

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

BROADBAND NEEDS IN EDUCATION,)	GN Docket Nos. 09-47, 09-51, 09-137
INCLUDING CHANGES TO)	CC Docket No. 02-6
E-RATE PROGRAM)	WC Docket No. 05-195
TO IMPROVE BROADBAND DEPLOYMENT)	

**COMMENTS of FUNDS FOR LEARNING, LLC
on
NPB PUBLIC NOTICE #15**

INTRODUCTION

Funds For Learning, LLC (“FFL”) is submitting these comments in response to the Commission’s request for comments in the above-captioned proceeding. FFL is a regulatory compliance firm that specializes in the E-rate program. It has been providing services to the E-rate community since the fall of 1997, when the Commission was making final preparations to launch the program. Our primary responsibility to our clients is to ensure that they remain compliant with what has become, over the years and for many different reasons, an extremely broad and frequently complex set of rules and regulations. FFL is proud to have been one of the founding members of the E-rate Management Professionals Association, also known as E-mpa™.

In the *Notice*, the Commission seeks comments on a wide variety of matters concerning broadband needs in education and “how the Commission can modify the E-rate program to more effectively meet the needs of applicants as well as whether the program can be a vehicle to stimulate the adoption of broadband throughout communities.” Because our expertise is in the “nuts and bolts” of the E-rate program, we will focus our comments on those kinds of issues and, more specifically, on ones that we

feel most comfortable highlighting in the context of this proceeding. Those issues include: (1) expanding community access to broadband and improving the E-rate application review process simultaneously by amending and clarifying certain rules; (2) a plan to modify the discount matrix that the Commission first raised in 1997; (3) what potential impact of so many unfunded Priority Two funding requests may have on the expansion of broadband; and (4) adjusting the funding cap to give schools and libraries at least the same amount of purchasing power that the fund gave them when the program began.

I. E-RATE MODIFICATION - PARAGRAPH 11

“c. We seek comment on program modifications to maximize the use of broadband connections that are subsidized by the E-rate program. Recognizing that the statute requires that discounts be provided on services used for “educational purposes,” we seek information on whether, and if so, how, past interpretations of the “educational purposes” requirement have restricted demand aggregation at the community level to support higher capacity broadband. For example, the program could be modified to allow for use of broadband facilities at schools by the general community, rather than just by school faculty and students...”

Past interpretations of the “educational purposes” requirement have restricted community access to broadband unnecessarily and, moreover, made the E-rate application process much more difficult and complex.

A. The Problem

The reduction in E-rate funding and the increased complexity of the application process that schools are forced to endure whenever their plans include inviting the local community into their school buildings to take advantage of their E-rate supported high-speed networks discourages schools from sharing bandwidth with “outsiders” for any purpose. Moreover, it discourages them from being entirely forthright about their intentions, as it is extremely difficult to speculate so many months or sometimes even years in advance about whether or when and how often they are going to permit so-called “ineligible users” to use E-rate supported bandwidth inside their school buildings.

Because of the Commission's definition of "eligible services" and the mistaken creation, in our opinion, of an "ineligible user" category, E-rate supported broadband in schools never gets fully utilized. In the evenings and on weekends, for example, when the broadband demand of students and teachers on school networks is generally quite low, parent and community groups would welcome the opportunity to take advantage of the high-speed Internet access available there, which would otherwise go to waste. This is especially true in certain rural areas and other parts of the country where broadband services continue to lag behind. Allowing schools the option to open up their networks to the public in this fashion is good public policy: it not only is a good way to increase broadband access, it is remarkably economical and, in addition, creates a wonderful opportunity to get more people involved in local schools. Indeed, when it comes to "maximizing the use of broadband connections that are subsidized by the E-rate program," one of the Commission's goals, we cannot think of an easier, more cost effective way to do so than this.

Unlike libraries, schools may not let just anyone use their E-rate supported broadband services. Schools may do so lawfully, only if they account for ineligible usage by so-called ineligible users by cost allocating out of the pre-discount cost of those services the estimated value of that ineligible use. We do not believe that this is consistent with what the Commission initially intended and, quite frankly, we do not even think it makes much sense. If anyone in the community can use a computer at the local library to access the Internet, and that access is considered for "educational purposes," it follows logically that they should not be prohibited from doing the exact same thing at the local high school, yet this is exactly how the rules today operate. The rationale for cutting off access, which we urge the Commission to reject, is that the user is either no longer "eligible" once he or she sets foot inside a school building and/or access for the identical purpose is no longer deemed "educational." It stands to reason, therefore, that this type-of-building based approach to "educational purposes" needs to be changed and the term, "eligible user," be stricken from the E-rate lexicon.

