

Before the  
**Federal Communications Commission**  
Washington, DC

In the Matter of: )  
)  
**Modernizing the E-rate** ) WC Docket No. 13-184  
**Program for Schools and** )  
**Libraries** )  
)

**Petition for Waiver**  
on behalf of  
**The State of Colorado**

*via electronic filing*  
September 2, 2020

**State of Colorado**  
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## Summary

As part of ongoing efforts to close the digital divide and support the remote schooling needs of all students during the COVID-19 pandemic, the State of Colorado, by and through Attorney General Phil Weiser, submits this petition seeking an emergency waiver of current restrictions on the use of E-Rate funds and E-Rate-funded facilities to allow schools to extend their broadband network connectivity to students' homes, or other safe and convenient community access points, in cases where physical classrooms are not fully open to all students during normal school hours and days of the week and those students cannot access virtual classrooms because they lack adequate internet connectivity at home.

Millions of preK-12 students in America, including tens of thousands of students in Colorado, lack affordable broadband internet at home.<sup>1</sup> As the Commission has recognized, this problem is not new.<sup>2</sup> But its capacity to exacerbate educational disparities is amplified by the COVID-19 pandemic.<sup>3</sup> To limit community spread of COVID-19, school districts limited in-person instruction and shifted substantially or exclusively to a virtual-classroom model where teaching, learning, and peer-to-peer

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<sup>1</sup> See Monica Anderson and Andrew Perrin, *Nearly One-in-Five Teens Can't Always Finish Their Homework Because of the Digital Divide*, PEW RESEARCH CENTER (Oct. 26, 2018) (“15% of U.S. households with school-age children do not have a high-speed internet connection at home”), <https://www.pewresearch.org/fact-tank/2018/10/26/nearly-one-in-five-teens-cant-always-finish-their-homework-because-of-the-digital-divide/>; Rafi Goldberg, *Digital Divide Among School-Age Children Narrows, but Millions Still Lack Internet Connections*, NAT'L TELECOMM. & INFO. ADMIN. BLOG (Dec. 11, 2018) (“approximately 7 million school-age children . . . lived in households without home Internet service in 2017”), <https://www.ntia.doc.gov/blog/2018/digital-divide-among-school-age-children-narrows-millions-still-lack-internet-connections>; *Colorado School District Community Needs Inventory*, COLO. DEP'T OF EDUC. (last updated April 22, 2020) (finding more than 65,000 students in Colorado lacked internet access at home), <http://www.cde.state.co.us/safeschools/communityneeds>.

<sup>2</sup> Indeed, the Commission previously noted this problem – and the Homework Gap it creates – as an important manifestation of the digital divide that must be closed. See Statement of Commissioner Mignon Clyburn, *Modernizing the E-rate Program for Schools and Libraries*, Report and Order, 29 FCC Rcd. 15538, 15631, WC Docket No. 10-90, 13-184 (Dec. 19, 2014) (Describing a student “stuck in the digital dark, forced like too many others to sit outside, in parking lots, to get free access to the Internet for better educational, employment, healthcare, and e-commerce opportunities and engage through social media because of the absence of connectivity at home.”); Statement of Commissioner Jessica Rosenworcel, *id.* at 15634 (“The Homework Gap is the cruelest part of the digital divide”); FCC Chairman Ajit Pai, *Bread and Butter*, FCC BLOG (May 18, 2020) (“Since my first day as FCC Chairman, closing the digital divide has been my top priority.”), <https://www.fcc.gov/news-events/blog/2020/05/18/bread-and-butter>.

<sup>3</sup> As Chairman Pai said in May 2020, “the importance of extending Internet access to every American has never been clearer than during the coronavirus pandemic. If you don't have an Internet connection at home . . . [y]our children can't participate in distance learning.” Pai, *supra* note 2.

interaction occurs online, often from the safety of home.<sup>4</sup> Many school districts have continued this shift to virtual classrooms to start the 2020-21 schoolyear. As of August 26, 2020, 39 of the 50 largest school districts in the nation, including Denver and Jefferson County school districts in Colorado, are choosing remote learning only as their back-to-school instructional model.<sup>5</sup> But 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.<sup>6</sup> Low-income students are particularly likely to lack adequate internet at home.<sup>7</sup> In short, during the pandemic, the Homework Gap is temporarily a Schooling Gap.

