Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Children's	)	CC Docket No. 96-45
Internet Protection Act	)	FCC 01-31
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REPLY COMMENTS OF THE CONSORTIUM FOR SCHOOL NETWORKING and THE INTERNATIONAL SOCIETY FOR TECHNOLOGY IN EDUCATION

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I. ITRODUCTION AND EXECUTIVE SUMMARY

The Consortium for School Networking ("CoSN")[1] and the International Society for Technology in Education ("ISTE")[2] hereby offer these reply comments in response to the Commission's Further Notice of Proposed Rule Making in the above-captioned proceeding (the "NPRM"), released February 1, 2001, concerning implementation of the Children's Internet Protection Act (the "CHIP Act"). CoSN and ISTE are two of the most prominent non-profit, member-based organizations in the educational technology arena. Because much of CoSN and ISTE's constituency depend on E-Rate funding for access to and use of the Internet as a tool for learning and research, the CHIP Act stands to impact our members significantly. In CoSN and ISTE's original comments[3] concerning CHIP Act implementation, we urged the Commission to craft rules and guidelines in a way that creates the least burdensome implementation requirements and permits maximum flexibility and autonomy for schools and libraries. Our members will comply with the law, but we urge the Commission to make it less difficult for them to do so.

Our comments are in response to comments made by the Internet Safety Association ("ISA")[4], the National Law Center for Children and Families ("NLC")[5], and the American

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[1] CoSN is a non-profit organization that promotes the use of new technologies to improve K-12 learning and provides resources and support for educational technology leaders at the state and local level. CoSN's membership includes national education associations, local school districts, state education agencies and individual community leaders that are committed to integrating technology into the classroom.

[2] ISTE is the leading organization for educational technology professionals. With its affiliates, ISTE's membership exceeds 75,000 teachers, technology coordinators, administrators, teacher educators and other educational technology professionals.

[3] *See* "Comments of the Consortium of School Networks and the International Society for Technology in Education," CC Docket No. 96-45 (February 15, 2001). *Available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512461681.

[4] *See* "Comments Of The Internet Safety Association In Response To A Request For Comments From The Federal Communications Commission Regarding Notice Of Proposed Rule Making Implementing The Children's Internet Protection Act," CC Docket Number 96-45 (February 14, 2001). *Available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512461674.

Center for Law and Justice ("ACLJ").[6] In this reply, CoSN and ISTE also cite comments filed by individuals and institutions that we feel should guide the Commission's hand in this rulemaking. CoSN and ISTE urge the Commission to address the following issues:

- **The monitoring and reporting requirements proposed by ISA and NLC are not directed by CHIP Act, are unworkable and burdensome, would inappropriately place librarians and teachers in the position of evaluating expressive content, and would run counter to public policies protecting the privacy of children and library patrons.**

    - ISA and NLC's proposed requirements are not directed by the CHIP Act.

    - The monitoring and reporting requirements run counter to the public policy of protecting the privacy of children and library patrons expressed by the Family Educational Rights and Privacy Act of 1974, the Children's Online Privacy Protection Act of 1998, and state laws protecting the privacy of library patrons and school children.

    - Because Congress did not mandate public file and complaint regulations in the CHIP Act, the Commission should reject the request the ACLJ's request for such rules and allow local schools and libraries maximum flexibility in implementing the law.

    - The monitoring and reporting proposal would usurp the time of teachers and librarians for the benefit of commercial software vendors.

    - The monitoring and reporting requirements are unworkable and burdensome; and would replace community-based legal standards with those of individual librarians and teachers.

- **The Commission should refrain from improperly asserting jurisdiction over other federal agencies.**
- **In The Case Of Large School Districts And Consortia Recipients, The Commission Should Allow Flexibility Of Certification And Not Penalize CHIP Compliant Consortia Members Or Communal Consortia Purchases When Individual Entities Fail To Certify.**

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[5] *See* "Comments of the National Law Center for Children and Families ("NLC") In the Matter of Federal-State Joint Board on Universal Service," CC Docket No. 96-45 (February 15, 2001). *Available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512461513.

II. The monitoring and reporting requirements proposed by ISA and NLC are not directed by the CHIP Act, are unworkable and burdensome, would inappropriately place librarians and teachers in the position of evaluating expressive content, and would run counter to public policies protecting the privacy of children and library patrons.

In their comments before the Commission on CHIP Act implementation, ISA and NLC list a number of disclosure and reporting requirements they would have the Commission impose on CoSN and ISTE's constituency. We believe that such requirements would be unduly burdensome and that they are not required by the CHIP Act. Therefore, the Commission should not promulgate the rules that NLC and ISTE have requested.