B. Our Proposed Solution: Overview

There is, we believe, a relatively uncomplicated and straightforward solution to this problem, and it comes with a significant bonus to boot. In addition to expanding access to broadband, this solution will ease the E-rate application process considerably. It involves two steps and both are squarely within the Commission's control:

- Amend the clarification of the term “educational purposes” set forth in the *Second Report and Order* (FCC 03-101, released April 30,2003) so that there is a single definition that applies equally to both schools and libraries, one that will enable schools to provide the same kind of community access to its E-rate supported networks that libraries do now. (We offer a proposed amendment below).
- Clarify that the statutory definitions of “elementary school” and “secondary school” have nothing whatsoever to do with who may use E-rate supported services inside a school building, but rather, that they set forth the test that organizations (as opposed to users) must pass to benefit from E-rate discounted services. In other words, the statute's definitions of “school” do not create a class of ineligible “users.” They merely circumscribe the universe of organizations operating under the “school” umbrella that Congress decided, for purposes of expanding Universal Service coverage, should qualify to receive advanced telecommunications services at a discounted rate.

If and when, we hope, the Commission adopts these measures, USAC will stop quizzing schools about who will be using the E-rate supported networks inside their buildings. Inevitably, this will increase the speed with which USAC can review applications. The other benefit of this too, of course, is that schools will have the freedom to share their broadband with their local communities -- just as libraries do now. We do not believe that our proposal suggests a change in policy as much as it does a mid-course correction.

i. Amend the “Educational Purposes” Definition

In short and as we have already discussed, if someone besides a student or school employee uses a neighborhood school’s network to access the Internet and then walks across town to the local library and uses that library’s network for the exact same purpose, that “purpose” cannot possibly fail the “educational purposes” test on one side of town yet pass it on the other. The Commission’s policy is to expand Universal Service support by discounting services delivered to libraries and schools and to expand broadband access as cost-effectively as possible. That policy is substantially undermined when the exact same service, which the exact same people use, at two different E-rate eligible locations is eligible for discounts at one location but not the other.

Our proposed solution is to amend the definition of “eligible services” so that it (1) applies uniformly to both schools and libraries, especially since Congress never indicated that the two should be treated differently for this purpose; (2) does not define the term more broadly than the Commission has defined it before; and (3) is in keeping with the Congressional mandate set forth in Section 254(h)(1)(B) of the Telecommunications Act that services requested by schools and libraries must be used for "educational purposes."

Accordingly, both the current definition and our proposed amended version are set forth below:

The current definition of “educational purposes” reads:

[A]ctivities 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 to library patrons, qualify as "educational purposes." Activities that occur on library or school property are presumed to be integral, immediate, and proximate to the education of students or the provision of library services to library patrons.

Our proposed amended version reads:

[A]ctivities that are integral, immediate, and proximate to the community-minded missions and interests of schools and libraries, respectively, qualify as "educational purposes." Activities that occur on school or library property are presumed to be integral, immediate, and proximate for this purpose.

ii. Clarify That on School Property there are No “Ineligible Users”

Naturally we agree with the Commission’s statement in paragraph 11 that appears to suggest that perhaps the definition of “educational purposes” ought be modified to “allow for use of broadband facilities at schools by the general community, rather than just by school faculty and students.” There is more to the problem, however, than just that. To root out the problem completely, the Commission needs to address the other half of the problem, which stems, in our opinion, from the notion or the idea that there actually is such thing as a “class of ineligible users.”¹ We believe strongly that there is not. We are not sure where or by whom that term was used first or how it was derived. What we do know, though, is that it is misleading, engenders a great deal of confusion, and has resulted, in our opinion, in some very poor decision-making on the part of USAC.

The so-called “classes of ineligible users,” is inexorably and incorrectly linked to the statutory definition of “eligible schools,” a definition that limits E-rate support only to schools that offer elementary and secondary education, as the states and territories in which those schools are located define those terms. That is why the Commission and thus USAC will not fund, for example, any broadband use by pre-school or adult education programs in schools located in states where the definitions of elementary and secondary education, respectively, do not include those programs – even though those pre-K and adult education students attend class in classrooms in “eligible” elementary or secondary school buildings and, moreover, need Internet access for “educational purposes.” Those students, in USAC’s view and, therefore, the Commission’s, are “ineligible users.” But the program was designed to fund whatever eligible services were provided to eligible schools; the architects of the program were not concerned with who might use them once they were delivered. Everyone who has been around the program for any length of time knows that the only restrictions the rules place on how a school

¹ On this issue, we believe, the Commission may have also fallen prey to this trap. *See* paragraph 11, d of the Notice wherein the Commission states, “We seek comment on any legislative changes that would expand the *classes of eligible users*. For example, *the statute currently limits E-rate support to elementary schools and secondary schools, which are defined by each individual state*. What would the impact be of modifying the statute to permit colleges, community colleges, pre-kindergarten, Headstart, or other entities to participate in the E-rate program?”(Emphasis added).

uses its eligible services is that it must use them for “educational purposes” and at eligible locations, and that it may not resell them.

