

**BEFORE THE NEW YORK STATE
JOINT COMMISSION ON PUBLIC ETHICS**

CONSUMER WATCHDOG
John M. Simpson, Privacy Project Director

Complainant

v.

ERIC E. SCHMIDT,

Respondent

**COMPLAINT REGARDING THE UNLAWFUL CONFLICTS OF INTEREST
OF ERIC E. SCHMIDT, MEMBER OF THE SMART SCHOOLS
COMMISSION AND EXECUTIVE CHAIRMAN OF GOOGLE INC.**

I. INTRODUCTION

1. On April 17, 2014, Governor Cuomo announced the appointment of Eric E. Schmidt (“Schmidt”), Executive Chairman of Google Inc. (“Google”) to the New York State Smart Schools Commission (the “Commission”).¹ Schmidt should remove himself from the Commission because he possesses serious, troubling and unlawful conflicts of interest. This is not the case of an industry participant advising on general policy initiatives; instead, it involves Schmidt, the Executive Chairman of Google, advising on how to spend \$2 billion on educational technology that Google offers in New York. In fact, as detailed below, Schmidt and Google want to grow substantially Google’s education business in New York and elsewhere. Schmidt’s fiduciary duty to the private corporate interests of Google raises serious questions about his ability to act in the best interests of New York instead of the best interests of Google. Indeed, Schmidt’s ownership or control of Google stock represents approximately 5.5% of Google, and is currently valued at over \$5 billion.² For 2013, Google paid Schmidt total compensation valued at approximately \$19.3 million, and in February 2014, Google paid Schmidt an additional bonus valued at approximately \$100 million, all to advance Google’s interests as its Executive Chairman.³ Schmidt’s Commission participation raises the appearance of impropriety, compromises the integrity of the Commission, and provides

¹ Press Release, Gov. Andrew Cuomo, Governor Cuomo Announces Members of Smart Schools Commission (Apr. 17, 2014), <https://www.governor.ny.gov/press/04172014-smart-schools-commission>.

² Notice of 2014 Annual Meeting of Stockholders and Proxy Statement (Mar. 28, 2014), https://investor.google.com/pdf/2014_google_proxy_statement.pdf; Eric E. Schmidt, c/o Google Inc., Statement of Changes in Beneficial Ownership (Form 4) (Apr. 10, 2014), *available at* <http://www.sec.gov/Archives/edgar/data/1242463/000112760214014440/xslF345X03/form4.xml>.

³ *See* https://investor.google.com/pdf/2014_google_proxy_statement.pdf; Google Inc.; Form 8-K (Jan. 29, 2014), <http://www.sec.gov/Archives/edgar/data/1288776/000128877614000017/goog02042014-8k.htm>; *see also* Brian Womack, *Google Chairman’s Compensation More Than Doubles in 2013*, Bloomberg News, Mar. 28, 2014, *available at* <http://www.bloomberg.com/news/2014-03-28/google-chairman-s-compensation-more-than-doubles-in-2013.html>.

Schmidt and Google the perfect vehicle for Google to pursue state funds, improve Google's reputation and position in the education market, and to do what is best for Google, instead of what is best for New York.

2. Schmidt and Google's interest in limiting privacy protections for individuals, including students, is also in direct conflict with New York student privacy protection policy. As described further below, in March 2014, Governor Cuomo announced a number of new key initiatives to protect student privacy, including procedures for parent notification in case of any data breach, strong penalties for student privacy violations, a "bill of rights" for parents, and the naming of a Chief Privacy Officer for the State Education Department.⁴ Because of these and other New York student privacy priorities, it will be especially critical for the Commission to weigh impartially the benefits of education technology against the possibility that such technology may compromise children's interests and security. Schmidt and Google, however, have a strong interest in limiting privacy protections for consumers and students. Indeed, under Schmidt's leadership, Google has been repeatedly sanctioned or charged with privacy violations, and this is especially true in New York. For example:

a. *New York And Dozens Of Other State Attorneys General Privacy Actions Against Google*: Just last year, the New York Attorney General announced two separate privacy actions against Google on behalf of New York and dozens of other State Attorneys General: (a) a \$17 million multistate privacy settlement over Google's unlawful online tracking of consumers;⁵

⁴ Press Release, Gov. Andrew Cuomo, Common Core Implementation Panel Releases Preliminary Recommendations (Mar. 10, 2014), <https://www.governor.ny.gov/press/03102014-common-core-implementation-panel-recommendations>.