ISA and NLC propose that schools and libraries be required to: 1) Log the number of attempts to access materials that are considered obscene, child pornography, or harmful to minors; 2) Log the number of times a technical protection measure blocks access to such materials; 3) Log the number of instances in which a technical protection measure failed to block access to such materials; 4) Log the number of times a technical protection measure blocked access to materials that did not fall into such categories; 5) Track actual or estimated visits and presumably individual uses of Internet access terminals; 6) Implement and maintain a complaint procedure for the public concerning technical protection measures being under- or over-inclusive; 6) Maintain written records of all complaints; 7) Maintain lists of web addresses that were under or over included by technical protection measures; and 8) In later years, certify that software products and services made by ISA's constituency are actually working as advertised and in compliance with the CHIP Act.[7] In addition, ACLJ proposes that schools and libraries

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[6] *See* "American Center for Law and Justice's Commentary on further Notice of Proposed Rulemaking Implementing the Children's Internet Protection Act," CC Docket No. 96-45 (February 15, 2001). *Available at* http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512461814.

[7] *See* NLC Comments, *supra*, note 5, para. 3 through 7; ISA Comments, *supra*, note 4, para. 3 through 13.

also maintain a public file and complaint system similar to the one mandated by complex broadcast regulations.[8]

As CoSN and ISTE shall explain below, these monitoring and reporting requirements are problematic for multiple reasons: they are not required by the CHIP Act; run counter to the public policy of protecting the privacy of children and library patrons as expressed by state and federal law; would usurp the time of teachers and librarians for the benefit of commercial software vendors; are unworkable and burdensome; and would replace community-based legal standards with those of individual librarians and teachers.

A. The monitoring and reporting requirements suggested by ISA and NLC are not directed by the CHIP Act.

The expansive list of requirements advocated for by ISA and NLC go far beyond the statutory direction of the CHIP Act. Nowhere in the statutory language does the Act empower the Commission to require monitoring and reporting requirements like those advocated by ISA and NLC. Placing these monitoring and reporting requirements on schools and libraries would be unreasonable in the absence of statutory requirements. Such requirements would be particularly inappropriate in light of congressional intent to protect children's privacy in the implementation of the CHIP Act, as expressed in Section 1702(b), which states, "[n]othing in this title…shall be construed to require the tracking of Internet use by any identifiable minor or adult user," and from exploitation by commercial entities as expressed in the Children's Online Privacy Protection Act of 1998.[9]

The CHIP Act requires the Commission to craft rules implementing the Act's requirements. In doing so, the Commission should continue to be guided by its stated desire to

[8] *See* ACLJ comments, *supra*, note 6, Sec. IV.
[9] 15 U.S.C. §§ 6501–6505.

implement the Act in a fashion that is "efficient and effective" and "impos[es] the lest burden on recipients."[10] The monitoring and reporting requirements advocated by ISA and NLC are not supported by the statute and would place great burdens on schools and libraries.

B. The monitoring and reporting requirements run counter to the public policy of protecting the privacy of children and library patrons expressed by the Family Educational Rights and Privacy Act of 1974, the Children's Online Privacy Protection Act of 1998, and state laws protecting the privacy of library patrons and school children.

The record keeping and analysis requirements proposed by ISA and NLC present a threat to the privacy of our nation's schoolchildren, and to adult and minor users of our nation's public libraries as well. The monitoring and reporting duties advocated by ISA and NLC would by design mandate monitoring and recording of all Web use. For instance, in order to meet the proposed reporting requirements as to under- and over-inclusiveness of filtering technologies, schools and libraries would be forced to record each individual search. In addition, ISA and NLC would have our constituency log which website addresses were and were not blocked by filters. As we stated in our initial comments regarding CHIP Act implementation, the tracking and logging of Internet use by students endangers their privacy.[11] Some URLs[12] can contain a user's personal information, such as name, address, telephone number, email address, age and other facts, if the user has entered in such data into a Web site. Additionally, depending on the Internet Service Provider and the filtering software or service used, it may be impossible to separate personally identifiable information from web log data.[13] Given that this data would be

[10] NPRM, Para.6.
[11] *See* CoSN and ISTE Comments, *supra*, note 3, at 22.
[12] The term URL stands for Uniform Resource Locator and generally denotes the Internet address of a given page on the Internet. URLs are typically displayed in a web browser's 'location' or 'address' bar.
[13] For example, the Internet filtering & access management product CyberSnoop is specifically designed to track Web surfing and other Internet activity by specific user. Their product philosophy is that it is important to know, for instance, which children are looking for bomb information on the Internet. CyberSnoop donated its product to the City of Denver for use in schools following the tragic shooting at Columbine High School. *See* http://www.pearlsw.com/news/release.html. We are not aware of whether or not the Denver schools are using this

collected and maintained by schools and is personally identifiable information about students, it qualifies as a "student record" and therefore its disclosure is limited by state and federal law. CoSN and ISTE urge the Commission to defer to these state and federal regulations concerning student records as described below.