By granting this waiver, the Commission can take immediate action to close the digital divide during the COVID-19 emergency. Current E-Rate rules disincentivize, and in some instances prohibit entirely, the use of E-Rate funds or E-Rate-funded facilities to extend schools' broadband connectivity beyond physical campuses for educational purposes. As provided in 47 C.F.R. § 1.3, 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.<sup>8</sup> Here, both criteria are met. With schools limiting in-person instruction to reduce the spread of COVID-19 and mitigate the ongoing public health crisis, a waiver is necessary to provide students with the broadband internet connectivity they require to participate in virtual classroom education during the 2020-21 school year.

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<sup>4</sup> See *Map: Coronavirus and School Closures*, EDUC. WEEK (last updated May 15, 2020) [hereinafter *Map: Coronavirus and School Closures*] (“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>.

<sup>5</sup> *School Districts' Reopening Plans: A Snapshot*, EDUC. WEEK (last accessed Sept. 1, 2020) [hereinafter *School Districts' Reopening Plans*], <https://www.edweek.org/ew/section/multimedia/school-districts-reopening-plans-a-snapshot.html>.

<sup>6</sup> See Dana Goldstein, Adam Popescu, and Nikole Hannah-Jones, *As School Moves Online, Many Students Stay Logged Out*, N.Y. TIMES (Apr. 6, 2020),

<https://www.nytimes.com/2020/04/06/us/coronavirus-schools-attendance-absent.html?action=click&module=RelatedLinks&pgtype=Article>; Anna North, *The Shift to Online Learning Could Worsen Educational Inequality*, VOX (Apr. 9, 2020),

<https://www.vox.com/2020/4/9/21200159/coronavirus-school-digital-low-income-students-covid-new-york>.

<sup>7</sup> See Anderson & Perrin, *supra* note 1 (“School-age children in lower-income households are especially likely to lack broadband access.”).

<sup>8</sup> 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)).

## Discussion

The State of Colorado’s topographic variety, from rolling prairies to metropolitan centers to mountain peaks and valleys, and socioeconomic diversity requires a multifaceted and community-specific approach to closing the digital divide. Before and during the current pandemic, the State has taken substantial steps to close the digital divide and expand access to broadband internet. Local governments and school districts have engaged in similar efforts. The E-Rate program has been instrumental in supporting network connectivity for schools and libraries across Colorado. Nevertheless, according to a School District Community Needs Inventory conducted in spring 2020, approximately 65,000 Colorado students lack access to or have not adopted broadband internet at home.<sup>9</sup> With many Colorado school districts using remote learning via virtual classrooms to start the 2020-21 school year, this digital divide threatens to exacerbate educational inequities. To mitigate this threat and help provide all its students with adequate internet connectivity to participate in remote schooling during the pandemic, the State of Colorado respectfully requests the Commission grant this waiver.

### **I. The Commission Should Waive Any Restrictions on the Use of Current E-Rate Funding, and E-Rate Funded Facilities, to Extend Schools’ Broadband Connectivity Beyond Physical Campuses for Educational Purposes**

Beginning in March 2020, across Colorado and nationwide, the COVID-19 public health crisis upended educational systems.<sup>10</sup> School districts closed physical classrooms and shifted to remote, online schooling via virtual classrooms for the remainder of the 2019-2020 school year. More than 350,000 Colorado students attend school districts that started the 2020-21 school year with remote schooling as their sole instructional model,<sup>11</sup> and other districts are using a hybrid of remote and in-person instruction.<sup>12</sup> Remote schooling will likely remain a significant – and, in some cases, exclusive – mode of instruction during the 2020-21 school year. However, longstanding disparities in household access to affordable broadband and internet-enabled devices prevent many students from participating in remote schooling, effectively locking the doors to the virtual classroom.<sup>13</sup> Despite the efforts of local governments, civic organizations, and school districts and to implement

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<sup>9</sup> COLO. DEP’T OF EDUC., *supra* note 1.

<sup>10</sup> See *Map: Coronavirus and School Closures*, *supra* note 4.

<sup>11</sup> See *School Districts’ Reopening Plans*, *supra* note 5.

<sup>12</sup> See *School Districts’ Reopening Plans*, *supra* note 5.

<sup>13</sup> See *supra* notes 1-2, 6-7.

stopgap measures ahead of the new school year, many Colorado students still lack access to adequate at-home broadband internet.<sup>14</sup>

During the current public health crisis, the FCC can ensure the doors to online classrooms are open to all students by waiving restrictions on the use of E-Rate funds to extend broadband networks to students who lack adequate internet connectivity at home. The E-Rate program's Eligible Services List currently prohibits the use of E-Rate funds to support "off-campus use, even if used for an educational purpose."<sup>15</sup> The cost-allocation rule,<sup>16</sup> which requires schools to exclude from E-Rate funding requests the proportion of internet connections and equipment used for ineligible services, such as off-campus use, creates a cumbersome and costly obstacle that further discourages schools from extending their network connectivity to support students' participation in virtual classrooms.<sup>17</sup> These rules prevent school districts from meeting essential educational needs in a manner consistent with public health and safety during the COVID-19 pandemic.

