

**Before the Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of  
Affordable Connectivity Program

WC Docket No. 21-450

**COMMENTS OF THE CENTER FOR DEMOCRACY & TECHNOLOGY**

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## **Executive Summary**

The Center for Democracy & Technology (CDT) respectfully submits these comments in response to the Public Notice issued by the Wireline Competition Bureau, seeking public comment on the new Affordable Connectivity Program established by the Infrastructure Investment and Jobs Act.

CDT applauds the efforts of Congress and the Commission to close the homework gap and bridge the digital divide and offers these comments on how to connect students and families while protecting their privacy. The Affordable Connectivity Program provides critical resources to connect students learning from home to their lessons and to help make broadband affordable for low-income families. However, a failure to garner students' and families' trust can chill participation and hamper the Program's effectiveness. To help earn that trust, the Commission should protect students' and families' privacy by:

- Clarifying that the monitoring requirement of the Children's Internet Protection Act does not require schools to engage in pervasive tracking of students' online activity.
- Using school enrollment data—rather than sensitive individual eligibility data—when possible to verify students' participation in the National School Lunch Program or the School Breakfast Program, including by maintaining eligibility for students who attend a school participating in the Community Eligibility Provision.
- Reconsidering the Bureau's interpretation of the timeline for rulemaking under the Infrastructure Investment and Jobs Act in order to ensure that schools and communities may fully and equitably participate in the establishment of the Affordable Connectivity Program.

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## Introduction

On November 15, 2021, the President signed the Infrastructure Investments and Jobs Act,<sup>1</sup> which among many other provisions, modified the existing Emergency Broadband Benefit Program<sup>2</sup> (EBB) administered by the Commission to become the Affordable Connectivity Program (ACP), with additional funds to provide discounted broadband connections to certain low-income households.<sup>3</sup> On November 18, 2021, the Commission's Wireline Competition Bureau (the Bureau) issued a Public Notice<sup>4</sup> asking for public comment on how to modify the Emergency Broadband Benefit Program to establish the ACP.

CDT strongly supports the ACP and the Commission's work to close the digital divide and homework gap. In order to achieve those goals most effectively and to ensure that beneficiaries of the ACP are not forced to sacrifice their privacy, the Commission should take several steps as it implements the ACP. First, it should clarify that the requirement in the Children's Internet Protection Act (CIPA) for schools to monitor students' online activities does not require pervasive tracking. As CDT's research has shown, some schools engage in such tracking under the mistaken belief that CIPA requires them to do so, which is particularly harmful to lower-income and historically marginalized groups of students, including many of those who would be beneficiaries of the ACP.

Second, the Commission should continue to permit the use of school enrollment data rather than sensitive individual eligibility data to verify enrollment in the National School Lunch Program or the School Breakfast Program and consequent qualification for the ACP. That approach protects the privacy of students' and families' data, while leaving ample means for the Commission to protect the integrity of the ACP and prevent fraud and abuse.

Finally, the Commission should reconsider the timeline for this rulemaking to enable schools and communities to fully and equitably provide input into the establishment of the ACP.

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<sup>1</sup> Infrastructure Investment and Jobs Act, Pub. L. 117-58, sec. 60502 (2021) [hereinafter Infrastructure Act], available at <https://www.congress.gov/bill/117th-congress/house-bill/3684/text>.

<sup>2</sup> See Consolidated Appropriations Act, 2021, Pub. L. 116-260, div. N, sec. 904 (2020) [hereinafter Consolidated Appropriations Act], available at <https://www.congress.gov/bill/116th-congress/house-bill/133/text>.

<sup>3</sup> Infrastructure Act., sec. 60502(b)(1)(A); Consolidated Appropriations Act, sec. 904(a)(6).

<sup>4</sup> *Wireline Competition Bureau Seeks Comment on the Implementation of the Affordable Connectivity Program*, WC Docket 21-450, Public Notice, DA 21-1453 (WCB Nov. 18, 2021) [hereinafter Public Notice], available at <https://www.fcc.gov/document/fcc-seeks-comment-new-affordable-connectivity-program>.