Because of the way E-rate program rules have been interpreted in recent years, “ineligible users” have been turned, essentially, into E-rate repellants. For example, USAC will reject a funding request to wire a room, if the school tells USAC that it plans on placing pre-K students in it, even though its plans may change or the assignment to that room may not last for very long. Furthermore, USAC will reduce the amount of funding that an eligible school would otherwise be entitled to receive, simply because its student population includes some “ineligible users.” Take Internet Access for instance. USAC will reduce the estimated pre-discount cost for those services based on an estimated percentage of “ineligible users” who will be attending that school, the number of rooms occupied by the “ineligible users” or some other “reasonable” cost allocation formula. We could not possibly disagree more with the way these rules are being interpreted and applied. If a school is eligible, and the service is eligible, and the service is being used for an “educational purpose” at an eligible location, then the service should be funded in full.

There are “ineligible schools,” and there are “ineligible services,” but there are no “ineligible classes of users.” It is evident to us, based on our reading of the original *Report and Order*², that the Commission envisioned a process whereby once a school established its eligibility, it would be entitled thereafter to receive the full benefit of discounted services throughout its building, just like a library would. If the Commission had any concerns about particular classes of “ineligible users” being present in school buildings and taking advantage of those services while they were there, the Commission kept them extremely well hidden, despite the length and care of its analysis.

Indeed, we believe that the entire issue is actually moot, as the Commission actually anticipated that schools would have good reasons to open up their E-rate

² FCC Universal Service Order (regarding Schools and Libraries), FCC 97-157, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 12 FCC Rcd 8776 (1997).

supported networks to individuals besides students, faculty, staff and administrators -- and the Commission neither prohibited nor cautioned against it. The issue came up indirectly in the *Report and Order* while the Commission was considering whether the prohibition against resale of discounted services prevented schools and libraries from charging fees for using their computer labs.³ The Commission concluded that it did not, because the fees would help them to defray the cost of their computers, which, unlike the Internal Connections and broadband services to which those computers would be linked, were not subsidized by the universal support mechanisms. Notably, the Commission had no problem at all with and expressed no reservations whatsoever about outsiders using school or library computers connected to E-rate supported broadband and/or connections. Nor, significantly, did the Commission make any mention of ineligible use or classes of ineligible users.

What is important for the Commission to keep in mind while it is considering this particular issue is that school buildings have a tendency to morph, to adapt to changing circumstances over time. One room might be a pre-school room today and, six months from now, a kindergarten classroom. An adult education room might one day become a media lab or vice versa. A janitor's closet may be only days away from becoming a data closet. The point is that schools are never static. They are evolving constantly, just like their students. More and different space is always in demand.

Therefore, for E-rate funding purposes, whether a school building happens to house pre-K and/or adult education students somewhere in its building or allows parents or community groups into its building to use its networked computers makes absolutely no difference. It is the "school," as an entity, that is eligible for discounted services. And it is to the school's buildings, where those services may be provided. The rules require no further inquiry into who will be using the service inside or around those buildings.

This, we submit, is how the rules were intended to be and should, hopefully in the very near future, be clarified and applied. Applying the rules this way potentially makes

³ *Id. at para. 567*

E-rate supported broadband available everywhere in a school building and to anyone who the school invites on to its property to use one of its networked computer or its wireless network -- from an adult education student to the PTA president to the director of a local children's nutrition service.

In stark contrast, the way USAC currently applies the rules forces it to be always on the lookout for "classes of ineligible users." When it finds them or the school serves them up (i.e., anyone besides school employees or elementary or secondary school students who will use an end user device connected to the school's local area network), USAC reduces the school's funding automatically to account for what it would characterize as "ineligible use" by "ineligible users" (e.g., students who are pre-K or adult education students in states where the education of those students is not considered "elementary" or "secondary" education or anyone who does not work for the school.)

When deciding what simple changes the Commission can make to yield large rewards in terms of helping to ease the administrative bottleneck in E-rate application processing and to expand community access to broadband, we urge the Commission to place the changes we have proposed very high on its list.

