural mobile home park.¹¹

But despite these admirable ad hoc efforts, nearly one year after the COVID-19 public health emergency first necessitated the shift to remote schooling, millions of students still lack adequate home Internet and cannot join their better-connected peers in the virtual classroom.¹² This level of educational inequity is unacceptable. Students whose schools are closed during the pandemic need broadband at home. E-Rate can meet this need. School districts stand ready to use E-Rate funded services to rapidly connect their students to high-speed Internet. In a recent survey of more than 2,000 E-Rate program participants, 93 percent reported that they would use E-Rate funds to connect students at home for virtual schooling, if allowed by the Commission.¹³

Given the urgent need, school districts' proven ability to rapidly deploy innovative solutions, and the availability of hundreds of millions of dollars "reserved" for the E-Rate program but currently unused, the undersigned state attorneys general urge the Commission to (1) clarify that the use of E-Rate eligible services for off-campus teaching and learning during the pandemic constitutes use for an "educational purpose"; (2) clarify that cost-allocation is not required for eligible E-Rate services used primarily for off-campus educational purposes during the pandemic; (3) waive existing rules as necessary to allow school districts and libraries to use E-Rate support during the pandemic to connect their students and staff to high-speed Internet adequate for remote learning quickly, efficiently, and with technologies best suited to their particular geographic and educational needs; and (4) make available any "reserved" but unused E-Rate funds to support remote learning during the pandemic.¹⁴

¹⁰ Matt Zalaznick, *How one school district connected (almost) all its students*, DIST. ADMIN. (May 20, 2020), <https://districtadministration.com/boulder-valley-school-district-wifi-Internet-access-equity-E-Rate-heroes-act-fcc/>.

¹¹ Tamara Chuang, *Students disappeared from classes when they lost internet. A rural Colorado school district's creativity got them back online*, COLO. SUN (Jan. 7, 2021), <https://coloradosun.com/2021/01/07/covid-economy-students-christmas-broadband-rural/>.

¹² TITILAYO TINUBU ALI ET AL., COMMON SENSE MEDIA, LOOKING BACK, LOOKING FORWARD 5 (2021), https://www.commonsensemedia.org/sites/default/files/uploads/pdfs/final_-_what_it_will_take_to_permanently_close_the_k-12_digital_divide_vfeb3.pdf ("[U]p to 12 million K-12 students remain under-connected going into 2021").

¹³ FUNDS FOR LEARNING, 2020 E-RATE TRENDS REPORT 24, <https://fundsforlearning.app.box.com/v/2020ErateTrends>.

¹⁴ The magnitude and urgency of the present circumstances warrant using all available tools to help provide affordable high-speed Internet connectivity to unserved student households. Both E-Rate and the Emergency Broadband Benefits Program authorized by the 2021 Consolidated Appropriations Act promise to help meet this urgent need. The Commission should take steps to ensure that E-Rate supports avoid duplication with the Emergency Broadband Benefits Program and other sources of federal funding that may be immediately available for the purpose of support remote learning. We encourage the Commission to work closely with school districts to identify and implement procedures to quickly provide needed connectivity to unserved student households without duplicating benefits.

II. The Communications Act and Commission precedent authorize the Commission to enable remote schooling during the pandemic.

- a. *Section 254 of the Communications Act supports, off-campus use of E-Rate-supported services by students and educators who lack adequate at home Internet connectivity fulfills an educational purpose, and, therefore, is eligible for E-Rate support during the pandemic*

Section 254(h)(1)(B) of the Communications Act (the “Act”) calls for universal service support to be provided “to elementary schools, secondary schools, and libraries for educational purposes.”¹⁵ To this end, the E-Rate program provides “universal service discounts for eligible services and/or equipment (collectively, eligible services), including connections necessary to support broadband connectivity to eligible schools and libraries.”¹⁶

The Commission’s rules define “educational purposes” to mean “activities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate, and proximate to the provision of library services.”¹⁷ The Commission has established a presumption that activities that occur in a library or a classroom or on library or school property serve an educational purpose and, therefore, are eligible for E-Rate funding.¹⁸ However, as one petitioner observes, “[t]his presumption does not mean there is a ban on using E-Rate services provided off campus; it simply means that the applicant needs to show that the service serves an ‘educational purpose.’”¹⁹ Indeed, the Commission has recognized that various off-campus services are “integral, immediate, and proximate to the education of students or the provision of library services to library patrons, and thus, would be considered to be an educational purpose”²⁰ and, therefore, are eligible for E-Rate support. As examples of off-campus services that fulfill an educational purpose, the Commission lists “a school bus driver’s use of wireless telecommunications services while delivering children to and from school, a library staff person’s use of wireless telecommunications service on a library’s mobile library unit van, and the use by teachers or other school staff of wireless telecommunications service while accompanying students on a field trip or sporting event.”²¹

During the COVID-19 pandemic, disparities in household access to affordable high-speed Internet and Internet-enabled devices prevent many students from participating in

¹⁵ 47 U.S.C. § 254(h)(1)(B) (emphasis added); *see also Schools and Libraries Universal Service Support Mechanism*, WC Docket No. 02-6, Sixth Report and Order, 25 FCC Rcd 18762, 18774, para. 22 (2010) (*Schools and Libraries Sixth Report and Order*) (amending the rules to require that E-rate-funded services be used *primarily* for educational purposes).