## I. The Commission Should Clarify the Monitoring Requirement of the Children’s Internet Protection Act to Ensure that Students Are Not Subject to Unnecessary Invasions of Their Privacy

As CDT has previously urged,<sup>5</sup> the Commission should clarify that CIPA’s “monitoring” requirement<sup>6</sup> does not require students who benefit from Commission programs to sacrifice their privacy to connect to online resources. Recent research by CDT indicates that schools are implementing invasive software to monitor students’ activity online, often as a result of an overbroad interpretation of CIPA’s “monitoring” requirement, with a disproportionate impact on lower-income and historically marginalized groups of students and families.<sup>7</sup>

Student activity monitoring software permits schools unprecedented glimpses into students’ lives, from analyzing students’ browsing habits to scanning their messages and documents to viewing or listening to activities in the home.<sup>8</sup> Overbroad, systematic monitoring of online activity can reveal sensitive information about students’ personal lives, such as their sexual orientation, or cause a chilling effect on their free expression, political organizing, or discussion of sensitive issues such as mental health. Among other things, CDT’s recent research showed:

- **Monitoring is widespread and used outside school hours.** In polling research conducted by CDT, 81 percent of teachers reported that their schools use student activity monitoring software.<sup>9</sup> Of those teachers, only one in four reported that monitoring is limited to school hours.<sup>10</sup> Seventy-one percent report that monitoring takes place on

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<sup>5</sup> Center for Democracy & Technology, Notice of *Ex Parte*, WC Docket No. 21-93 (filed Nov. 8, 2021), *available at* <https://www.fcc.gov/ecfs/filing/110841407570>; CDT Comments at 2-9, WC Docket No. 21-93 (filed Apr. 5, 2021), *available at* <https://www.fcc.gov/ecfs/filing/1040520868433>.

<sup>6</sup> 47 U.S.C. § 254(h)(5)(B); 47 CFR § 54.520(c)(1)(i).

<sup>7</sup> CDT, Student Activity Monitoring Software: Research Insights and Recommendations 2 (2021), *available at* <https://cdt.org/insights/student-activity-monitoring-software-research-insights-and-recommendations>; DeVan L. Hankerson et al., Center for Democracy & Technology, Online and Observed 10-11 (2021), *available at* <https://cdt.org/insights/report-online-and-observed-student-privacy-implications-of-school-issued-devices-and-student-activity-monitoring-software>.

<sup>8</sup> See Sidney Fussell, *Borrowed a School Laptop? Mind Your Open Tabs*, *Wired* (Oct. 7, 2021), <https://www.wired.com/story/borrowed-school-laptop-mind-open-tabs>; Mark Keierleber, *An Inside Look at the Spy Tech That Followed Kids Home for Remote Learning*, *The 74* (Sept. 14, 2021), <https://www.the74million.org/article/gaggle-spy-tech-minneapolis-students-remote-learning>.

<sup>9</sup> CDT, Student Activity Monitoring Software, *supra* note 7, at 2.

<sup>10</sup> *Id.*

school-issued devices, while only 16 percent stated that monitoring also occurs on personal devices.<sup>11</sup>

- **Monitoring disproportionately affects low-income students.** In interviews with CDT, technology leaders in school districts with wealthier student populations reported that their students are more likely to have access to personal devices, which are subject to less monitoring than school-issued devices.<sup>12</sup> In its polling research, CDT found that approximately two-thirds of rural, low-income, Hispanic, and African American students rely on school-issued devices and may consequently be disproportionately subject to student activity monitoring.<sup>13</sup>
- **Monitoring chills student expression.** Six in ten students in CDT’s polls agreed with the statement, “I do not share my true thoughts or ideas because I know what I do online is being monitored,” and 80 percent report being “more careful about what I search online when I know what I do online is being monitored.”<sup>14</sup>
- **Parents and teachers are concerned about monitoring.** Although approximately two-thirds of teachers and parents believe that the benefits of student activity monitoring software outweigh its risks, they nonetheless have concerns about its use. Forty-seven percent of teachers and 51 percent of parents report concerns with monitoring software, such as the risk that LGBTQ+ students may be outed.<sup>15</sup> Fifty-seven percent of teachers and 61 percent of parents were concerned that student activity monitoring could cause “long-term harm to students” if it is used for discipline or out of context.<sup>16</sup>

CIPA’s “monitoring” provision may be motivating overbroad surveillance of students’ lives. In interviews with CDT, school district technology leaders reported that they have adopted monitoring software to comply with CIPA’s perceived requirements.<sup>17</sup> CIPA, however, does not require invasive surveillance of students, and the Commission has the authority to

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<sup>11</sup> *Id.*

<sup>12</sup> Hankerson et al., *supra* note 7, at 10-11.