CoSN and ISTE remind the Commission that current federal and state laws appropriately govern access to school and library records, including those of the type requested by ISA and NLC.[14] Unlike the comments filed by these organizations, neither state nor federal laws make a distinction between individual or aggregate data from schools. Any information released about students is considered a school record,[15] and most states provide similar privacy protections for library patrons' records. The information requested by ISA and NLC is already governed by existing categories of state and federal law. Without an explicit congressional mandate, the Commission should not disturb the existing law by crafting unsound, burdensome and conflicting new requirements.

The Family Educational Rights and Privacy Act of 1974 ("FERPA"), also known as the "Buckley Amendment" to the General Education Provisions Act,[16] permits parents to inspect and review their children's educational records and generally protects the confidentiality of student records. The statute applies to all educational agencies that accept federal financial assistance and applies to all pupils in those schools. Where an educational record includes information about more than one student, a parent is only permitted to review portions of the document

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software, however, the point remains that "technology protection measures" as contemplated by the CHIP Act may be designed to link personally identifiable information to Web logs. GetNetWise, an Internet safety information resource oriented towards parents, lists 63 Internet safety tools that "monitor" use of the Internet. *See* http://www.getnetwise.org/tools.

[14] *See* NLC Comments, *supra*, note 5, para. 3 through 7; ISA Comments, *supra*, note 4, para. 3 through 13.

[15] *See e.g.,* Ohio Rev. Code Ann. § 149.43 (Page 1990), which defines "public records" to mean any record that is kept by any public office, including but not limited to, state, county, city, village, township and school district units. The section then excepts certain school records containing proprietary information.

[16] 20 U.S.C.A. § 1232(g) (1990 & Supp. 1995).

relating to his or her child.[17] Likewise, educational records may only be released with written consent from the student's parent or pursuant to a court order with the condition that parents and students are notified before the records are released.[18] There are certain exceptions whereby individuals may obtain access to a student's educational records even in the absence of written consent or a court order. These individuals include: school officials and teachers who have a legitimate educational interest in the records; officials of other schools in which the student seeks to enroll; authorized representatives of state educational authorities; and appropriate emergency personnel if knowledge of such information is necessary to protect the health or safety of the student or others.[19]

FERPA represents a decades-long desire by Congress to protect the privacy of children in schools. The statute clearly outlines those individuals who are able to access student records absent parental consent, and the interests of commercial entities are conspicuously absent. Likewise, the Children's Online Privacy Protection Act, mentioned above, also expresses Congress' intent to protect children's privacy. COPPA requires commercial Web sites and online services directed at children 12 and under, or which collect information about age, to provide parents with notice of their information practices and obtain parental consent prior to the collection of personal information from children; and, requires such sites to provide parents with the ability to review and correct information about their children collected by such services.[20]

CoSN and ISTE believe that releasing personal data about school children to ISA's constituency, as suggested by ISA and NLC, would be in direct opposition to the spirit and intent

[17] *See* 20 U.S.C.A. § 1232(g)(a)(1)(A).
[18] *See* 20 U.S.C.A. §§ 1232(g)(b)(2)(A) and (B).
[19] *See* 20 U.S.C.A. §§ 1232(g)(b)(1)(A) to (I).
[20] *See* Center for Democracy and Technology. "Analysis of Rules Implementing the Children's Online Privacy Protection Act" (February 21, 2000). *Available at* http://www.cdt.org/privacy/cdtanalysisofftc.shtml.

of FERPA of COPPA. Without explicit direction from Congress, the Commission should not craft rules that undermine or come into conflict with these federal regulations.

Many states also have laws that restrict access to information about students and library patrons. For instance, Florida's General Education Provision explicitly sets forth the Legislature's intent to protect the rights of students and their parents with respect to student records.[21] The statute grants students and parents rights of access, rights of challenge, and rights of privacy with respect to these records. Like FERPA, under the Florida statute, schools may not release student records to anyone, with the exception of certain individuals and organizations, without the written consent of the student's parent or guardian, or pursuant to a court order upon the condition that parents and students are notified prior to the release of the records. Many states exempt students' school records from their public access requirements, and nearly every state provides a statutory exemption from disclosure for library records that would identify library patrons with specific materials or services.[22] Finally, given that the regulations in question will also apply to private schools receiving E-Rate funding, this proposal, if adopted, would provide for particularly inappropriate meddling by federal regulators.