¹⁶ FCC, Wireline Competition Bureau Seeks Comment on Petitions for Emergency Relief, *supra* note 4, at 2.

¹⁷ 47 C.F.R. § 54.500.

¹⁸ FCC, Wireline Competition Bureau Seeks Comment on Petitions for Emergency Relief, *supra* note 4, at 2 (citing *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, *Second Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 9202, 9208, para. 17 (2003)).

¹⁹ SHLB Petition, *supra* note 3, at 9.

²⁰ FCC, Wireline Competition Bureau Seeks Comment on Petitions for Emergency Relief, *supra* note 4, at 2.

²¹ *Sixth Report and Order*, *supra* note 14, 25 FCC Rcd at 18778 n.90.

remote schooling while their physical school buildings are closed to limit the community spread of COVID-19. Without adequate Internet connectivity, these students are excluded from the space where formal education is occurring – the virtual classroom. During this temporary period of educational disruption caused by the pandemic emergency, technology services that provide high-speed Internet connectivity to students who lack adequate Internet at home or at safe locations outside the physical school building are at least as “integral, immediate, and proximate to the education of students” as the above examples cited approvingly by the Commission.²²

Further support for the Commission’s power to take the requested actions comes from section 254(c)(3) of the Act, which authorizes the Commission to “designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h)[.]”²³ which is described above. Congress explicitly gave the Commission “specific authority to alter the definition [of services] from time to time, and to provide a different definition for schools, libraries, and health care facilities.”²⁴ As multiple petitioners point out, in April 2020 the Commission used this authority “to allow health care providers to purchase Internet access services for participating patients’ use in their homes or mobile locations during the pandemic in the Connected Care Pilot Program and can take a similar action in the E-Rate program.”²⁵ The Commission concluded that supporting broadband connectivity for remote uses for a “discrete, limited duration Pilot Program falls within the scope of section 254(h)(2)(A) of the Act”²⁶ because it would “enhance health care providers’ access to ‘advanced telecommunications and information services’”²⁷ by “expand[ing] health care providers’ digital footprints for purposes of providing connected care services and allow[ing] health care providers to serve more eligible low-income patients and veterans through the Pilot Program.”²⁸ The statutory authority and policy considerations justifying the Commission’s Connected Care Pilot Program Order apply with equal force to the Commission’s ability to allow E-Rate funding to support broadband connectivity to students’ homes during the pandemic.²⁹

In summary, consistent with the Communications Act and the Commission’s prior determinations, the Commission can and should clarify that, during the COVID-19 pandemic, off-campus use of E-Rate-supported services by students who lack adequate at home Internet connectivity fulfills an educational purpose, and, therefore, is eligible for E-Rate support.

- b. *Given the special circumstances of the COVID-19 pandemic, and the overwhelming public interest in connecting students to the virtual classroom while physical schools are closed, the Commission is authorized to amend or*

²² *See id.*

²³ 47 U.S.C § 254(c)(3).

²⁴ H.R. REP. NO. 104-458, at 131 (1996) (Conf. Rep.), available at <https://www.congress.gov/104/crpt/hrpt458/CRPT-104hrpt458.pdf>.

²⁵ FCC, Wireline Competition Bureau Seeks Comment on Petitions for Emergency Relief, *supra* note 4, at 7 (citing Colorado Petition, *supra* note 5, at 6-7; SHLB Petition, *supra* note 3, at 22-23).

²⁶ *Connected Care Pilot Program Report and Order*, 35 FCC Rcd at 3417-18, paras. 87-88 (2020).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See* SHLB Petition, *supra* note 3, at 22; Colorado Petition, *supra* note 5, at 5-7.

waive E-Rate program rules as necessary to support a range of technological mechanisms to provide broadband connectivity for remote schooling.