⁵ Press Release, Att'y Gen. Eric Schneiderman, A.G. Schneiderman Announces \$17 Million Multistate Settlement With Google Over Tracking Of Consumers (Nov. 18, 2013), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-17-million-multistate-settlement-google-over-tracking>.

and (b) a \$7 million multistate privacy settlement over Google’s unlawful collection of data from wireless networks nationwide.⁶

b. *Federal Trade Commission Privacy Actions Against Google:* The Federal Trade Commission (“FTC”) has also resolved privacy actions against Google, for instance: (a) a record \$22.5 million civil penalty announced in August 2012 to settle privacy related charges that Google misrepresented to users of Apple that Google would not track their web usage for advertising purposes;⁷ and (b) an October 2011 settlement with Google over privacy charges that Google used deceptive tactics and violated its own privacy promises to consumers when it launched its social network, Google Buzz, in 2010.⁸

c. *Google Acknowledged Student Privacy Allegations In Federal Suit:* In a federal suit against Google in the Northern District of California, Google acknowledged that it scanned student email messages for content,⁹ an admission the media called “potentially explosive” because “Google has acknowledged scanning the contents of millions of email messages sent and received by student users of the company’s Apps for Education tool suite for schools.”¹⁰

⁶ Press Release, Att’y Gen. Eric Schneiderman, A.G. Schneiderman Announces Multistate Settlement with Google for Violating Privacy Rights (March 12, 2013), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-multistate-settlement-google-violating-privacy-rights>.

⁷ See Press Release, Fed. Trade Comm’n, Google Will Pay \$22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple’s Safari Internet Browser (Aug. 9, 2012), <http://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented>.

⁸ See Press Release, Fed. Trade Comm’n, FTC Gives Final Approval to Settlement with Google over Buzz Rollout (Oct. 24, 2011), <http://www.ftc.gov/news-events/press-releases/2011/10/ftc-gives-final-approval-settlement-google-over-buzz-rollout>.

⁹ *In re Google Inc. Gmail Litig.*, No. 13-MD-02430, ECF Doc. # 44 at 4 (N.D. Cal. June 13, 2013) (Google acknowledged that Google Apps for Education and other markets allows “email content [to be] scanned to deliver targeted ads”).

¹⁰ Benjamin Herold, *Google Under Fire for Data-Mining Student Email Messages*, Education Week, Mar. 26, 2014, available at <http://www.edweek.org/ew/articles/2014/03/13/26google.h33.html>.

3. There are many other examples of Google's checkered privacy record. For instance, when discussing Google's approach to privacy in 2010, Schmidt famously stated that "Google policy is to get right up to the creepy line but not cross it."¹¹ Similarly, when discussing privacy and technology in 2009, Schmidt explained that "[i]f you have something you don't want anyone to know, maybe you shouldn't be doing it."¹² As these comments and the above matters make clear, Schmidt and Google have a strong interest in pressing for Commission policies and decisions that lessen privacy protection for individuals, including students. These interests impair Schmidt's ability to serve as an impartial participant on the Commission, and risk recommendations that put Schmidt and Google's commercial interests ahead of New York's interest in student privacy.

4. Importantly, this is not the first instance in which Schmidt and Google have ignored a clear conflict of interest to gain a business advantage. In August 2009, amid an investigation by the Federal Trade Commission's Bureau of Competition, Schmidt was forced to resign his position on Apple's Board of Directors due the conflict of interest inherent in serving on a direct competitor's Board.¹³ Schmidt's already-demonstrated disregard for conflicts of interest enhances the public's perception of the impropriety of his appointment and

¹¹ See, e.g., Derek Thompson, *Google's CEO: "The Laws Are Written by Lobbyists,"* The Atlantic, Oct. 10, 2010, available at <http://www.theatlantic.com/technology/archive/2010/10/googles-ceo-the-laws-are-written-by-lobbyists/63908/>.

¹² See, e.g., Rob Pegoraro, *Google's Eric Schmidt Steps Down, Depriving Web Of Future Quotes,* The Wash. Post, Jan. 21, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/20/AR2011012006128.html> (collecting additional similar quotes from Schmidt).