While many school and libraries voluntarily publish or respond to requests for information about complaints regarding material accessed over the Internet, other local communities have opted not to maintain records or not to provide access to them. Libraries, in particular, are community service institutions dedicated to helping individuals gain access to information, including government records and instructions for petitioning the government for redress of grievances. Instead of implementing the requirements requested by ISA and NLC,

[21] General Education Provision § 228.093(1)
[22] *See e.g.,* Ill. Ann. Stat. ch. 116, para. 207, § 7(L); Ind. Code Ann. § 5-14-3- 4(a)(16); Iowa Code Ann. § 22.7(13); Neb. Rev. Stat. § 84-712.05(10).

therefore, the Commission should give deference to the regulatory schemes already in place at the community, state and federal levels.

CoSN and ISTE strongly support policies providing the public with access to information. CoSN and ISTE are equally supportive of policies that ensure the privacy of school children and library patrons. It is our position that the Commission should not create new federal rules for state and local government records – and in the case of private schools, private organizations whose records are not appropriately the business of the federal government – where the statute does not direct them and where existing federal and state law governs.

C. ISTE and CoSN urge the Commission to avert the threat to student privacy posed by filtering technologies that track Internet use by refusing to promulgate new rules regulating the publication and dissemination of Internet use data culled by filters.

ISA and NLC ask the Commission to force schools and libraries to log and *publicly disclose* sites that are over- and under-included by technical protection. This represents a dangerous intrusion into the privacy of schoolchildren and library patrons because some URLs[23] can contain a user's personal information, such as name, address, telephone number, email address, age and other facts, if the user has entered in such data into a Web site. Additionally, depending on the Internet Service Provider and the filtering software or service used, it may be impossible to separate personally identifiable information from web log data. The commission would therefore be endangering student privacy if it implements the disclosure requirements proposed by ISA and NLC.[24]

[23] The term URL stands for Uniform Resource Locator and generally denotes the Internet address of a given page on the Internet. URLs are typically displayed in a web browser's 'location' or 'address' bar.

[24] In addition to being an unsound policy. ISTE and CoSN believe this is a violation os state and federal law. See section II(b) of this document.

As the Commission weighs whether to implement these disclosure requirements, it should be guided by a factual record that highlights the danger to student privacy presented by the tracking of Internet use data by filtering technology. For example, a recent court decision in New Hampshire,[25] Judge Gillian L. Abramson, Rockingham County Superior Court, NH, allowed a concerned parent to access the Internet use logs generated by students at a local school.[26] The court ruled that student privacy was not implicated in the Web addresses of the sites they visit. In this case, the person reading the records was a concerned parent, but what if it had been a child predator seeking passwords to a student's web-email account or a commercial entity mining student data? ISA and NLC's requirements would eliminate the need for a court order to get access to this private information. Additionally, depending on the Internet Service Provider and the filtering software or service used, it may be impossible to separate personally identifiable information from web log data. For example, the Internet filtering and access management product CyberSnoop is specifically designed to track Web surfing and other Internet activity by specific user. Their product philosophy is that it is important to know, for instance, which children are looking for bomb information on the Internet. CyberSnoop donated its product to the City of Denver for use in schools following the tragic shooting at Columbine High School.[27] We are not aware of whether or not the Denver schools are using this software, however, the point remains that "technology protection measures" as contemplated by the CHIP Act may be designed to link personally identifiable information to Web logs.[28]

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[25] *James M. Knight v. School Administrative Unit No. 16, et al*., Rockingham County Superior Court (Nov. 7, 2000).
[26] See "Court tells school: Give dad Internet log," *available at* http://www.eagletribune.com/news/stories/20001107/FP_008.htm. See also Carl S. Kaplan, "Suit Considers Computer Files," *available at* http://search3.nytimes.com/2000/09/29/technology/29CYBERLAW.html
[27] *See* http://www.pearlsw.com/news/release.html.
[28] GetNetWise, an Internet safety information resource oriented towards parents, lists 63 Internet safety tools that "monitor" use of the Internet. *See* http://www.getnetwise.org/tools.