<sup>13</sup> CDT, Research Slides: Key Views Toward Edtech, School Data, and Student Privacy 48 (2021), *available at* <https://cdt.org/insights/report-navigating-the-new-normal-ensuring-equitable-and-trustworthy-edtech-for-the-future/>.

<sup>14</sup> CDT, Student Activity Monitoring Software, *supra* note 7, at 4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; see Mark Keierleber, *Don’t Get Gaggled*, The 74 (Oct. 18, 2020), <https://www.the74million.org/article/dont-get-gaggled-minneapolis-school-district-spends-big-on-student-surveillance-tool-raising-ire-after-terminating-its-police-contract>.

<sup>17</sup> Hankerson et al., *supra* note 7, at 11-12; see Mark Keierleber, *Minneapolis School District Addresses Parent Outrage Over New Digital Surveillance Tool as Students Learn Remotely*, The 74 (Oct. 28, 2020), <https://www.the74million.org/minneapolis-school-district-addresses-parent-outrage-over-new-digital-surveillance-tool-as-students-learn-remotely>.

clarify its interpretation. The law does not define the term “monitoring” but instead includes an express “disclaimer” that “[n]othing” in the statute “shall be construed to require the tracking of Internet use by any identifiable minor or adult user.”<sup>18</sup>

Further, statements from around the time of CIPA’s passage suggest that the 106th Congress and its contemporaries understood that “monitoring” did not require technically sophisticated surveillance. During debate over CIPA, Sen. Patrick Leahy noted that “a lot of schools and libraries have found a pretty practical way” of monitoring students by having “their teachers, their parents, and everybody else . . . walking back and forth and looking over their shoulder saying: What are you looking at?”<sup>19</sup> Similarly, in deciding a constitutional challenge to CIPA, the Eastern District of Pennsylvania described many libraries’ adoption of “monitoring implemented by a ‘tap on the shoulder’ of patrons perceived to be offending library policy.”<sup>20</sup>

Given the harms caused by student activity monitoring software and Congress’s intent that “monitoring” not entail the tracking of students, CDT urges the Commission to clarify that “monitoring” is narrow and limited to the minimal amount of data collection needed to achieve CIPA’s goals, both on- and off-campus. For example, schools may limit the data they obtain by collecting only aggregate information whenever possible and minimizing where and when monitoring is occurring, such as by monitoring aggregate traffic on the school network, rather than over individual devices.

This rulemaking is an appropriate time to clarify the scope of CIPA’s monitoring requirement. Although the ACP does not incorporate CIPA’s requirements, the Commission has applied them to devices distributed by schools under the Emergency Connectivity Fund.<sup>21</sup> Consequently, many students are now using school-issued devices equipped with varying

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<sup>18</sup> Consolidated Appropriations Act, 2001, Pub. L. 106–554, app. D, div. B, title XVII, sec. 1702(b), 114 Stat. 2763, 2763A–336 (2000), available at <https://www.congress.gov/bill/106th-congress/house-bill/4577>; 47 U.S.C. § 254 Note. As suggested by contemporaneous reports, “tracking” includes the gathering of data from activity online and connecting it with other data to make inferences about the user. See Federal Trade Commission, Online Profiling: A Report to Congress 3-6 (2000), available at <https://www.ftc.gov/sites/default/files/documents/reports/online-profiling-federal-trade-commission-report-congress-part-2/onlineprofilingreportjune2000.pdf>.

<sup>19</sup> 146 Cong. Rec. S5823-45 (daily ed. June 27, 2000) (statement of Sen. Leahy), available at <https://www.congress.gov/congressional-record/2000/06/27/senate-section/article/S5823-8>.

<sup>20</sup> *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 406 (E.D. Pa. 2002).