¹³ Press Release, Fed. Trade Comm'n, Statement of Bureau of Competition Director Richard Feinstein Regarding the Announcement that Google CEO Eric Schmidt Has Resigned from Apple's Board (Aug. 3, 2009), <http://www.ftc.gov/news-events/press-releases/2009/08/statement-bureau-competition-director-richard-feinstein-regarding>.

necessitates scrutiny by the New York State Joint Commission on Public Ethics (the “Joint Commission”).

5. As a result of these conflicts, Schmidt is already in violation of three provisions of Section 74 of the New York Public Officials Law (“Section 74”).¹⁴ His mere appointment (a) creates the impression that he can improperly influence decisions of the Commission; (b) raises suspicion among the public; and (c) places him in an official position where he will not be able to exercise independent judgment in carrying out his duties. Additionally, if allowed to serve on the Commission, Schmidt will inevitably violate two more provisions of Section 74 because his role will make it impossible to (a) avoid using confidential information he acquires as a Commission member for personal benefit; and (b) refrain from taking official actions in which Google has at least some financial interest. Because it is well settled under New York law that Section 74 applies to advisory board members like Schmidt,¹⁵ the Complainant respectfully requests that the Joint Commission investigate whether Schmidt’s participation on the Commission presents unlawful conflicts of interest in violation of Section 74.

II. FACTS DEMONSTRATING SCHMIDT’S UNLAWFUL CONFLICTS OF INTEREST

A. The Commission Will Advise New York Regarding How To Spend \$2 Billion On Educational Technology

6. Governor Cuomo’s 2014 – 2015 Executive Budget “recommends a \$2 billion general obligation bond act, to be brought before voters in November 2014.”¹⁶

¹⁴ N.Y. Pub. Off. Law § 74(3) (McKinney 2008 & Supp. 2014).

¹⁵ New York State Ethics Commission, Adv. Op. No. 98-07 - Application of Public Officers Law §74 to members of New York State advisory boards (July 15, 1998), <http://www.jcope.ny.gov/advice/ethc/98-07.htm>.

¹⁶ Governor Andrew Cuomo, *Building on Success*, 2014-15 Executive Budget at 30 (Jan. 21, 2014), available at <http://publications.budget.ny.gov/eBudget1415/fy1415littlebook/BriefingBook.pdf>.

7. This \$2 billion “will fund enhanced education technology in schools, with eligible projects including infrastructure improvements to bring high-speed broadband to schools and communities in their school district and the purchase of classroom technology for use by students. . . .”¹⁷

8. Governor Cuomo created the Commission to advise the State regarding how to spend this \$2 billion, including how to use these funds to “outfit classrooms with high-speed broadband and digital devices.”¹⁸

9. On April 17, 2014, Governor Cuomo announced his appointment to the Commission of: (a) Schmidt; (b) Geoffrey Canada, President and CEO of Harlem Children’s Zone; and (c) Constance Evelyn, Superintendent of the Auburn School District in Cayuga County.

B. Google Pays Schmidt Huge Sums For The Same Responsibilities As His Uncompensated Commission Responsibilities

10. As discussed above, Schmidt controls a stake in Google currently valued at over \$5 billion.¹⁹ In addition, for 2013, Google paid Schmidt total compensation valued at approximately \$19.3 million, and in February 2014, Google paid Schmidt an additional bonus valued at approximately \$100 million, all to advance Google’s interests as its Executive Chairman.²⁰

¹⁷ *Id.*

¹⁸ See <https://www.governor.ny.gov/press/04172014-smart-schools-commission>.

¹⁹ Notice of 2014 Annual Meeting of Stockholders and Proxy Statement (Mar. 28, 2014), https://investor.google.com/pdf/2014_google_proxy_statement.pdf; Eric E. Schmidt, c/o Google Inc., Statement of Changes in Beneficial Ownership (Form 4) (Apr. 10, 2014), *available at* <http://www.sec.gov/Archives/edgar/data/1242463/000112760214014440/xslF345X03/form4.xml>.

²⁰ See https://investor.google.com/pdf/2014_google_proxy_statement.pdf; <http://www.sec.gov/Archives/edgar/data/1288776/000128877614000017/goog02042014-8k.htm>; *see also* <http://www.bloomberg.com/news/2014-03-28/google-chairman-s-compensation-more-than-doubles-in-2013.html>.

11. Such interests, as set forth in Schmidt’s Executive Chairman job description, include: “building partnerships and broader business relationships, government outreach and technology thought leadership”²¹ These responsibilities overlap completely with his responsibilities as a Commission appointee.

