

*August 2, 2022*

**Via email and regulations.gov.**

The Honorable Catherine E. Lhamon  
Assistant Secretary for Civil Rights  
U.S. Department of Education  
Office for Civil Rights  
400 Maryland Avenue, SW  
Washington, D.C. 20202-1100

Re: Discriminatory Effects of Online Monitoring of Students on LGBTQI+ Students, Students of Color, and Students with Disabilities

Assistant Secretary Lhamon:

Over the past year, the U.S. Department of Education (ED) has worked to protect the rights of LGBTQI+ students, students of color, and students with disabilities.<sup>1</sup> However, the increasingly prevalent use of student activity monitoring software threatens to undermine those rights. Such software, which monitors students' most sensitive online activity, culminating in disciplinary actions, "outing," and interactions with law enforcement, is often used in ways that discriminate against protected groups of students. The undersigned civil, digital, and education rights organizations urge ED, through the Office for Civil Rights (OCR), to issue a policy statement that clarifies the intersection of civil rights laws and student activity monitoring, condemns uses of student activity monitoring that run afoul of students' civil rights and civil liberties, and states OCR's intent to take enforcement action against violations that result in discrimination, especially against historically marginalized groups of students. We are eager to support OCR's work to protect students.

Student activity monitoring software allows schools to view students' screens, record their browsing and search histories, and scan their messages and documents stored online or on school devices.<sup>2</sup> The resulting surveillance is pervasive: 89 percent of teachers report that their school uses student activity monitoring software,<sup>3</sup> and monitoring often occurs outside of school hours.

The widespread use of student activity monitoring comes at the same time as policy actions at the state level that explicitly target LGBTQI+ students, requiring schools to disclose their gender identity or sexual orientation against their will,<sup>4</sup> and that seek to curb students'

access to literature, scholarship, and resources regarding race and LGBTQI+ identities and stories.<sup>5</sup> With its insights into students' online lives, student activity monitoring is primed to become a key mechanism in that policy apparatus.<sup>6</sup>

These developments underscore the urgency and necessity for OCR to act to protect students from widespread harms, primarily affecting the groups of students that civil rights laws are intended to protect. In particular, research conducted by the Center for Democracy & Technology (CDT) reveals how online monitoring practices violate the civil rights laws that OCR enforces.<sup>7</sup>

- **Title VI: Exacerbating disproportionate discipline and law enforcement interactions for students of color.** As a result of student activity monitoring, students of color are experiencing increased interactions with law enforcement, as well as being disciplined at disproportionate rates. **44 percent** of teachers report that students were contacted by law enforcement because of behaviors flagged by student activity monitoring. Moreover, **78 percent** of teachers report that student activity monitoring flagged students for violations of disciplinary policy, and **59 percent** report that a student was actually disciplined following those alerts. That discipline falls disproportionately along racial lines, with **48 percent of Black students and 55 percent of Hispanic students** reporting that they or someone they know got into trouble as a result of student activity monitoring — compared to 41 percent of white students.
- **Title IX: Targeting LGBTQI+ students for “outing,” discipline, and criminal investigations.** LGBTQI+ students are disproportionately targeted as a result of student activity monitoring. **29 percent** of LGBTQI+ students report that they or another student they know has had their sexual orientation or gender identity disclosed without their consent (i.e., “outed”) due to student activity monitoring. Additionally, **56 percent** of LGBTQI+ students reported that they or someone they know was disciplined as a result of student activity monitoring, and **31 percent** reported they were contacted by law enforcement regarding a crime flagged by the software — compared to 44 percent and 19 percent, respectively, for their non-LGBTQI+ peers.
- **Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Harming students’ expression and mental health.** Research also suggests that students with disabilities are experiencing disproportionate harm as a result of student activity monitoring, including through behavioral threat assessments.<sup>8</sup> Approximately **five in ten** students agree with the statement: “I do not share my true thoughts or ideas because I know what I do online may be monitored.” This chilling effect is compounded for students with learning differences and physical disabilities, with **60 percent and 67 percent**, respectively, reporting that they do not share their true thoughts or feelings

due to monitoring. Moreover, **66 percent** of teachers are concerned that students are less likely to access resources or visit websites that might provide help to them, such as how to share their sexual orientation or gender identities with their families or how to access mental health supports.

Finally, previous CDT research showed that students experiencing poverty and students of color rely more heavily on school-issued devices, which are more likely to be subject to monitoring than personal devices.<sup>9</sup> As a result, these groups of students are subject to increased risks of all of the aforementioned discriminatory outcomes.