Temporarily waiving these restrictions on "off-campus" support is consistent with the Communications Act, which requires the Commission to support services that "are essential to education, public health, or public safety"<sup>18</sup> and "are consistent with the public interest, convenience, and necessity."<sup>19</sup> To enable school districts to promptly obtain and deploy Wi-Fi hotspots and other services necessary to support remote schooling, the Commission should also waive, specific to this purpose, the E-

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<sup>14</sup> See Erica Breunlin, *Online Classes Aren't Going Anywhere, But Thousands of Colorado Students Still Don't Have Internet Access*, COLORADO SUN (July 17, 2020), <https://coloradosun.com/2020/07/17/colorado-students-schools-education-online-learning-remote-coronavirus-covid-19/>.

<sup>15</sup> The FY 2020 Eligible Services List ("ESL") and the Proposed FY 2021 ESL both list "off-campus use" as an ineligible service. See *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), [https://docs.fcc.gov/public/attachments/DA-19-1249A1\\_Rcd.pdf](https://docs.fcc.gov/public/attachments/DA-19-1249A1_Rcd.pdf); *Wireline Competition Bureau Seeks Comment on Proposed Eligible Services List for the E-Rate Program*, WC Docket No. 13-184, Public Notice, DA 20-767, at 9 (WCB 2020) (rel. July 21, 2020), <https://docs.fcc.gov/public/attachments/DA-20-767A1.pdf>.

<sup>16</sup> 47 C.F.R. § 54.504(e).

<sup>17</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-564, FCC SHOULD ASSESS MAKING OFF-SCHOOL PREMISES ACCESS ELIGIBLE FOR ADDITIONAL FEDERAL SUPPORT 23 (July 2019), <https://www.gao.gov/assets/710/700629.pdf> ("School districts we met with said that existing E-Rate program rules that require cost-allocation . . . limit their ability to address the homework gap and providing off-premises access remains a challenge for schools and school districts."); Petition for Waiver by Boulder Valley School District and Samuelson-Glushko Technology Law & Policy Clinic, WC Docket Nos. 13-184, 10-90 (May 16, 2016) (identifying various ways that the cost-allocation rule deters schools from expanding network connectivity to support off-campus use for educational purposes by students who lack at-home internet access).

<sup>18</sup> 47 U.S.C. § 254 (c)(1)(A).

<sup>19</sup> 47 U.S.C. § 254 (c)(1)(D).

Rate program’s complex application procedures<sup>20</sup> and competitive bidding requirements.<sup>21</sup> Waiver of the provisions listed above, at least through the conclusion of the 2020-21 school year, is justified by the special circumstances of the COVID-19 public health crisis and the overwhelming public interest in enabling all students to safely participate in virtual classroom learning.

## **II. The Commission Has the Authority to Allow Schools to Use E-Rate Funds to Provide Wi-Fi Hotspots or Other Mechanisms for Extending Network Connectivity to Students for At-Home Educational Purposes**

The Commission can authorize school districts to use E-Rate funds to provide, for at-home educational use, Wi-Fi hotspots or other mechanisms for extending network connectivity to students who cannot participate in virtual classrooms because they lack adequate internet connectivity. As the Commission recognized in its 2014 E-Rate Order, Sections 254(c)(1), (c)(3), (h)(1)(B), and (h)(2) of the Communications Act (“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.”<sup>22</sup> 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”<sup>23</sup> and “are consistent with the public interest, convenience, and necessity.”<sup>24</sup> 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.

Further support for the Commission’s power to take the requested action comes from Section 254(c)(3) of the Act, which authorizes the Commission to “designate additional services for such support mechanisms for schools . . . for the purposes of subsection (h).”<sup>25</sup> 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. . . .”<sup>26</sup> In particular, Section 254(h)(2)(A) requires the

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<sup>20</sup> 47 C.F.R. § 54.504.

<sup>21</sup> 47 C.F.R. § 54.503.

<sup>22</sup> Report and Order, *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket 13-184, para 67 (rel. July 23, 2014) (“2014 E-Rate Order”), citing 47 U.S.C. §§ 254(c)(1), 254(c)(3), 254(h)(1)(B), 254(h)(2).

<sup>23</sup> 47 U.S.C § 254(c)(1)(A).

<sup>24</sup> 47 U.S.C § 254(c)(1)(D).