12. Schmidt’s responsibilities as Executive Chairman also include “advising the [Google] CEO and senior leadership on business and policy issues.”²² Such advice will undoubtedly reflect the “business and policy” information Schmidt acquires as a Commissioner, further evidencing the overlap in Schmidt’s responsibilities as Executive Chairman of Google and as a member of the Commission.

13. In light of Schmidt’s responsibilities as Google’s Executive Chairman, it is clear that Schmidt’s participation on the Commission *is part of his job for Google*, and that Google – not New York – is paying Schmidt huge sums for such responsibilities. Indeed, there is nothing in the public record indicating that New York will pay Schmidt anything as a Commission member; thus, Schmidt has more to gain from his interest in Google than from his participation on the Commission.

C. Schmidt And Google Stand To Benefit From The Commission’s Funds And Want To Grow Substantially Google’s Education Business In New York

14. With 50 million K-12 students in 98,000 public schools, spread across 13,600 school districts, the United States’ education system is a large, fast-growing market with the potential to be a huge source of revenue for Google or Google’s competitors.²³

²¹ See Google Inc. Management Team, Executive Officers, Eric. E. Schmidt, https://www.google.com/intl/en_us/about/company/facts/management/#eric.

²² *Id.*

²³ National Center for Education Statistics, Fast Facts, *available at* <http://nces.ed.gov/fastfacts/display.asp?id=372>.

15. Schmidt and Google are aggressively seeking to grow Google's education business in New York and other markets. For example:

a. Through its product, Google Fiber, Google seeks to provide high-speed broadband to schools by obtaining large government and municipal network contracts.²⁴

b. Google is also seeking aggressively to provide schools with digital devices and services such as online educational platforms, and technology training for teachers and students.²⁵ In fact, Google has developed an extensive website specifically targeting the education market: "Google for Education," <http://www.google.com/edu/tools-and-solutions/index.html>.

c. Further demonstrating its commitment to the education sector, Google recently entered into an agreement with Synnex Corporation for Synnex Corporation to, among other things, distribute Google Chromebooks and related products to school district customers throughout North America. Synnex has described this relationship as one that will "revolutionize education" in North America.²⁶

d. Moreover, Google has set its sights on New York schools specifically. For instance, it is currently seeking to hire a full-time sales representative in New York whose

²⁴ Nathan Olivarez-Giles, *Google Fiber in Kansas City, Kan., free to schools, available to public in 2012*, L.A. Times, Mar. 30, 2011, available at <http://latimesblogs.latimes.com/technology/2011/03/google-fiber-in-kansas-city-kan-free-to-schools-available-to-public-in-2012.html>; see also Mike Anderson, *Provo schools among first to use Google Fiber*, KSL.com, Apr. 18, 2013, available at <http://www.ksl.com/?sid=24843114> ("[A technology teacher in Provo] also said Google Fiber will continue to further a pilot program recently developed by Provo schools that includes allowing students to take devices home to use for school projects. While the Google Fiber announcement is big news for the city of Provo, Google will also receive a \$50 million network with the contract").

²⁵ See Google for Education, <http://www.google.com/edu/tools-and-solutions/index.html>; see also Rolfe Winkler, *Chromebooks Take Other Mobile PCs to School*, Wall St. J., Jan. 23, 2014, available at <http://online.wsj.com/news/articles/SB10001424052702304856504579338941198812358>.

²⁶ Press Release, SYNnex Corporation Is the First Distributor to Bring Google Chrome Management Console and Services to Revolutionize Education in the North American Channel (Jan. 8, 2014), Wall St. J., Jan. 8, 2014, available at <http://online.wsj.com/article/HUG1753530.html>.

primary responsibilities will include “evangeliz[ing] Google tools like Apps, Search and Chrome, to leading companies, schools and government agencies.”²⁷

e. Google has already captured a significant share of the education market. Seventy-two of the top one hundred U.S. News ranked colleges and seven of eight Ivy League schools use Google Apps for Education.²⁸ Chromebooks currently comprise over 20% of the laptops used in U.S. K-12 schools,²⁹ with schools purchasing 175,000 Chromebooks in the summer of 2013 alone.³⁰

16. Notably, Google has an exceptionally strong long term interest in penetrating the New York and other education markets and providing products and services to students. As discussed above and further below, Google mines student data for advertising purposes, students represent Google’s future customer base,³¹ and students influence their parents’ technology purchasing choices.³²

²⁷ Job Announcement, Google Sales Representative, Education, New York, NY, USA, https://www.google.com/about/careers/search/?src=Online/TOPs/EMEA+SGA+University+MBA&utm_source=EMEA+SGA+University+MBA&utm_medium=jobposting&utm_campaign=freeaggr#!t=jo&jid=22285001& (last visited Apr. 22, 2014).