Student activity monitoring is subjecting protected classes of students to increased discipline and interactions with law enforcement, invading their privacy, and creating hostile environments for students to express their true thoughts and authentic identities. At minimum, this environment causes disparate impact<sup>10</sup> and — to the extent that monitoring software is expressly coded to flag words related to protected classes<sup>11</sup> — may constitute disparate treatment.<sup>12</sup> OCR should issue a policy statement that clarifies the intersection of civil rights laws and student activity monitoring, condemns uses of student activity monitoring that run afoul of students' civil rights, and states OCR's intent to take enforcement action against violations that result in discrimination.

We urge OCR to begin developing a policy statement to curb these harms under Title VI, Title IX, the ADA, and Section 504.<sup>13</sup> We support OCR's work to protect students and invite continued dialogue on these technologies and their impact on students.

Sincerely,

American Association of School Librarians  
(AASL)

American Civil Liberties Union

American Library Association

Center for Democracy & Technology

Civil Rights Corps

Common Sense Media

Data Quality Campaign

Electronic Frontier Foundation

The Freedom to Read Foundation  
InnovateEDU

LGBT Tech

National Center for Learning Disabilities

Next Century Cities

People's Economic & Environmental  
Resiliency Group

State Educational Technology Directors  
Association (SETDA)

Cc: Lisa Brown  
Monique Dixon

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- <sup>1</sup> E.g., *Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021); U.S. Department of Education, [Return to School Roadmap Under the IDEA](#) (2021); U.S. Department of Education, [Long COVID Under Section 504 and the IDEA](#) (2021); U.S. Department of Education, [Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students](#) (2021); U.S. Department of Education, [Letter to Educators re Discrimination Against Asian American and Pacific Islander Students](#) (2021).
- <sup>2</sup> Hugh Grant-Chapman et al., Center for Democracy & Technology, [Student Activity Monitoring Software: Research Insights and Recommendations](#) 2 (Sept. 21, 2021); Hugh Grant-Chapman et al., Center for Democracy & Technology, [Views on Student Activity Monitoring Software](#) 6 (Sept. 21, 2021) [hereinafter, *Views on Student Activity Monitoring*].
- <sup>3</sup> Elizabeth Laird et al., Center for Democracy & Technology, [Hidden Harms: The Misleading Promise of Monitoring Students Online](#) 8 (2022) [hereinafter, *Hidden Harms*].
- <sup>4</sup> [Ala. Act No. 2022-289](#), sec. 5 (SB 184); [Fl. Law Ch. No. 2022-22](#), sec. 1 (SB 1557); [Letter from Governor Greg Abbot, State of Texas, to Comm. Jaime Master, Texas Department of Family and Protective Services](#) (Feb. 22, 2022).
- <sup>5</sup> [Banned in the USA: Rising School Book Bans Threaten Free Expression and Students' First Amendment Rights](#), Pen America (Mar. 16, 2022).
- <sup>6</sup> Cf. Todd Feathers, [After Dobbs, Advocates Fear School Surveillance Tools Could Put Teens at Risk](#), The Markup (July 8, 2022).
- <sup>7</sup> *Hidden Harms*, *supra* note 3, at 19-24.
- <sup>8</sup> Lydia X. Z. Brown et al., Center for Democracy & Technology, [Ableism And Disability Discrimination in New Surveillance Technologies](#) 16, 17-21 (2022); Jazmyne Owens, New America, [Threat Assessment Systems as a School Safety Strategy](#) (2021).
- <sup>9</sup> DeVan Hankerson et al., Center for Democracy & Technology, [Online and Observed: Student Privacy Implications of School-Issued Devices and Student Activity Monitoring Software](#) 10 (Sept. 21, 2021); Hugh Grant-Chapman & Elizabeth Laird, Center for Democracy & Technology, [Key Views Toward Ed Tech, School Data, and Student Privacy](#) 48 (Nov. 15, 2021).
- <sup>10</sup> See U.S. Department of Justice, [Proving a Violation of the Disparate Impact Standard](#), Title VI Legal Manual (2021); *accord* 34 C.F.R. § 100.3(b)(2) (disparate impact under Title VI regulations); 34 C.F.R. §§ 106.21(b)(2), 106.36(b), 106.52 (Title IX regulations); 34 C.F.R. § 104.4(b)(4) (Section 504 regulations); 28 C.F.R. § 35.130(b)(3) (ADA regulations).
- <sup>11</sup> Alejandra Caraballo, [Remote Learning Accidentally Introduced a New Danger for LGBTQ Students](#), Slate (Feb. 24, 2022); Avery Kleinman, [Remote Learning Ushered in a New Era of Online Academic Surveillance. What's Next?](#), 1A (Jan. 12, 2022).
- <sup>12</sup> *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 607–08 (1983); *Cannon v. University of Chicago*, 441 U.S. 677, 691 (1979).
- <sup>13</sup> Although we applaud ED's recent notice of proposed rulemaking under Title IX, the harms caused by student activity monitoring extend beyond the scope of that rulemaking. Moreover, student activity monitoring is harming students now, and students cannot wait until the eventual final rule for ED to act.