<sup>25</sup> 47 U.S.C § 254(c)(3).

<sup>26</sup> H.R. REP. NO. 104-458, at 131 (Conf. Rep.), available at <https://www.congress.gov/104/crpt/hrpt458/CRPT-104hrpt458.pdf>.

Commission to establish rules “to enhance, to the extent technically feasible and economically reasonable, access to *advanced* telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries.”<sup>27</sup>

As the Commission noted last year, “the E-Rate program provides funding for internal connections, which are primarily used for Wi-Fi, a technology that has enabled schools and libraries to transition from computer labs to one-to-one digital learning.”<sup>28</sup> Wi-Fi hotspots are internal connections, functionally akin to the Wi-Fi routers that distribute wireless connectivity from a school’s network to students and teachers in physical classrooms. In this moment of emergency, the school classroom – i.e. the locus of teaching and learning – has shifted from a shared physical space to a virtual space reaching anywhere adequate internet is available, including students’ homes. The Commission can and should shift the E-Rate program in lockstep, at least during the pandemic, by allowing E-Rate funds to support Wi-Fi hotspots or other mechanisms that extend schools’ network connectivity for off-campus educational use by students who lack adequate at-home connectivity to participate in virtual classrooms.

In a related context, the Commission has already embraced the urgency of this moment and used its authority under Section 254(h)(2)(A) to expand internet connectivity to provide access to essential services during the pandemic. In April 2020, the Commission relied on Section 254(h)(2)(A) in creating a \$100 million Connected Care Pilot Program intended to “expand health care providers’ digital footprints for purposes of providing connected care services and allow health care providers to serve more eligible low-income patients and veterans through the Pilot Program and, thus, enhance health care providers’ access to ‘advanced telecommunications and information services.’”<sup>29</sup> The Commission found that “funding health care provider purchase of broadband Internet access service for participating patients through this discrete, limited duration Pilot Program falls within the scope of section 254(h)(2)(A) of the Act.”<sup>30</sup> In reaching that conclusion, the Commission noted various facts – including “growing evidence of the benefits of

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<sup>27</sup> 47 U.S. Code §254(h)(2)(A) (emphasis added); *see also* 47 U.S. Code §254(b)(6) (Stating, as a principle upon which the Commission shall base universal service policies, “Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).”)

<sup>28</sup> *See Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order, FCC 19-117, note 2 and accompanying text (Dec. 3, 2019), <https://docs.fcc.gov/public/attachments/FCC-19-117A1.pdf>.

<sup>29</sup> *In the Matter of Promoting Telehealth for Low-Income Consumers*, WC Docket Nos. 18-213, 20-89, Report and Order, FCC 20-44, para. 88 (rel. April 2, 2020), <https://docs.fcc.gov/public/attachments/FCC-20-44A1.pdf>.

<sup>30</sup> *Id.*

connected care services both for health care providers and their patients”<sup>31</sup> and that “the costs of broadband Internet access service for patient use in their homes or mobile locations, . . . are an obstacle [to the adoption of] connected care services”<sup>32</sup> – which, as other observers have noted, apply equally to students needing broadband internet at home to access essential education services.<sup>33</sup> As the Order establishing the Connected Care Pilot Program demonstrates, the Commission has the authority to enhance access to “advanced telecommunications and information services” and expand the digital reach of service providers – in education as much as in healthcare – for the purposes of providing essential services.

### **Conclusion**

With schools adopting remote schooling via virtual classrooms to mitigate the spread of COVID-19, the educational need for all students to have adequate internet connectivity home is more pressing than ever. In accordance with the Commission’s waiver standard and mandate under the Act, granting this waiver furthers the public interest by meeting educational needs without jeopardizing public health during the pandemic. For these reasons, the Commission should allow schools to extend their broadband network connectivity to students’ homes, or other safe and convenient community access points, in cases where students cannot access virtual classrooms because they lack adequate internet connectivity at home.

Respectfully submitted,

**/s/ Adam T. Rice**

Adam T. Rice

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<sup>31</sup> *Id.* at para 90.

<sup>32</sup> *Id.*

<sup>33</sup> See Emergency E-Rate Letter, New America’s Open Technology Institute, WC Docket Nos. 02-6, 13-184, 11-42, 17-287, 09-197, 96-45, at 7 (Apr. 8, 2020), [https://newamericadotorg.s3.amazonaws.com/documents/Emergency\\_E-Rate\\_Letter\\_OTI\\_Final\\_040820.pdf](https://newamericadotorg.s3.amazonaws.com/documents/Emergency_E-Rate_Letter_OTI_Final_040820.pdf).