



### **OBOR Legal Research Centre**

Inputs for study on the solutions to promote digital education for young people and to ensure their protection from online threats

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## **THE OPPORTUNITY TO LEARN USING AI TOOLS AT SCHOOLS: IMPOSING RESTRICTIONS ON STUDENTS' USAGE VS. PRIORITIZING STUDENTS' RIGHT AND FREEDOM TO LEARN**

### WHAT ARE THE MAIN CHALLENGES THAT YOUNG PEOPLE FACE IN ACCESSING DIGITAL EDUCATION?

1. Around the world, it can be observed that schools and universities are limiting the use of generative AI. The limits imposed vary to different extents, for example some even completely ban its use.<sup>1</sup>
2. Learning to use **generative AI tools is an indispensable part of digital education**, preparing students for both life and work.<sup>2</sup> This is required by **SDG Targets 4.4-4.6** which explicitly emphasize the importance of acquiring technical and employable skills.
3. Currently, there is usually not a uniform policy as to the use of generative AI in schools and universities issued by many governments or by the education providers themselves. It is often left to the discretion of individual schools, departments, or teachers.<sup>3</sup>

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<sup>1</sup> See, e.g., Blake Jones, Madina Touré & Juan Perez Jr., More schools want your kids to use ChatGPT. Really., POLITICO (Aug. 23, 2023); Natasha Singer, Ban or embrace? Colleges wrestle with AI-generated admissions essays., NEW YORK TIMES (Sep. 2, 2023).

<sup>2</sup> Martin Kwan, How to Co-Exist With Tech Is ChatGPT's Lesson (2023) Education Week.

<sup>3</sup> Martin Kwan, Students' Right to Free Inquiry vs. A.I. Usage Policy at Schools and Universities, NOTRE DAME JOURNAL OF EMERGING TECHNOLOGIES (2023), [https://ndlsjnet.com/wp-content/uploads/2023/12/Martin\\_Kwan\\_Blog\\_Post.pdf](https://ndlsjnet.com/wp-content/uploads/2023/12/Martin_Kwan_Blog_Post.pdf).

4. Access to generative AI tools can be expensive for young people. Many tools require subscription fees which some students may not be able to afford unless provided by their schools. In other words, this is **an issue of accessibility and inclusiveness of digital education**.
5. Mastering the use of generative AI tools can be difficult for young people if no training or guidance is provided. It requires actual opportunities to test and apply the tools. If students are prevented from using them in actual tasks, they are deprived of the valuable opportunities to develop AI skills.
6. The restrictions can be seen as **a challenge and potential threat to the freedom to learn, as part of academic freedom, the right to education, and freedom of speech**.<sup>4</sup>
  - 6.1. Do young people have say in the policy process?
  - 6.2. Have their rights been duly taken into account in the policy process?
  - 6.3. Are there adequate justifications for the derogation of their rights?
  - 6.4. Are there sufficient mechanisms in place that continually review the relevance of the AI policy, for example as to whether there has been a change of circumstances that warrants relaxation/adjustment of the restrictions when we increasingly appreciate the unneglectable potential and applications of the AI technologies?

WHAT STEPS ARE TAKEN TO ENSURE THAT DIGITAL EDUCATION IS ACCESSIBLE AND PROMOTED AMONG YOUNG PEOPLE?

7. To ensure the freedom of inquiry is duly respected, it is important to **explicitly** recognize that access to opportunities to learn AI tools is warranted by the above rights.
8. Governments and educational stakeholders should review whether existing laws and policies protect the right to learn. It is important to both (1) fit AI education within

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<sup>4</sup> Ibid.

existing legal and policy frameworks; and (2) develop tailored measures that specifically address AI as a new aspect and challenge to digital education.

## 9. The European context:

9.1. Existing normative framework has adequate capacity to ensure inclusive and accessible AI education:

9.1.1. European Court of Human Rights recognizes that “staff and/or students should be free to teach, learn and research without the fear of disciplinary action.”<sup>5</sup>

9.1.2. Some countries have incorporated academic freedom in their constitutions, such as Hungary and Portugal. Art. 13 of the *EU Charter of Fundamental Rights* provides explicitly for academic freedom.

9.2. New tailored measures are also being introduced:

9.2.1. Timely guidelines have been published by the European Commission, which prioritizes “promoting excellence and trust” in AI and review the ethical considerations of AI in education.<sup>6</sup>

9.2.2. Accessible and inclusive digital education has been prioritized.<sup>7</sup>

## 10. The US:

10.1. Existing legal framework has adequate capacity to ensure inclusive and accessible AI education:

10.1.1. The New York District Court *in Albaum v. Carey* observed: “The Supreme Court has been a particularly jealous guardian of First Amendment rights when academic freedom is threatened. As Mr. Justice Harlan put it: When academic teaching-freedom and its corollary learning-freedom, so essential

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<sup>5</sup> *Case of Mustafa Erdoğan and Others v. Turkey*, Eur. Ct. Hm. Rts., Applications nos. 346/04 and 39779/04) (2014), at para. 4.

<sup>6</sup> European Commission, The Commission publishes guidelines to help teachers address misconceptions about Artificial Intelligence and promote its ethical use (Oct. 25, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_6338](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6338).

<sup>7</sup> European Commission, Ethical guidelines on the use of artificial intelligence (AI) and data in teaching and learning for educators (2022).

to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion ... into this constitutionally protected domain.”<sup>8</sup>

10.1.2. In *Sweezy v. New Hampshire*, the Supreme Court affirmed its significance:

“Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”<sup>9</sup>

10.2. