

September 19, 2023

Via Electronic Mail

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In October of last year, the White House stood tall in its commitment to guiding the development and use of automated systems in a manner that “protect[s] civil rights, civil liberties, and privacy” through the Blueprint for an AI Bill of Rights (“Blueprint”).¹ In this initiative, the White House identified priorities related to the use of AI in education, specifically mentioning use cases such as:

- Preventing unchecked and continuous monitoring and surveillance of students;
- Providing extra protections for data related to domains like demographics (presumably classifications protected by law, including race, sex, and disability)² and LGBTQ+ status, understanding that this data has been used in programs to make predictions about student success; and
- Protecting sensitive information collected through software like the use of online proctoring systems that claim to detect if a student is cheating on an exam using biometric markers.³

The U.S. Department of Education (“Department”) was featured as a leader at the release event of the

¹ *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*, White House (October 2022), <https://perma.cc/RV5N-QGMM>.

² *Id.* at 27.

³ *Id.* at 37.

Blueprint, committing to providing guidance on the use of AI in teaching and learning.⁴

In the year since the release of the Blueprint, the need for education-related protections remains and, if anything, is even more urgent with the explosive emergence of generative AI. As recently released CDT research demonstrates, students continue to experience harm through AI-driven technology, particularly in the area of civil rights.⁵ Accordingly, we urge the Department to reflect the priorities articulated in the Blueprint by issuing further guidance, and taking related enforcement actions, concerning the application of civil rights laws to schools' use of AI.

CDT research shows that, despite remote learning no longer being the primary method of instruction, **88 percent** of teachers still report that their school uses AI-powered software to monitor students' activity online. As a result of such monitoring, **two-thirds** of these teachers report that a student at their school has been disciplined, while **38 percent** report that a student has been contacted by law enforcement. These capabilities are not limited to school-owned devices, as **40 percent** of teachers report their school monitors students' personal devices. Members of marginalized communities disproportionately suffer those consequences: LGBTQ+ students are more likely to be disciplined than their peers, and licensed special education teachers report higher incidents of law enforcement contact among their students. This compounds existing inequities as students of color, LGBTQ+ students, and students with disabilities are already more likely to be disciplined in school or overrepresented in the incarcerated youth population.⁶ Further, **19 percent** of LGBTQ+ students report that they or someone they know was outed as a result of this technology, up **6 percentage points** from 2021-22.

On top of constant monitoring, students are having their online content moderated by filtering and blocking software in ways that interfere with learning. Nearly **100 percent** of teachers report that their school uses this technology. Of the students in those schools, **71 percent** report that this technology has prevented them from completing assignments, with LGBTQ+ students being

⁴ Caitriona Fitzgerald and Ben Winters, *The White House Can Build on Its AI Bill of Rights Blueprint Today*, Protocol (Oct. 10, 2022), <https://perma.cc/N5UF-GARC>.

⁵ Elizabeth Laird, Madeleine Dwyer, & Hugh Grant-Chapman, *Off Task: EdTech Threats to Student Privacy and Equity in the Age of AI*, Ctr. for Democracy & Tech (Sep. 20, 2023), <https://cdt.org/insights/report-off-task-edtech-threats-to-student-privacy-and-equity-in-the-age-of-ai/>.

⁶ See *Disciplining Public School Students*, Gov't Accountability Off. (Apr. 10, 2018), <https://perma.cc/3D7B-X2AP>. See Joshua Rovner, *Youth Justice by The Numbers*, The Sentencing Project (May 16, 2023), <https://perma.cc/5JER-Q3L6>. See Joseph G. Kosciw, Caitlin M. Clark & Leesh Menard, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools*, Gay, Lesbian & Straight Educ. Network 92 (2021), <https://perma.cc/XX44-T2AS>. See *Dehumanization, Disability, and Resistance*, Derecka Purnell, in *Becoming Abolitionists: Police, Protests, and the Pursuit of Freedom* 203, 217 (2021) ("Disabled/neurodivergent people comprise just 26% of the United States population—but represent . . . up to 85% of the incarcerated youth population.").

more likely to report this challenge. Approximately **one-third** of teachers agree that content associated with or about LGBTQ+ students and students of color is more likely to be filtered or blocked, amounting to a digital book ban. Title I teachers and licensed special education teachers are even more likely to report this subjective, values-based content filtering and blocking.

Early experiences with generative AI suggest it is likely to give rise to similar concerns. **Fifty-eight percent** of students report having used generative AI, with students with IEPs and/or 504 plans being more likely to use this technology. Although only **24 percent** of teachers report having been trained on how to respond if they suspect a student has used generative AI, approximately **50 percent** report that a student at their school has been disciplined for using the technology. Licensed special education teachers are even more likely to report their students have experienced such negative consequences.