²⁸ Google Inc., Official Blog, *A new way of doing things on campus*, Sept. 13, 2012, <http://googleblog.blogspot.com/2012/09/a-new-way-of-doing-things-on-campus.html>.

²⁹ <http://online.wsj.com/news/articles/SB10001424052702304856504579338941198812358>.

³⁰ Brittany Hillen, Slashgear.com, *Chromebooks now being utilized by 22% of K-12 US school districts*, Oct. 2, 2013, <http://www.slashgear.com/chromebooks-now-being-utilized-by-22-of-k-12-us-school-districts-02300117>.

³¹ Jay Yarow, Business Insider.com, *Google’s Ad Revenue Per User Is Insanely Ahead Of Its Rivals*, Dec. 19, 2013, <http://www.businessinsider.com/googles-ad-revenue-per-user-2013-12>; Dan Dzombak, The Motley Fool, *How Much is a User Worth?*, Aug. 27, 2012, <http://www.fool.com/investing/general/2012/08/27/how-much-is-a-user-worth.aspx>.

³² Justin Beneke *et al.*, *The Influence of the Youth on Their Parents’ Purchasing Decisions of High-Technology Products*, 5(10) Afr. J. of Bus. Mgmt. 3807 (2011) (children, often regarded as “internet mavens,” are instrumental in the purchase of high-technology products).

17. Accordingly, Schmidt and Google stand to benefit from the Commission's funds, and there can be no doubt that Schmidt and Google want Google to "outfit [New York] classrooms with high-speed broadband and digital devices."³³

III. APPLICABLE LAW

A. The Joint Commission May Investigate Alleged Violations Of Section 74

18. The Joint Commission was established in 2011 to restore public trust in government by ensuring compliance with the State's ethics and lobbying laws, regulations, and guidance.³⁴ As part of its mandate, the Joint Commission is authorized under Executive Law 94(13)(a) to investigate violations of Section 74.³⁵

19. Section 74 precludes an appointee to the Commission from, among other things:

a. Possessing other "employment which will impair his independence of judgment in the exercise of his official duties."³⁶

b. Disclosing "confidential information acquired by him in the course of his official duties nor use such information to further his personal interests."³⁷

c. Engaging in "any transaction as representative or agent of the state with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties."³⁸

³³ <https://www.governor.ny.gov/press/04172014-smart-schools-commission>.

³⁴ New York State Joint Commission on Public Ethics, <http://www.jcope.ny.gov/about/jurisdiction.html>.

³⁵ N.Y. Exec. Law § 94(13)(a) (McKinney 2010 & Supp. 2014).

³⁶ N.Y. Pub. Off. Law § 74(3)(a).

³⁷ N.Y. Pub. Off. Law § 74(3)(c).

³⁸ N.Y. Pub. Off. Law § 74(3)(e).

d. Giving “by his conduct [a] reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.”³⁹

e. Failing to “pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.”⁴⁰ These prohibitions may be referred to collectively as the “Prohibited Acts.”

20. Where the Joint Commission finds a knowing and intentional violation of Section 74, it may order suspension or removal from office or a civil penalty not to exceed \$10,000.⁴¹

21. Accordingly, Complainant respectfully submits that the Joint Commission has jurisdiction to both investigate and remedy Schmidt’s unlawful conflicts of interest as discussed herein.

B. Section 74 Applies To Schmidt As A Member Of The Commission

22. It is well settled under New York law that advisory board members like Schmidt are subject to Section 74 if they are policy makers *or* if one or more members are appointed by the Governor.⁴² Here, though not required, both conditions are satisfied.

23. The Governor clearly appointed Schmidt.⁴³ With respect to whether he is a policy maker, Schmidt need not have “final governmental authority” or “executive power” to

³⁹ N.Y. Pub. Off. Law § 74(3)(f).

⁴⁰ N.Y. Pub. Off. Law § 74(3)(h).