Another example of the danger presented by disclosure of student Internet use data may be seen in the recent sale of student Internet use data to the Department of Defense by Seattle-based software vendor, N2H2.[29] N2H2's filtering product, Bess, logs all web site URLs visited by students who use the system. N2H2 started a business venture with marketing firm Roper Starch Worldwide, which sells the data to interested companies as a monthly report on where children spend their time online at school. Although N2H2 claims it does not tie the Internet use logs to personally identifiable information, some URLs, as explained above, do contain potentially private and individual specific information about users.[30] ISA and NLC's proposal would make much of this data a matter of public record for all to use.

The Commission cannot ignore the growing factual record in this proceeding that evidences a threat to privacy when filtering policies and products include the logging of Internet use histories. Organizations such as the Center for Democracy and Technology ("CDT") and People for the American Way ("PFAW") as well as CoSN and ISTE have highlighted the fact that privacy is an important consideration the Commission must address in its implementation of the CHIP Act. In comments responding to this NPRM, CDT and PFAW note that student "development cannot properly occur when a student feels that his or her every move is being electronically monitored."[31] In addition to the concerns that student Internet use could be mined by commercial interests, CDT and PFAW point out that such a violation of student privacy might have implications for their academic careers:

> Under the Act, online viewing logs could become part of the child's permanent educational record, and could be taken into consideration when administrators

[29] *See* Cara Branigan, "CIPA Opponents Cite N2H2's Sale of Student Data" (February 12, 2001). eSchool News Online. *Available at* http://www.eschoolnews.com/showstory.cfm?ArticleID=2246. N2H2's web site is available at http://www.n2h2.com.

[30] *See* above at 8.

[31] *See* "Comments of the Center for Democracy and Technology and the People for the American Way Foundation," CC Docket No. 96-45 (February 15, 2001). *Available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512461677.

> determine grade promotions, admission into special programs, disciplinary actions, or even college applications. The dissemination of this type of information could alter the treatment students are offered, and could have a significant impact on the educational world in general.[32]

CDT and PFAW also note that CHIP Act has privacy implications for adults.[33]

On the issue of privacy and Internet filters, comments filed with Commission are not limited to institutional commentators. Individuals like Todd Whitlock, technology coordinator for North Davies Community Schools of Indiana, have also noted the effects of the CHIP Act on privacy. Whitlock states that the CHIP Act's requirements burden schools and libraries while leading to increased revenues for filter software vendors who mine and sell students Internet use data: "[Filter software vendors] are selling this information. The government is requiring us to filter Internet use and then the statistics of our use (that we have to pay for) is being sold for profit for businesses."[34] Similarly, Kenneth J. Conroy in his comments suggests that the Commission set a standard whereby only local administrators, parents and teachers could review Internet use logs. "Corporations," he states, "have no business knowing what a child does online."[35]

In sum, as the record shows, student privacy is threatened by commercial interests and policies that would turn a mandate for Internet filtering into a requirement for Internet tracking of students' private data. ITSE and CoSN urge the Commission to avert this danger by refusing

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[32] *Id*. at Sec. IV, para. 3.

[33] "In addition to the privacy concerns raised by the monitoring of students, use of filters in libraries also raises privacy concerns for adults. As discussed above, adult patrons who wish to have filters disabled must ask the permission of a library administrator based on criteria of "bona fide research or other lawful purpose. Adult patrons would therefore be forced to reveal sensitive or personal research subject matter in order to obtain otherwise available, constitutionally protected information, compromising their privacy and chilling their use of the Internet." *Id*.

[34] *See* Todd Whitlock's Comments on the CHIP Act, filed on behalf of North Daviess Community Schools (Feb. 14. 2001). *Available at* http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512461435.

[35] *See* Kenneth J. Conroy's comments (Jan. 24. 2001). *Available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512459952.

to promulgate new rules regulating the publication and dissemination of Internet use data culled by Internet filters.

D. Because Congress did not mandate public file and complaint regulations in the CHIP Act, the Commission should reject the ACLJ's request for such rules and allow local schools and libraries maximum flexibility in implementing the law.

CoSN and ISTE would also like to address comments made by the American Center for Law and Justice.[36] ACLJ suggests having schools and libraries maintain an extensive public file and public complaint system similar to the systems maintained by the broadcast industry.[37] Nowhere in the specific language of the CHIP Act are such requirements enumerated, and therefore, CoSN and ISTE ask the Commission to reject this extra-legislative request to impose additional and burdensome rules on our constituency. Schools and libraries should be free to implement public file and public comment and complaints systems, but such policies should not be compelled by the Commission where Congress has not expressly required it to do so. Many libraries already maintain public file records and policies that allow for public complaints. CoSN and ISTE believe that the decision to do so should be a local one and not an additional federal mandate with which to comply.