<sup>21</sup> *Establishing Emergency Connectivity Fund to Close the Homework Gap*, WC Docket No. 21-93, Report and Order, 36 FCC Rcd 8696, 8748, para. 111 (2021).

monitoring tools to connect from home. This creates an unreasonable disparity, making students' and families' privacy dependent on which state or federal program they use to connect to their education, while leaving those who can afford their own devices significantly less likely to be subject to monitoring. The Commission should clarify that CIPA's monitoring requirement is narrow and may be achieved without unduly treading on student privacy.

**II. The Commission Should Continue to Use School Enrollment Data—Rather than Sensitive Individual Eligibility Data—When Possible to Verify Students' Participation in the National School Lunch Program or the School Breakfast Program and Provide Safeguards for Sensitive Individual Information**

*A. Use School Enrollment Data When Possible, Including When a Student Attends a School Participating in the Community Eligibility Provision*

Under the Consolidated Appropriations Act,<sup>22</sup> a low-income household is eligible to participate in the Affordable Connectivity Program if at least one member has been approved to participate in the National School Lunch Program under the Richard B. Russell National School Lunch Act<sup>23</sup> or the School Breakfast Program (together, the NSLP) under the Child Nutrition Act of 1966.<sup>24</sup> The Act permits broadband providers to rely on schools to verify households' participation in the NSLP.<sup>25</sup> Under the Emergency Broadband Benefit Program, the Commission permitted students attending schools participating in the U.S. Department of Agriculture's Community Eligibility Provision (CEP) to qualify for the EBB.<sup>26</sup> The Infrastructure Act maintains NSLP eligibility for the ACP,<sup>27</sup> and the Commission should continue to permit CEP-based enrollment in the ACP to ensure students have access to the ACP's benefits while also protecting their privacy.

Many schools do not collect individual eligibility applications for the NSLP, but instead provide free lunches to all students through the CEP. The CEP permits schools to provide free lunches to all of their students if at least 40 percent of the school's students are "categorically

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<sup>22</sup> Consolidated Appropriations Act, sec. 904(a)(6).

<sup>23</sup> 42 U.S.C. § 1751 et seq.

<sup>24</sup> 42 U.S.C. § 1773.

<sup>25</sup> Consolidated Appropriations Act, sec. 904(b)(2)(C).

<sup>26</sup> *Emergency Broadband Benefit Program*, WC Docket No. 20-445, Report and Order, 35 FCC Rcd 4612, 4682-84, paras. 52-56 (2021) [hereinafter EBB Order].

<sup>27</sup> See Infrastructure Act, sec. 60502(b)(1).



eligible” for the NSLP through participation in other qualifying benefits.<sup>28</sup> “CEP aims to combat child hunger in high poverty areas, while reducing administrative burden and increasing program efficiency by using current, readily available data to offer school meals to all students at no cost.”<sup>29</sup> As of 2019, 64.6% of all eligible schools had adopted community eligibility,<sup>30</sup> meaning that a large number of schools with the most vulnerable student populations no longer collect student-level data on who is eligible for the NSLP.

Consequently, data on individual students’ eligibility for the NSLP will often not be available; even if it is, it may be incomplete and will include sensitive information such as families’ socioeconomic status and participation in government programs. Because students’ participation in the NSLP carries implied information about families’ socioeconomic status and participation in federal and state benefit programs,<sup>31</sup> it is considered particularly sensitive. Consequently, that information is protected not only by the Family Educational Rights and Privacy Act (FERPA),<sup>32</sup> but also the Richard B. Russell National School Lunch Act, which limits disclosure without parental consent to a few enumerated recipients responsible for implementing federal and state education and nutritional programs.<sup>33</sup> Disclosure of a student’s participation in the NSLP may run afoul of those protections.

To address the risks of unavailable or poor-quality data and to protect student privacy, the Commission should discourage broadband providers from seeking those data on an individual level. Instead, broadband providers should verify eligibility for the Program by continuing to rely on school enrollment data and school participation in the CEP when possible. Enrollment data and school participation in the CEP are less sensitive than individual NSLP

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<sup>28</sup> 7 CFR § 245.9(f); U.S. Department of Agriculture, CEP Fact Sheet (2015), *available at* <https://www.fns.usda.gov/cn/community-eligibility-provision-resource-center>.