⁴¹ N.Y. Pub. Off. Law. § 74(4); N.Y. Exec. Law § 94(14).

⁴² New York State Ethics Commission, Adv. Op. No. 98-07 - Application of Public Officers Law §74 to members of New York State advisory boards (July 15, 1998), <http://www.jcope.ny.gov/advice/ethc/98-07.htm>.

⁴³ <https://www.governor.ny.gov/press/04172014-smart-schools-commission>.

have a policymaking function.⁴⁴ It is enough that he plays a “role in the development of State policy.”⁴⁵ The Smart Schools Commission will play a role in the development of policy because it will provide advice regarding, among other things, how to spend \$2 billion to enhance technology in the classroom and improve teaching.

24. Accordingly, Schmidt must refrain from engaging in the Prohibited Acts listed above.⁴⁶

IV. SCHMIDT CANNOT SERVE ON THE COMMISSION WITHOUT VIOLATING SECTION 74

A. Schmidt Possesses Multiple Conflicts Of Interest In Violation of Section 74

25. Schmidt possesses multiple conflicts of interest in violation of Section 74 because of: (a) Schmidt’s fiduciary responsibilities to Google; (b) Schmidt’s financial interest in Google; (c) Schmidt and Google’s continuing desire to expand aggressively its educational technology business in New York and elsewhere; (d) Schmidt and Google’s interest in limiting privacy protections for individuals, including students; and (e) Schmidt and Google’s commitment to government influence, lobbying and relations to benefit Google.

26. As mentioned above, Schmidt is already in violation of three provisions of Section 74. His mere appointment (a) creates the impression that he can “improperly influence” decisions of the Commission; (b) “raise[s] suspicion among the public”; and (c) places him in an official position where he will not be able to exercise “independence of judgment” in carrying out his duties.⁴⁷ Additionally, if allowed to serve on the Commission, Schmidt will inevitably violate two more provisions of Section 74 because his role will make it

⁴⁴ <http://www.jcope.ny.gov/advice/ethc/98-07.htm>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ N.Y. Pub. Off. Law § 74(3)(a), (h), (f).

impossible for him to (a) avoid “using confidential information acquired . . . to further his personal interests”; and (b) refrain from taking official actions in which he “has a direct or indirect financial interest that might reasonably tend to conflict with . . . his official duties.”⁴⁸

27. There is already “suspicion among the public” concerning Schmidt’s appointment. Within hours of Schmidt’s appointment, the media questioned Schmidt’s clear conflicts of interest explaining that “[b]y pumping more dollars for tech purchases into what’s already America’s best-funded K-12 education system, the proposed \$2 billion Smart Schools Bond Act will expand an important market for Google, which competes with Apple and Microsoft to sell laptops, tablet computers and other devices to schools. Did this somehow escape the governor’s notice?”⁴⁹

28. The likelihood of further violations is even greater because Schmidt is the only Commission appointee from the private sector, and the only one with demonstrated business and technological expertise. As one reporter has observed, the Commission clearly lacks members who could temper Schmidt’s potential favoritism towards Google product because “[o]ddly enough, the two other new appointees to the Smart Schools Commission are not named Tim Cook [CEO of Apple] or Bill Gates [former CEO and Chairman of Microsoft].”⁵⁰

29. It is also beyond dispute that Schmidt can make recommendations to the Commission that explicitly or implicitly favor Google, or that disfavor Google’s competitors.

30. Schmidt cannot eliminate his Section 74 conflicts by recusing himself from voting on matters that impact Google. Indeed, Section 74 concerns all of Schmidt’s “conduct”

⁴⁸ N.Y. Pub. Off. Law § 74(3)(c), (e).

⁴⁹ E.J. McMahon, *Google guy to weigh in on school tech funds?*, NY Torch, Apr. 17, 2014, <http://www.nytorch.com/?p=8600>.

⁵⁰ *Id.*

as a Commission member and every material recommendation that Schmidt will make regarding how New York should spend \$2 billion can impact Google or its competitors.⁵¹

31. Similarly, it is immaterial that voters will decide whether to approve the Smart Schools Bond Act in November 2014. Indeed, the Commission, and not voters, will “advise the State on how to best invest the Governor’s proposed \$2 billion Smart Schools Bond Act. . . .”⁵²

32. Thus, Schmidt cannot serve on the Commission without violating Section 74.

B. A Joint Commission Investigation Is Also Appropriate Because Of Schmidt And Google’s Conflicting Interest In Limiting Privacy Protections And In Government Influence, Lobbying And Relations

33. As explained earlier, Schmidt and Google’s interests in limiting privacy protections and gaining influence in government compound Schmidt’s conflicts of interest, support the need for an investigation, and call into question Schmidt’s role on the Commission.