II. E-RATE DISBURSEMENT -- PARAGRAPH 12

"e. We seek comment on these issues as well as other ideas to modify E-rate disbursements and discounts to maximize the deployment of broadband."

In the original *Report and Order*⁴, in a paragraph entitled "Adjustments to Discount Matrix," the Commission stated that it had a plan involving a reduction in discount rates that it would consider if demand for E-rate funds outstripped demand. This proposal, in our view, illustrates that there are a wide variety of ways that the discount matrix can possibly be adjusted and adjusted fairly, simply by focusing on the problem creatively. In pertinent part, the Commission explained its plan as follows:

⁴ *Id.* at para. 542.

...if estimated funding requests for the following funding year demonstrate that the funding cap will be exceeded, we will consider lowering the guaranteed percentage discounts available to all schools and libraries, except those in the two most disadvantaged categories, by the uniform percentage necessary to permit all requests in the next funding year to be fully funded.

III. E-RATE FUNDING -- PARAGRAPH 13

“a. To what extent does the annual E-rate funding cap of \$2.25 billion limit the extent of broadband deployment by eligible schools and libraries?...

b. To the extent the Commission modifies its E-rate rules to encourage additional requests for funding for broadband services under priority 1, how would that change likely impact the availability of funding for priority 2 services?”

The annual E-rate funding cap of \$2.25 billion has the potential to create a broadband gulf between schools and libraries that have been fortunate to receive large amounts of funding for Priority Two services and those that have not had the same degree of good fortune.

The growing demand for Priority One services is a success story, but it is also a threat to the program. For a Priority One service to be truly effective, it must be connected to internal connections infrastructure on a school or library campus. Yet, the growing demand for Priority One services, without a similar increase in the \$2.25 billion E-rate funding cap, is making it increasingly unlikely that Priority Two infrastructure projects will receive discounts. Ironically, the on-site infrastructure that ultimately validates the need for Priority One services is in many cases not being installed.

The long-term impact of this phenomenon may mean that those applicants with an existing internal connections infrastructure will enjoy the benefit of robust Priority One services, while those with inadequate networks will be held back from receiving the Priority Two infrastructure that would allow them to tap into more effective Priority One services. In essence, a new digital divide could be created, with the dividing line being those schools lucky enough to have at one-time received Priority Two funding and those who did not.

IV. E-RATE FUNDING -- PARAGRAPH 13

“a. To what extent does the annual E-rate funding cap of \$2.25 billion limit the extent of broadband deployment by eligible schools and libraries? What are the implications of indexing the cap to inflation?”

To provide schools and libraries with at least the same amount of buying power as the Commission intended to provide initially in 1997, the Commission should adjust the funding cap upwards to compensate for the buying power that schools and libraries have lost due to inflation since that time. Accordingly, we propose that the funding cap be increased annually to at least \$3.02 billion.

At the program’s outset, the size of the E-rate funding cap was a subject of great debate. Many commentators believed it to be too low to satisfy demand and to meet programmatic objectives; others thought it much too high.⁵ The New York Public Library, for instance, thought that the size of fund would be “too small to meet adequately the needs of schools and libraries nationwide,” and history has proved them to be correct. It recommended, therefore, that “strong consideration should be given to increasing the size of the fund.”⁶ NYNEX, on the other hand, “recommended instead that the cap be set initially at \$1.5 billion, with a goal of achieving the McKinsey full classroom model by the year 2005, and that the cap be reevaluated in 10 years.” (Emphasis added).⁷

The Commission noted that it was at a disadvantage in trying to estimate how much support this program would require, as it had no historical data to which to turn and the reports it had to rely on were of limited utility as they attempted “to estimate costs in an area where technologies are developing rapidly and demand is inherently difficult to predict.”⁸ Ultimately, the Commission adopted the Joint Board’s recommendation to cap annual contributions at \$2.25 billion annually, which was based, in part, on the following estimate of demand for eligible services: “approximately \$3.1 to \$3.4 billion

⁵ *Report and Order* at para. 533.