<sup>29</sup> U.S. Department of Agriculture, *National School Lunch Program and School Breakfast Program: Eliminating Applications Through Community Eligibility as Required by the Healthy, Hunger-Free Kids Act of 2010*, 81 Fed. Reg. 50194, 50195 (July 29, 2016).

<sup>30</sup> Food Research & Action Center, *Community Eligibility: The Key to Hunger-Free Schools* (2019), *available at* <https://frac.org/wp-content/uploads/community-eligibility-key-to-hunger-free-schools-sy-2018-2019.pdf>.

<sup>31</sup> USDA, *Eligibility Manual for School Meals at 22* (July 18, 2017), *available at* <https://www.fns.usda.gov/cn/eligibility-manual-school-meals> (describing eligibility based on income and household size or participation in government programs).

<sup>32</sup> 20 U.S.C. § 1232g; 34 C.F.R. § 99.30.

<sup>33</sup> 42 U.S.C. § 1758(b)(6); 7 C.F.R. § 245.6(i).

eligibility data and face fewer legal restrictions. When collecting individual data is the only option, such data collection should be accompanied by communication with families, parental consent, and additional safeguards such as data-sharing agreements, data minimization, and best security practices.

Reliance on CEP data meets the eligibility requirements of the Infrastructure Act and the Consolidated Appropriations Act. A school's adoption of the CEP excuses it from collecting NSLP applications from families and automatically approves all students at the school for free meals.<sup>34</sup> Thus, all households with students attending CEP schools meet the Consolidated Appropriations Act's requirements that at least one member of a household has (1) "applied for" and (2) "been approved" for "benefits under the free and reduced price lunch program."<sup>35</sup> Those requirements remain in place under the Infrastructure Act,<sup>36</sup> and accordingly, those households should be deemed eligible for the Program.

*B. Accompany the Collection of Any Individual Data with Proactive Communications with Families, Parental Consent, and Additional Safeguards*

For students who attend schools that do not participate in the CEP, broadband providers should obtain parental consent through the ACP enrollment process to permit the school to disclose the child's individual participation in the NSLP to broadband providers.<sup>37</sup> Without that consent, disclosure of the child's NSLP eligibility status by a school may not be permissible under either FERPA<sup>38</sup> or the National School Lunch Act.<sup>39</sup> Further, because schools may not have collected eligibility applications from families for the current school year,<sup>40</sup>

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<sup>34</sup> 42 U.S.C. § 1759a(a)(1)(F)(ii), (iv); 7 C.F.R. § 245.9(f)(4)(iii), (iv).

<sup>35</sup> Consolidated Appropriations Act, sec. 904(a)(6)(B).

<sup>36</sup> See Infrastructure Act, sec. 60502(b)(1).

<sup>37</sup> The U.S. Department of Education has interpreted FERPA to permit parental consent to be obtained by third parties. Family Policy Compliance Office, U.S. Department of Education, The Family Educational Rights and Privacy Act Guidance on Sharing Information with Community-Based Organizations at 7-8 (2014), *available at* [https://studentprivacy.ed.gov/Community\\_Based\\_Organizations](https://studentprivacy.ed.gov/Community_Based_Organizations) ("There is nothing in FERPA that would preclude a community-based organization from obtaining a signed and dated written consent . . . .")

<sup>38</sup> 20 U.S.C. § 1232g; 34 C.F.R. § 99.30.

<sup>39</sup> 42 U.S.C. § 1758(b)(6); 7 C.F.R. § 245.6(i).

<sup>40</sup> USDA, P-EBT Q&A at 6 (Jan. 29, 2021), *available at* <https://fns-prod.azureedge.net/sites/default/files/resource-files/Pandemic-EBT-state-plans-2020-2021-schools-child-care-gas.pdf> (noting that, due to pandemic-related disruptions, "[m]any school districts did not collect applications at the start of this school year"); Cory Turner, 'Children Are Going Hungry': Why Schools Are Struggling to Feed Students, NPR (Sept. 8, 2020),

individual verification (where necessary) should be based on participation in the NSLP during either the current or prior school years.