The Commission need not look farther than the ACLJ's own comments to see that their proposed rules would be burdensome and inapplicable. In the ACLJ's own words, these requirements are "complex rules and enforcement mechanisms."[38] As CoSN and ISTE have stated before, the entities covered by the CHIP Act are recipients of federal funds for Internet access and services and are thus among the poorest schools and libraries. The Commission

[36] *See* ACLJ comments, *supra*, note 6, Sec. IV.
[37] *See id.* at 14-15.
[38] *See id.* at iv.

should not impose these complex administrative burdens on struggling schools and libraries, especially where the CHIP Act does not require them. ACLJ's argument is flawed for another reason as well: analogizing the regulation of the broadcast industry to regulation of our schools and libraries ignores the essential differences between the two industries. The largely profit-driven motives of the broadcast industry do not animate our schools and libraries as they go about the business of educating our school children and curing the digital divide through free public access to the Internet. Thus, imposing the same sorts of regulations is inappropriate.[39] More importantly, the Commission's regulation of broadcasters flows from the government's ownership of the airwaves and the scarcity of the spectrum. Considerations of scarcity are wholly absent in the case of schools and libraries. While the regulations proposed by ACLJ may work in the broadcasting context, they are inapplicable and unduly burdensome as federal mandates in the schools and libraries context.

CoSN and ISTE encourage ACLJ and its constituency to seek public file systems from their local schools and libraries. Local education agencies and governments are best suited to address the community's local needs. ACLJ's requests for new rules are not grounded in the language of the CHIP Act. If Congress wanted to create such a national public file system requirement, it would have expressly stated so. The Commission, however, should not impose these additional requirements that are both redundant and costly to implement.

E. The monitoring and reporting proposal would usurp the time of teachers and librarians for the benefit of commercial software vendors.

[39] This is analogous to commercial speech in the First Amendment context, which is accorded less protection in part due to its irrepressible nature. The commercial interests of the broadcast industry deal more easily regulation because they are on the path in search of profits.

By requiring librarians and teachers to monitor, review and report on the effectiveness of each and every search query performed at a filtered computer, the valuable time of these individuals will be taken away from the essential activities of teaching and providing access to information. Simply put, federal regulations should not create rules that in large part require librarians and teachers to become the unpaid staff of filtering software companies.

The role of schools and libraries is to educate our children and provide our citizens with access to information. It is not their role to do the job of the software companies. ISA seems to suggest that the professional staff of schools and libraries should supplement the filtering software workforce and correct deficiencies in software products. This sentiment is reinforced by NLC and ISA's request that schools and libraries maintain lists of web addresses that were under- or over-included and, in later years, certify that software products made by ISA's constituency are actually working.[40]

While we have no doubt that schools and libraries encountering problems with the filtering products or services they select will share their concerns with software vendors, CoSN and ISTE consider this to be an issue best left to the local schools and libraries. Federal rules should not impose such additional burdens on the schools and libraries subject to this Act.

CoSN and ISTE urge the Commission to prevent the limited time and resources of school and library employees from being controlled by commercial interests.

[40] *See* NLC Comments, *supra*, note 5, para. 3 through 7; ISA Comments, *supra*, note 4, para. 3 through 13.

F. The monitoring and reporting requirements are unworkable and burdensome and would replace community-based legal standards with those of individual librarians and teachers.

CoSN and ISTE urge the Commission to reject as overly burdensome and inappropriate the requests made by ISA and NLC to impose record-keeping and analysis requirements on our nation's schools and libraries.[41]

1. ISA and NLC's proposal is unworkable and overly burdensome.

It is impossible for teachers, administrators, and librarians to implement these extensive requirements. In order to comply with NLC and ISA's proposal that the number of times a technical protection measure blocked access to materials not falling into the prohibited categories be monitored and reported, a librarian or school administrator would be forced to:

(1) track every search made by every user on every filtered computer;

(2) conduct duplicative searches on non-filtered computers;[42]

(3) investigate each individual link blocked by the filtered computer on the non-filtered computer; and

(4) determine whether or not the site that was blocked fell into one of the categories of prohibited material outlined in the statute.

Likewise, in order to log the number of times a filter *failed* to block obscene sites, librarians and school administrators would be forced to:

(1) run parallel searches every time a user logged on, and

(2) make judgements about the content allowed by the filter.

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[41] *See* NLC Comments, *supra*, note 5, para. 3 through 7; ISA Comments, *supra*, note 4, para. 3 through 13.

