

December 9, 2020

Respondus, Inc.  
Attn: Legal  
8201 164th Ave NE  
Suite 200  
Redmond, WA 98052

Dear Counsel:

We write in regard to Respondus, Inc.'s provision of online test proctoring services. We represent the Electronic Privacy Information Center ("EPIC"), a public interest research center located in Washington, D.C., focused on emerging privacy and civil liberties issues. EPIC is one of the leading consumer protection organizations in the country specializing in privacy and data protection. EPIC has a long history of promoting transparency and accountability for information technology.<sup>1</sup> Our members include experts in law, technology, and public policy.

This letter serves as notice that EPIC has filed a Complaint and Request for Investigation, Injunction, and Other Relief with the Office of the Attorney General for the District of Columbia regarding Respondus' online proctoring tools. As we set forth in the Complaint, Respondus' excessive and unjustified collection of students' personal information (including biometric data) and reliance on opaque, unproven AI analysis to flag purported instances of cheating constitute unfair or deceptive trade practices under the D.C. Consumer Protection Procedures Act ("DCCPPA") and the Federal Trade Commission Act ("FTC Act"). This letter also serves as notice of EPIC's intent to bring an action against Respondus for violations of the DCCPPA if Respondus fails to promptly cure its unlawful trade practices.

In response to the COVID-19 pandemic, many educational institutions have implemented online test proctoring services as part of their remote learning arrangements.<sup>2</sup> But this rapid growth has brought renewed attention to the invasive nature of online proctoring systems. In order to meet their academic obligations, students must increasingly agree to compulsory collection of biometric

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<sup>1</sup> See EPIC, *Algorithmic Transparency* (2020), <https://www.epic.org/algorithmic-transparency/>; EPIC, *Algorithms in the Criminal Justice System* (2020), <https://www.epic.org/algorithmic-transparency/crim-justice/>; Complaint of EPIC, *In re Airbnb* (Feb. 26, 2020); Petition of EPIC, *In re Petition for Rulemaking Concerning Use of Artificial Intelligence in Commerce* (Feb. 2020), <https://epic.org/privacy/ftc/ai/epic-ai-rulemaking-petition/>; Complaint of EPIC, *In re HireVue* (Nov. 6, 2019), [https://epic.org/privacy/ftc/hirevue/EPIC\\_FTC\\_HireVue\\_Complaint.pdf](https://epic.org/privacy/ftc/hirevue/EPIC_FTC_HireVue_Complaint.pdf); Comments of EPIC, *Consumer Welfare Implications Associated with the Use of Algorithmic Decision Tools, Artificial Intelligence, and Predictive Analytics*, Fed. Trade Comm'n (Aug. 20, 2018), <https://epic.org/apa/comments/EPIC-FTC-Algorithmic-Transparency-Aug-20-2018.pdf>.

<sup>2</sup> Drew Harwell, *Mass School Closures in the Wake of the Coronavirus Are Driving a New Wave of Student Surveillance*, Wash. Post (Apr. 1, 2020), <https://www.washingtonpost.com/technology/2020/04/01/online-proctoring-college-exams-coronavirus/>; see also Shea Swauger, *Software that Monitors Students During Tests Perpetuates Inequality and Violates Their Privacy*, MIT Tech. Rev. (Aug. 7, 2020), <https://www.technologyreview.com/2020/08/07/1006132/software-algorithms-proctoring-online-tests-ai-ethics/>.

and other sensitive personal data; audio and video surveillance of their intimate spaces; and opaque AI analysis of their movements, facial expressions, and keystrokes.

Respondus, the most widely used online proctoring service in the United States,<sup>3</sup> advertises several remote proctoring tools on its website. We are aware that one of those tools, Respondus Monitor, uses a student’s webcam and microphone to produce a recording of the student during an exam session.<sup>4</sup> According to Respondus, “Monitor AI”<sup>5</sup> analyzes facial imagery, motions, lighting, keyboard activity, mouse movements, hardware changes, and comparisons to other students who took the exam to detect purported instances of cheating.<sup>6</sup>

A student enrolled at an institution which uses Respondus Monitor has no choice but to allow the collection of their personal information and to submit to video monitoring and AI analysis in order to complete their required examinations. Yet Respondus has failed to establish a legitimate need for collecting such a vast array of personal data; Respondus has failed to fully disclose to students the logic, factors, and determinations of its AI; and Respondus has failed to identify any benefits to consumers or competition that would outweigh the privacy and other harms suffered by students.