⁶ *Id.* at para. 339

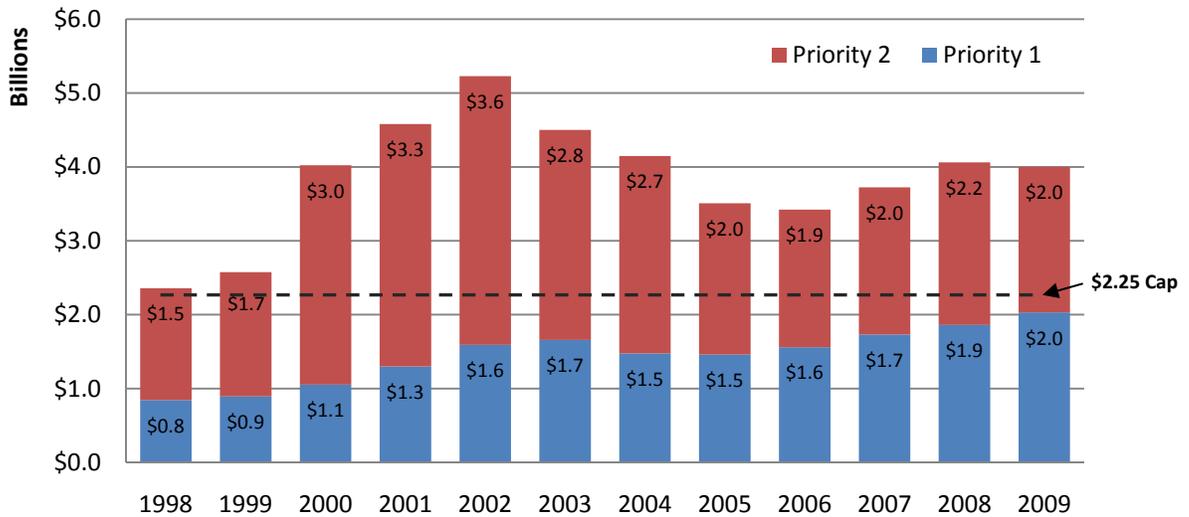
⁷ *Id.* at para. 337 (emphasis added).

⁸ *Id.* at para. 530.

annually during an initial four-year deployment period and approximately \$2.4 to \$2.7 billion annually during subsequent years.”⁹ As the table and graph below show, except for the first two years of the program, the demand for E-rate support has actually been much higher than what the Joint Board predicted and, rather than decreasing over time, has instead increased substantially. (Data Source: E-rate Manager™-- data service by Funds For Learning, LLC).

Year	Total Requests	Requested Amount
2009	125,983	\$4,001,840,791.79
2008	124,383	\$4,061,441,029.90
2007	125,468	\$3,723,860,720.95
2006	125,173	\$3,422,850,812.29
2005	127,634	\$3,508,860,594.21
2004	138,661	\$4,146,504,422.18
2003	139,863	\$4,500,875,773.60
2002	142,496	\$5,228,857,179.11
2001	163,678	\$4,579,355,339.17
2000	151,502	\$4,022,234,315.60
1999	136,204	\$2,576,527,127.95
1998	138,154	\$2,359,133,010.88
	1,639,199	\$46,132,341,117.63

E-rate Funding Requests by Funding Year



Data Source: E-rate Manager™-- data service by Funds For Learning, LLC

⁹ *Id.* at para. 531, n.1386

As many of the organizations that will file comments surely will note, the size of the E-rate funding cap should be increased. More than ten years ago, NYNEX suggested that the Commission should learn from experience and, after ten years, reconsider how high the cap needs to be. We agree with NYNEX. Now is the time to tackle this issue head-on. Twelve years of experience has proven that a \$2.25 billion annual cap is not nearly sufficient to keep pace with the demand that schools and libraries have for high-speed services. In a world that is relying more and more every day on high-speed connectivity, many schools and libraries are struggling just to keep up and many, as you will surely hear, are beginning to fall behind. Unfortunately, there are a large number of schools and libraries that would be happy right now just to get close to catching up.

Exactly how much more buying power schools and libraries need than the \$2.25 billion in annual E-rate support currently available to them, we will leave to them to tell you directly. All we know for certain is that \$2.25 billion is not worth today what it was twelve years ago when the Commission decided to set the cap at that level. Therefore, to give schools and libraries today at least as much E-rate-related purchasing power as they had in 1997, the Commission should adjust the cap for inflation. That is both a rational and easily defensible jumping off point from which to begin to determine how much more money, if any, the Commission needs to collect and set aside for this purpose.

The CPI inflation calculator on the Bureau of Labor Statistics website indicates that \$3.03 billion today provides the same amount of buying power as \$2.25 billion did in 1997. (<http://data.bls.gov/cgi-bin/cpicalc.pl>). Accordingly, we urge the Commission to raise the annual funding cap at least to that amount.

Funds For Learning thanks the Commission for this opportunity to share its views and the benefit of its E-rate-related experience with the Commission in connection with these important issues. We will be pleased to supplement these comments upon request.

Respectfully submitted,

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