Parental consent and compliance with legal requirements must be accompanied by additional safeguards to protect student privacy. Schools and broadband providers should proactively communicate with families about the scope of the ACP, what data will be shared to participate in the ACP, who will receive it, and how it will be used. When schools share those data with broadband providers, they should enter into written agreements with those providers, identifying the data to be shared and the purpose of the sharing, limiting the data's use and redisclosure, setting time limits for the retention of the data, and establishing minimum administrative and technical safeguards for the data.<sup>41</sup>

Recent reports have re-ignited questions about broadband providers' data practices,<sup>42</sup> and the Commission should also explicitly limit broadband providers' collection and use of personally identifiable information under the Program to only that which is necessary to verify eligibility and provide service. These privacy protections will help ensure that consumers are not forced into a false choice between protecting their privacy and using essential connectivity. Data collected by the National Verifier and the National Lifeline Accountability Database such as income or participation in government programs are highly sensitive. Although those data are necessary to operate the Program, their misuse or disclosure could invade users' privacy; as such, they deserve protection, just as the FCC requires telecommunications carriers to protect customer information under Title II.<sup>43</sup> Limiting broadband providers' collection and use of data balances the need to provide essential services with the need to protect users' privacy.

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<https://www.npr.org/2020/09/08/908442609/children-are-going-hungry-why-schools-are-struggling-to-feed-students>.

<sup>41</sup> See USED, Guidance for Reasonable Methods and Written Agreements (2015), *available at* <https://studentprivacy.ed.gov/resources/guidance-reasonable-methods-and-written-agreements>; USED, Written Agreement Checklist (2015), *available at* <https://studentprivacy.ed.gov/resources/written-agreement-checklist>.

<sup>42</sup> Federal Trade Commission, A Look at What ISPs Know About You: Examining the Privacy Practices of Six Major Internet Service Providers (2021), *available at* <https://www.ftc.gov/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service>.

<sup>43</sup> See 47 U.S.C. § 222; *Consumer Privacy*, FCC, <https://www.fcc.gov/general/customer-privacy> (last visited Jan. 13, 2021).

*C. Protect Privacy and Ensure Equitable Access to the ACP in Any Measures to Address Fraud, Waste, or Abuse Related to the CEP*

Qualification for the ACP through enrollment in a CEP school may be accompanied by measures to protect the integrity of the ACP and to address potential fraud, waste, and abuse by broadband providers, while protecting student privacy and equitable access to the ACP's benefits. A recent report by the Commission's Office of the Inspector General highlights some of these measures<sup>44</sup>:

- Comparing the number of households enrolled in the ACP with the number of students attending the respective schools participating in the CEP.
- Investigating the "repetitive" use of non-residential addresses to enroll in the program.
- Assessing the repetitive use of home addresses that are significant distances from a school participating in the CEP.

Those measures and similar efforts should be accompanied by steps to protect student privacy and ensure all students have equitable access to the program. Such steps might include:

- **Place the burden of anti-fraud measures on broadband providers.** The Commission should place the burden of measures to address potential fraud, waste, and abuse primarily on broadband providers, not individuals. The Inspector General's report made clear that fraudulent enrollments related to CEP eligibility resulted from false claims by providers and their sales agents.<sup>45</sup> The report noted, "EBB enrollment data shows that providers and providers' sales agents are driving these clearly improper enrollments."<sup>46</sup> Further, providers are likely to be better situated to detect fraud through focused, privacy protective measures rather than by policing each individual applicant, such as by comparing the number of households enrolled in the ACP through CEP eligibility at particular schools with the number of students attending those schools.
- **Create strategies and protocols for accountability and redress, especially for historically marginalized groups of students.** The Commission should take steps to ensure that any measures to address fraud, waste, and abuse do not adversely impact historically marginalized groups, including rural, low-income, unhoused, and migrant students. Currently, the EBB uses both automatic and manual verification of households'

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<sup>44</sup> Office of the Inspector General, Federal Communications Commission, Advisory Regarding Fraudulent EBB Enrollments Based On USDA National School Lunch Program Community Eligibility Provision 3 (2021), *available at* [https://www.fcc.gov/sites/default/files/oig\\_advisory\\_cep\\_11222021.pdf](https://www.fcc.gov/sites/default/files/oig_advisory_cep_11222021.pdf) [hereinafter *OIG Report*].

<sup>45</sup> *Id.* at 1.