[42] Unless the Commission allows for certain computers used only by adults to operate without technical protection measures, checking blocked sites for content on unfiltered computers itself would be an impossibility. Without this exception, school and libraries having a computer without a technical protection measure of some kind installed would not be in compliance with the CHIP Act.

It is evident that requiring schools and libraries to take part in this sort of monitoring would be unduly burdensome. Not only is this a considerable effort, but particularly in the case of non-classroom use of the Internet, a substantial invasion of the user's privacy. A library patron concerned about prostate cancer or sexually transmitted diseases, or a patron using the library to send an electronic greeting card to a distant loved one, can hardly be expected to utilize the Internet resources with the same comfort level when he or she knows that every click must be reviewed by school or library staff, and the content analyzed against a standard of prurience. The Commission should not, and cannot, expect librarians and school employees to comb through every search conducted on their computer systems.

2. The monitoring and reporting proposal would replace community-based legal standards with those of individual librarians and teachers.

In addition to being unworkable, the ISA and NLC's proposals would place librarians and teachers in the untenable position of making content decisions that replace those of the community. A rule requiring schools and libraries to keep logs of the number of attempts to access materials that are considered obscene, child pornography, or harmful to minors, assumes that school administrators and library employees can and should define, or at least determine, what content falls into these categories. Each librarian and teacher would have to make an individual judgement about whether or not a Web site was obscene, child pornography, harmful to minors or otherwise "inappropriate." On that basis, the teacher or librarian would be required to make a further decision as to whether the site was over- or under-blocked. In its drafting of the CHIP Act, Congress explicitly retained the community-based nature of these standards. The Commission may not enact rules that replace these community-based standards with the opinions of each and every teacher and librarian. As a matter of law, individuals, government entities, and

software companies for that matter, cannot make legal determinations about Internet content.[43] Terms used in the language of the Act – obscene, child pornography, harmful to minors – have particular legal meanings. The standards for classifying this sort of material are set by courts, not by individuals.

In addition, because under the law such classifications are rooted in community standards, it is unclear how such reporting would benefit the Commission. It would be impossible for the Commission to interpret and compare the number of "correctly" and "incorrectly" blocked sites as reported by a Kansas school using CyberSitter and a Los Angeles library using SurfControl. The information that the Commission would receive under this proposal would be essentially meaningless.

Those schools and libraries that are the biggest beneficiaries of the E-Rate for Internet access and services – and therefore the entities that must conform to CHIP Act requirements – are also among the poorest in the nation.[44] The Commission should not saddle recipients with additional administrative burdens they cannot afford. Many recipients have pointed to the "disabling during adult use" provision of the Act alone as overly-burdensome.[45] Implementing ISA and NLC's additionally burdensome rules on top of the actual requirements listed in the

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[43] *See* CDT and People For comments, *supra*, note 31.

[44] For example, the Deming Public Schools, in southern New Mexico, received an 86% discount in Year 2 of the E-Rate program. The majority of students are from poor families, and in many cases, their parents are migrant workers. In one Deming school, every single student qualified for the federal free or reduced-price lunch program. The E-Rate program permitted the school district to network classrooms, upgrade computers, and integrate technology into the curriculum. According to school district Finance Director Ted Burr, "[The E-Rate] has cut years off of the district technology implementation time line." *See* "E-Rate: Keeping the Promise to Connect Kids and Communities to the Future," published by EdLiNC, the Education and Libraries Networks Coalition, (July 2000). *Available at* http://www.edlinc.org/pubs/eratereport2.html#newmexico.

[45] *See* "Comments by Alan Engelbert, Director, Manitowoc Public Library," CC 96-45 (February 14, 2001). *Available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document =6512461530. "During 2000, Manitowoc Public Library's…Internet workstations were used a total of 16,499 hours by 18,216 people. Imagine what a nightmare it would be if library staff have to individually turn off filtering software for adults to access information they have every legal right to access, and then turn it back on when they finish. We

CHIP Act would require schools and libraries to hire additional staff, or at the very least divert librarians and school administrators from educating our nation's schoolchildren and running orderly and efficient libraries. Furthermore, it is impossible and inappropriate to require teachers, administrators, and librarians to make spot decisions about the content of individual Web sites. The establishment of such roving spot censors clearly contravenes the law.[46]

For these reasons, CoSN and ISTE urge the Commission to reject the reporting and monitoring requirements as unworkable and inappropriate as a matter of law.