34. Governor Cuomo and New York have a strong, important and demonstrated interest in protecting student privacy. For example, in March 2014, Governor Cuomo announced a series of key initiatives to advance his education priorities.⁵³ One such initiative was to better “protect student privacy.”⁵⁴ To do so, Governor Cuomo further announced that New York should enact “laws and policies that establish and/or reinforce strict data protection requirements, including procedures for parent notification in case of any data breach, including by a third-party, and strong penalties for violations; establishment of a “Parents Bill of Rights for Data Privacy” that includes complete transparency about what data is collected by the State

⁵¹ See N.Y. Pub. Off. Law § 74(3)(f).

⁵² <https://www.governor.ny.gov/press/04172014-smart-schools-commission>.

⁵³ <https://www.governor.ny.gov/press/03102014-common-core-implementation-panel-recommendations>.

⁵⁴ *Id.*

and by school districts, who it is shared with and why; and naming of a Chief Privacy Officer for the State Education Department whose responsibilities include establishing standards for educational agency data security and privacy policies.”⁵⁵

35. As shown earlier, however, Schmidt and Google have a strong interest in limiting privacy protections for consumers and students, and have been repeatedly sanctioned or charged with privacy violations by the New York Attorney General, the FTC and others.

36. The New York Attorney General’s announcement last year of the \$17 million multistate settlement with Google over Google’s unlawful online tracking of consumers was particularly harsh on Google, stating that “[b]y tracking millions of people without their knowledge, Google violated not only their privacy, but also their trust. . . .”⁵⁶

37. As further noted above, there are many other examples of Schmidt and Google’s checkered privacy record. Thus, contrary to New York’s interests, Schmidt and Google have a strong interest in pressing for Commission policies and decisions that lessen privacy protection for individuals, including students.

38. Moreover, Schmidt and Google’s interest in government influence, lobbying and relations also conflict with New York’s interest in having impartial members participate on the Commission. As *The Washington Post* recently revealed, Schmidt and Google engage in extensive “behind-the-scenes machinations [which] demonstrate how Google — once a lobbying weakling — has come to master a new method of operating in modern-day

⁵⁵ *Id.*

⁵⁶ <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-17-million-multistate-settlement-google-over-tracking>.

Washington, where spending on traditional lobbying is rivaled by other, less visible forms of influence.”⁵⁷

39. *The Washington Post* further explained that Google’s “system includes financing sympathetic research at universities and think tanks, investing in nonprofit advocacy groups across the political spectrum and funding pro-business coalitions cast as public-interest projects.”⁵⁸

40. Schmidt and Google’s extensive interest in government influence, lobbying and relations are in conflict with New York’s interest in having an impartial Commission determine how best to spend \$2 billion for New York students.

41. Finally, as described above, the Joint Commission should be aware that Schmidt and Google have previously ignored a clear conflict of interest to gain a business advantage. In 2009, the Federal Trade Commission (“FTC”) forced Schmidt to resign from Apple’s board due to conflicts of interest and competitive overlaps.⁵⁹ Schmidt’s prior disregard for conflicts of interest will only heighten the perception of impropriety surrounding Smith’s appointment to the Commission.

V. CONCLUSION

42. For the foregoing reasons, the Complainant respectfully requests that the Joint Commission investigate this matter, remove Schmidt from this position and impose any other appropriate relief.

⁵⁷ http://www.washingtonpost.com/politics/how-google-is-transforming-power-and-politicsgoogle-once-disdainful-of-lobbying-now-a-master-of-washington-influence/2014/04/12/51648b92-b4d3-11e3-8cb6-284052554d74_story.html.

⁵⁸ *Id.*

⁵⁹ Press Release, Fed. Trade Comm’n, Statement of Bureau of Competition Director Richard Feinstein Regarding the Announcement that Google CEO Eric Schmidt Has Resigned from Apple’s Board (Aug. 3, 2009), <http://www.ftc.gov/news-events/press-releases/2009/08/statement-bureau-competition-director-richard-feinstein-regarding>.