<sup>46</sup> *Id.* at 3.

eligibility.<sup>47</sup> However, there is no way to guarantee that either automatic or manual verification systems are error-free, and the Commission should ensure that students and families have access to mechanisms for accountability and redress for determinations that they are not eligible for the ACP.<sup>48</sup>

At the most basic level, accountability means having a point of contact for a student or parent who thinks they have been subjected to an incorrect or unfair decision. Redress is critical for historically marginalized groups, whose circumstance may not align with the assumptions underlying eligibility verification and anti-fraud measures. For example, unhoused people may list a non-residential address due to a lack of a permanent home address. Likewise, students living in rural school districts may live longer distances from their schools than is “typically”<sup>49</sup> expected. Several school districts in Alaska — specifically cited in the Inspector General’s report — cover tens of thousands square miles, and students may live significant distances from their schools.<sup>50</sup>

- **Preserve student and individual privacy.** The Commission should ensure that its anti-fraud measures protect student and individual privacy and ensure equitable access to the ACP:
  - *Minimize data collected and avoid privacy-invasive collection of personal information.* The Commission should minimize the data collection and documentation requirements for the ACP, not only to reduce barriers to participation but also to protect individual privacy. Collecting unnecessary data or keeping data after it is no longer useful creates an unnecessary risk that it could be used out of context or exposed in a breach. Critically, many of the solutions identified by the Inspector General in its report do not rely on collecting individual data, but instead utilize already publicly available information. Nonetheless, in response to the Inspector General’s report, the Bureau has already required that USAC collect additional data from students’ families.<sup>51</sup> The Commission should require documentation and data collection only when necessary to verify a household’s eligibility for the ACP and establish anti-fraud measures that do not create additional barriers for households.

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<sup>47</sup> EBB Order at 4634, para. 50.

<sup>48</sup> Hannah Quay-de la Vallee & Natasha Duarte, Center for Democracy & Technology, Algorithmic Systems in Education 24 (2019), available at <https://cdt.org/insights/algorithmic-systems-in-education-incorporating-equity-and-fairness-when-using-student-data/>.

<sup>49</sup> OIG Report at 3.

<sup>50</sup> American School & University, *Largest U.S. School District by Land Area* (Feb. 15, 2021), <https://www.asumag.com/research/top-10s/article/21155278/largest-us-school-districts-by-land-area>.

<sup>51</sup> Wireline Competition Bureau Announces Additional Program Integrity Measures for Emergency Benefit Program Enrollments Based on the Community Eligibility Provision, WC Docket No 20-445, Public Notice (WCB Nov. 22, 2021), available at <https://www.fcc.gov/document/wcb-implements-ebb-program-integrity-measures-cep-enrollments>.

- *Avoid untested, privacy-invasive technical solutions.* The Commission should subject technically sophisticated measures to address fraud, waste, and abuse to rigorous evaluations for privacy and equity. For example, technical measures relying on artificial intelligence or even facial recognition have unduly excluded people, especially people of color, from accessing governmental benefits.<sup>52</sup> Similarly, the Commission should reconsider the Bureau's suggestion that it require individuals to install a third party application on their devices.<sup>53</sup> Third-party applications that measure broadband usage may pose risks to individuals' security and privacy by collecting information on individuals' internet traffic, browsing history, and location, and the Commission should reject their use.

CDT applauds the Commission's efforts to ensure the long-term stability and integrity of the ACP, but measures to address fraud, waste, and abuse should not come at the undue expense of privacy or equity.

### **III. The Commission Should Reconsider the Bureau's Assessment that It Must Proceed on an Expedited Timeline or Forego Notice and Comment Rulemaking, as It May Curtail Public Engagement on the ACP**

The Commission should reconsider the Bureau's assessment that the Consolidated Appropriations Act requires it to proceed on an expedited timeline or that the ACP's December 31, 2021 effective date forces it to forgo notice and comment rulemaking. Public engagement on the implementation of the ACP will provide valuable feedback from diverse stakeholders such as community institutions, schools, and nonprofits, and neither the Consolidated Appropriations Act nor the ACP's effective date require the Commission to forgo that input.