Sections 254(c)(1), (c)(3), (h)(1)(B), and (h)(2) of the Act authorize the Commission “to set the list of services that will be supported for eligible schools and libraries, as well as to design the specific mechanisms of support.”³⁰ The Act requires the Commission, when determining which services to support, to consider the extent to which such services “are essential to education, public health, or public safety”³¹ and “are consistent with the public interest, convenience, and necessity.”³² With access to physical classrooms restricted because of COVID-19, the essential needs of public education and public health converge around a singular public interest, namely, ensuring students have access to the broadband internet they need to participate in remote schooling. To achieve this public interest, the Commission can and should take emergency action – including waiving aspects of the Eligible Services List for FY 2020³³ and FY 2021³⁴ – to support an array of available broadband technologies for off-campus use; school district leaders are well-positioned to identify the technological means that are most appropriate to meeting their students’ broadband connectivity needs.

The Commission may amend or waive its rules for good cause. Granting a waiver is appropriate when (i) special circumstances warrant deviation from the general rule; and (ii) such deviation will serve the public interest.³⁵ Here, both criteria are met. To reduce the spread of COVID-19 and mitigate the ongoing public health crisis, many schools are closed or are limiting in-person instruction; students who lack high-speed Internet at home are excluded from the virtual classroom. Under these circumstances, temporarily waiving certain E-Rate program rules is necessary and appropriate. Waiving aspects of the Eligible Services List and other rules will allow schools to use appropriate technological mechanisms to provide students quickly and efficiently with off-campus broadband Internet connectivity to enable their participation in virtual classroom education during the pandemic.

III. Conclusion

We thank the Commission for the opportunity to comment on this urgent matter that affects the education of elementary and secondary students in our states and territories. We urge the Commission to promptly take the actions requested above to unlock the doors of the virtual classroom while physical schools remain closed during the COVID-19 pandemic.

³⁰ *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket 13-184, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8895 at para. 67 (rel. July 23, 2014) (*2014 E-rate Modernization Order*), citing 47 U.S.C. §§ 254(c)(1), 254(c)(3), 254(h)(1)(B), 254(h)(2).

³¹ 47 U.S.C § 254(c)(1)(A).

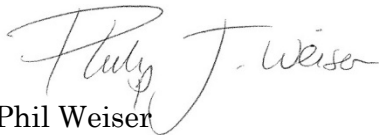
³² 47 U.S.C § 254(c)(1)(D).

³³ *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Order, 34 FCC Rcd 11959, 11967 (WCB 2019) (rel. Dec. 9, 2019) (FY 2020 Eligible Services List), https://docs.fcc.gov/public/attachments/DA-19-1249A1_Rcd.pdf.

³⁴ *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Order, DA 20-1418 (WCB 2020) (rel. Nov. 30, 2020) (FY 2021 Eligible Services List), <https://docs.fcc.gov/public/attachments/DA-20-1418A1.pdf>.

³⁵ See *Network IP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (citing *NE Cellular Tele. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

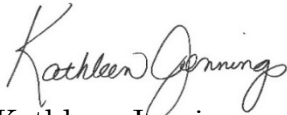
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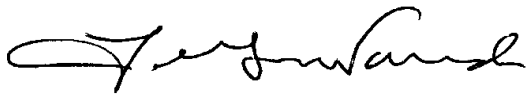
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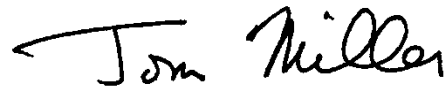
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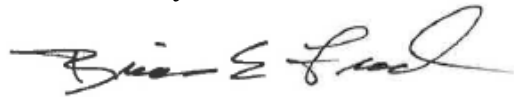
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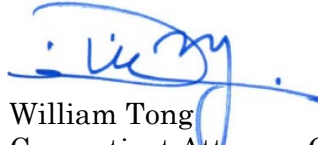
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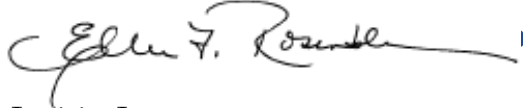
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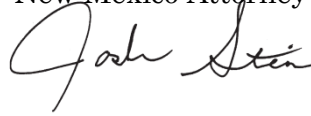
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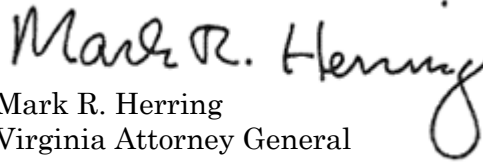
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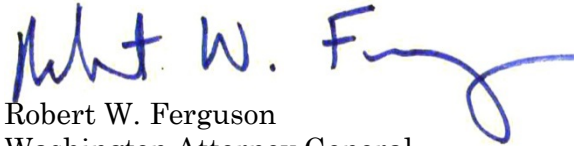
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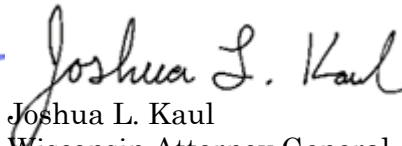
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