III. The Commission refrain from improperly asserting jurisdiction over other federal agencies

By asking that the Commission mandate filtering reports from the Department of Education and the Institute of Museum and Library Services demanding reports, ISA and NLC are requesting that the Commission extend it's rulemaking authority beyond entities covered by the E-Rate program to include independent federal agencies. This request that the Commission assert authority over the Department of Education and the Institute of Museum and Library Services is entirely inappropriate.[47] While we appreciate and shared the desire for harmonized implementation regulations for the CHIP Act, CoSN and ISTE urge the Commission not to overstep its bounds by asserting such jurisdiction over other federal departments and agencies.

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simply do not have enough staff time available to be able to cope with a situation like that." Many other comments to the Commission, not cited here individually, repeated this concern.

[46] *See* CDT and People For comments, *supra*, note 31.

[47] *See* NLC Comments, *supra*, note 5, para. 11; ISA Comments, *supra*, note 4, Sec. V.

IV. In the case of large school districts and consortia recipients, the Commission should allow flexibility of certification and not penalize CHIP-compliant consortia members or communal consortia purchases when individual entities fail to certify.

CoSN and ISTE wish to reiterate their position that that in the case of large school districts and consortia applications, the failure to certify by one recipient, or even a small number of recipients, should not penalize CHIP-compliant members of the consortia or district. This is particularly important in the case of communal resources such as shared networks or collectively purchased Internet bandwidth.

During the initial comment period on CHIP Act implementation, many commentators, including ITSE and CoSN, asked the Commission to take into account the complexity of large school district and consortia applications. The general theme of these comments is in accord with our position that local flexibility and autonomy should be preserved and that CHIP-compliant entities of large school district and consortia should not be penalized for failure to comply by fellow applicants. Communal resources like state-wide networks and bulk bandwidth purchases are especially difficult to deal with, but are also frequently crucial to the ongoing success of our nations poorest schools and libraries. ITSE and CoSN cite with approval comments made by Funds for Learning, LLC., which call for Commission-created rules to protect consortia funds when one entity has not properly certified CHIP-compliance.[48]

> Surely such a finding should not jeopardize the total funding commitment for a consortium, either while it is under review or after it has been approved. Rather, it would seem fair to require the non-compliant participant to return its share of the funding, if already committed, but not to adjust the funding level for the rest of the consortium, or the approved discount rate, if a consortium member is later found not to be in compliance.[49]

[48] *See* comments by Funds for Learning (Feb. 15, 2001). *Available at* http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512461622.
[49] *Id*. at page 4.

These thoughts are echoed in comments filed by Michigan's The Library Network[50]:

> Further, if a member of a consortium should be found to be in non-compliance, then the loss of discount (or requirements to repay previous discounts) should affect only that single entity and not the entire consortia. To implement rules that do not protect the consortia applicant in this manner will have a chilling effect on consortia applications. Such an effect is contrary to the FCC's goal to foster collaboration and the aggregation of demand.[51]

ITSE and CoSN urge the commission to promulgate rules to protect consortia applicants and large school districts. Communal purchases and networks should not be jeopardized because of non-compliance by a member of a consortia application.

The Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) already has a mechanism in place that could address the certification issue, namely the Program Integrity Assurance Team (PIA Team). The PIA Team's duties could be extended to assist with conflicts arising from separate certifications. This would greatly increase flexibility for schools trying to comply with the Act while maintaining efficiencies to the greatest extent possible. The PIA Team could be charged with finding fair ways to administer the remedial provisions of the Act in cases involving large school districts consortia applications. CoSN and ISTE urge that, to whatever degree possible, non-compliant entities should not impede the funding for complaint entities, especially where such groups applied for communal resources.

V. CONCLUSION

In crafting new rules or guidelines, the Commission should preserve local control and autonomy on the part of school and libraries. CoSN and ISTE believe that because state law

[50] *See* comments by The Library Network (Feb. 13, 2001). *Available at* http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512461344.
[51] *Id*. at Sec. 5.

appropriately governs the maintenance and disclosure of school and library records, the Commission should not create new, burdensome, and possibly redundant regulations regarding public records, especially given the absence of evidence current state and federal law is inadequately serving this need. CoSN and ISTE also ask that the Commission reject the unreasonably burdensome list of record-keeping and analysis requirements proposed by ISA and NLC. The Commission should reject this request in light of the privacy implications these requirements would create for our nation's schoolchildren and library patrons. CoSN and ISTE also do not believe that the Commission should assert jurisdiction over the Department of Education and Institute for Museum and Library Services as ISA requests that it do by mandating annual CHIP Act compliance summaries from those agencies. Finally, CoSN and ISTE reiterate that in the case of large school districts and consortia applications, the failure to certify by one recipient should not penalize CHIP-compliant recipients, especially in the case of communal resources like shared networks or collectively purchased Internet bandwidth.