Existing civil rights laws already make schools legally responsible for their own conduct, and that of the companies acting at their direction in preventing discriminatory outcomes on the basis of race, sex, and disability. Similarly, the Department has long been responsible for holding schools accountable to these standards. But the application of these civil rights requirements to AI presents new issues. Schools, and the companies that work with them, are grappling with questions about the responsible use of AI in education. They would benefit from clarity on how they can fulfill their long-standing civil rights obligations alongside the expansion of AI in the classroom.⁷

Decades of civil rights litigation and the Department's enforcement of civil rights law yield four key concepts that require guidance on this application to AI:

Disparate Treatment

Disparate treatment is intentional discrimination that can occur from either the unequal application of a neutral policy or a policy that is explicitly targeted at a protected class. An example of edtech that could implicate disparate treatment is the use of predictive analytics. **Fifty-eight percent** of teachers report that their schools already use early warning systems that predict whether a student is at risk of dropping out of high school, some of which incorporate protected characteristics (e.g., race, sex, and disability status).⁸ More guidance is needed to answer questions such as whether and when it is appropriate to use sensitive data about protected characteristics in predictive analytics.

⁷ Kristin Woelfel, Ariana Aboulafla, Elizabeth Laird & Sydney Brinker, *Late Applications: Protecting Students' Civil Rights in the Digital Age*, Ctr. for Democracy & Tech. (Sept. 20, 2023), <https://cdt.org/insights/report-late-applications-protecting-students-civil-rights-in-the-digital-age/>.

⁸ Todd Feathers, *Takeaways From Our Investigation Into Wisconsin's Racially Inequitable Dropout Algorithm*, Markup (Apr. 27, 2023, 8:00 AM), <https://perma.cc/3DV3-6TAK>.

Disparate Impact

Disparate impact occurs when a neutral policy has an adverse and disproportionate effect on protected classes even when not intentional. As described above, Title I and licensed special education teachers, along with LGBTQ+ students and students with IEPs and/or 504 plans, are reporting different, and often more negative, effects of the use of AI-driven technology in schools. This raises questions about how schools should measure, and intervene, when AI is having a disproportionate impact on students on the basis of race, sex, or disability.

Hostile Learning Environment

A hostile learning environment exists when severe, pervasive, or persistent treatment interferes with a student’s ability to participate or benefit from the services and activities provided by the school. Black and Hispanic students are more likely to use school-issued devices than their peers, and therefore be subjected to increased monitoring and related negative consequences.⁹ In fact, half of teachers agree that, “Students that use school-provided devices are more likely to get in trouble or face negative consequences for using generative AI.”

Denial of a Free Appropriate Public Education (FAPE)

The right to FAPE exists to guarantee that students with disabilities receive an education that meets their individual needs. Importantly, this includes ensuring that students are not disciplined because of the manifestations of their disabilities. Unfortunately, licensed special education teachers are more likely to report knowing students who have gotten in trouble and been contacted by law enforcement due to student activity monitoring, raising questions about whether these incidents lead to a loss of instructional time for students with disabilities and in turn, a potential violation of FAPE.

These questions and more are confronting schools now. Every student who is negatively impacted by these technologies may experience a loss of civil liberties, privacy, and educational opportunities. It is crucial to consider this impact against the backdrop of decades of nondiscrimination leadership in the education sector. Indeed, a coalition of groups led by CDT sent the Department a letter last year that called for more guidance on the application of civil rights to AI-driven technology.¹⁰ The Office of Educational Technology’s subsequent guidance on the use of AI

⁹ “[A]pproximately 6 in 10 Black students [and] 6 in 10 Hispanic students ... rely on a computer or tablet issued by their school” Elizabeth Laird, Hugh Grant-Chapman, Cody Venzke & Hannah Quay-de la Vallee, *Hidden Harms: The Misleading Promise of Monitoring Students Online*, Ctr. for Democracy & Tech. 6, 23 (Aug. 2022), <https://perma.cc/4FZA-W3VT>.

¹⁰ Cody Venzke & Elizabeth Laird, *Letter to ED Office for Civil Rights on Discriminatory Effects of Online Monitoring of Students*, Ctr. for Democracy & Tech. (August 3, 2022), <https://perma.cc/274A-F4LE>.

in teaching and learning in the wake of the Blueprint, however, mentioned civil rights only once. As we approach the one-year anniversary of the Blueprint, we call on the Department to fill this gap by issuing further guidance, and taking related enforcement actions, at this crucial nexus of AI and civil rights laws.

Sincerely,

Center for Democracy & Technology	Educating All Learners Alliance (EALA)
American Association of School Librarians (AASL)	Electronic Frontier Foundation (EFF)
American Civil Liberties Union (ACLU)	Electronic Privacy Information Center (EPIC)
American Library Association (ALA)	Fight for the Future
Autistic Self Advocacy Network (ASAN)	GLSEN
Bazelon Center for Mental Health Law	I Vote for Me
Center for Learner Equity	InnovateEDU
Council of Parent Attorneys and Advocates (COPAA)	LGBT Tech
Disability Rights in Education Defense Fund (DREDF)	National Center for Learning Disabilities (NCLD)
	Next Century Cities

Cc: Kristina Ishmael, U.S. Department of Education, Office of Educational Technology
Catherine Lhamon, U.S. Department of Education, Office for Civil Rights
Bruce Reed, The White House, Executive Office of the President
Neera Tanden, The White House, Domestic Policy Council
Lorraine Voles, The White House, Office of the Vice President
Jeff Zients, The White House, Executive Office of the President