In its Public Notice, the Bureau raises procedural issues regarding the timeline for rulemaking. The Bureau states, "The Infrastructure Act . . . does not modify the procedural and rulemaking timeline requirements contained in section 904(c) of the Consolidated Appropriations Act, and we interpret section 904(c) as also pertaining to the promulgation of

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<sup>52</sup> Rachel Metz, *Want Your Unemployment Benefits? You May Have to Submit to Facial Recognition First*, CNN Business (July 23, 2021), <https://amp.cnn.com/cnn/2021/07/23/tech/idme-unemployment-facial-recognition/index.htm>; Todd Feathers, *Facial Recognition Failures Are Locking People Out of Unemployment Systems*, Vice (June 18, 2021), <https://www.vice.com/en/article/5dbywn/facial-recognition-failures-are-locking-people-out-of-unemployment-systems>; Karen Hao, *The Coming War on the Hidden Algorithms that Trap People in Poverty*, MIT Technology Review (Dec. 4, 2020), <https://www.technologyreview.com/2020/12/04/1013068/algorithms-create-a-poverty-trap-lawyers-fight-back>.

<sup>53</sup> Public Notice, para. 47.

rules for the Affordable Connectivity Program.”<sup>54</sup> The Bureau also seeks comment on whether the December 31, 2021 effective date of the ACP gives the Commission “good cause” under the Administrative Procedure Act<sup>55</sup> to forego public input on consumer protection and other rules under the Infrastructure Act.<sup>56</sup>

The expedited rulemaking under the Consolidated Appropriations Act does not apply here. Division N, section 904(c) of the Consolidated Appropriations Act provides, “Not later than 60 days after the date of the enactment of this Act, the Commission shall promulgate regulations to implement” the Emergency Broadband Benefit Program.<sup>57</sup> In Section 904, “this Act,” is referring only to the Consolidated Appropriations Act, and its expedited rulemaking consequently does not apply to the Infrastructure Act. Further, “enactment” ordinarily refers to the one-time process by which a bill becomes law — that is, “a statute duly enacted pursuant to Art. I, §§ 1, 7” of the Constitution and its requirements for passage by both houses of Congress and presentment to the President.<sup>58</sup> The Consolidated Appropriations Act was enacted and became law on December 27, 2020, and amendments to it by the Infrastructure Act do not constitute a second “enactment” that would once again trigger its expedited timeline for rulemaking. The Commission can — and should — adhere to ordinary notice and comment rulemaking to ensure schools and communities may weigh in on the implementation of the ACP.

Moreover, even if the December 31 effective date of the ACP were to provide good cause to forgo notice and comment rulemaking,<sup>59</sup> nothing in the Administrative Procedure Act precludes the Commission from establishing interim rules and seeking comment before promulgating final rules to ensure adequate opportunities for the public — especially schools and communities — to participate in the development of the ACP’s rules. The Supreme Court

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<sup>54</sup> Public Notice, para. 2.

<sup>55</sup> 5 U.S.C. § 553(b)(B).

<sup>56</sup> Public Notice, paras. 91-92.

<sup>57</sup> Consolidated Appropriations Act, sec. 904(c)(1).

<sup>58</sup> *I.N.S. v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *id.* at 954 (“Amendment and repeal of statutes, no less than enactment, must conform with Art. I.”); *accord* Black’s Law Dictionary 619 (4th ed. 1968) (“Enact. To establish by law . . .”).

<sup>59</sup> CDT takes no position on whether the present circumstances constitute “good cause” as contemplated by the Administrative Procedure Act, 5 U.S.C. § 553(b).

has found that agencies may solicit comments and promulgate “final rules” following the promulgation of “interim” rules under the APA’s “good cause” exception to notice and comment rulemaking.<sup>60</sup> If the Commission were to find that the ACP’s effective date constitutes “good cause” to forgo public input in an interim round of rules, it should seek public input on the ACP’s final rules since the program, in the Bureau’s words, “is a longer term program”<sup>61</sup> that will shape how students, families, and communities connect into the future.

### **Conclusion**

CDT applauds the Commission’s continued efforts to close the homework gap and bridge the digital divide. That work can be accomplished while protecting students’ and families’ privacy by clarifying the application of the Children’s Internet Protection Act, verifying participation in the NSLP through enrollment data, and ensuring the public has an adequate opportunity to participate in the Commission’s rulemaking process.

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<sup>60</sup> *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2385-86 (2020).

<sup>61</sup> Public Notice, para. 100.