Respondus has also made misleading statements concerning its sharing of the personal information it collects from students. Although Respondus states that “[o]nly users with instructor credentials for [a] course . . . are able to view video sessions in conjunction with the student identifiable information,” Respondus admits that “[r]andom samples of video and/or audio recordings” “may be shared with researchers (research institutions and/or biometric experts) under contract with Respondus,”<sup>7</sup> a transfer of data which would necessarily include identifiable images of students’ faces.

The above-described business practices constitute violations of the DCCPPA, including but not limited to sections 28–3904 (unfair or deceptive trade practices generally), 28-3904(e) (misrepresentation as to a material fact), and 28-3904(f) (failure to state a material fact). Accordingly, EPIC and affected consumers are entitled to injunctive and monetary relief, in addition to any enforcement action taken against Respondus by the Attorney General for the District of Columbia.<sup>8</sup> These practices also constitute violations of Section 5 of the FTC Act,<sup>9</sup> exposing Respondus to potential FTC enforcement proceedings.

In order to avoid litigation between EPIC and Respondus and to protect the privacy of Respondus test-takers, EPIC hereby demands that Respondus commit in writing to:

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<sup>3</sup> Colleen Flaherty, *Big Proctor*, Inside Higher Ed (May 11, 2020), <https://www.insidehighered.com/news/2020/05/11/online-proctoring-surg-ing-during-covid-19>.

<sup>4</sup> *Additional Privacy Information – Respondus Monitor*, Respondus (2020), <https://web.respondus.com/privacy/privacy-additional-monitor/>.

<sup>5</sup> *Respondus Monitor*, Respondus (2020), <https://web.respondus.com/he/monitor/>.

<sup>6</sup> *The Most Powerful AI for Proctoring*, Respondus (2020), <https://web.respondus.com/he/monitor/>.

<sup>7</sup> *Terms of Use - Respondus Monitor (Institution)*, Respondus (2020), <https://web.respondus.com/tou-monitor-admin/>.

<sup>8</sup> D.C. Code § 28–3905(i)(3)(B).

<sup>9</sup> 15 U.S.C. § 45(a).

1. Strictly limit its collection of students' personal and biometric information;
2. Create, maintain, and publish a detailed log of what types of personal information Respondus collects from test-takers, how Respondus uses such data, and how long Respondus retains such data;
3. Refrain from transferring or providing third parties access to personal data collected from test-takers, including images of students;
4. Provide students with access, correction, and deletion rights with respect to their own data;
5. Make available to students the factors, logic, and determinations of the AI system(s) used to produce assessments of test-takers;
6. Comply fully with the Organisation for Economic Co-operation and Development ("OECD") Principles on Artificial Intelligence<sup>10</sup> and Universal Guidelines for Artificial Intelligence;<sup>11</sup> and
7. Submit to an annual audit by an independent third party of Respondus' privacy, data collection, and AI practices, the results of which shall be publicly reported.

If Respondus does not comply with the requests set forth in this letter, EPIC reserves all rights and remedies, including legal action. Accordingly, EPIC requests that Respondus takes steps to preserve all records, communications, and other evidence potentially relevant to such litigation, including but not limited to evidence concerning the collection, use, retention, and disclosure of Respondus user data and the operation of its AI system(s) used to evaluate test-takers for signs of academic dishonesty.

EPIC would prefer to resolve this matter amicably, and we look forward to your response by December 18, 2020. This letter is not a recitation of all of the facts pertaining to this matter or all of EPIC's possible claims. Accordingly, EPIC is not waiving any of its rights and remedies, all of which EPIC expressly reserves.

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CC: Lisa Brown, General Counsel, Georgetown University  
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<sup>10</sup> *Recommendation of the Council on Artificial Intelligence*, OECD (May 21, 2019), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>.

<sup>11</sup> *Universal Guidelines for Artificial Intelligence*, The Public Voice (Oct. 23, 2018), <https://thepublicvoice.org/ai-universal-guidelines/>.

Traevana Byrd, General Counsel, American University  
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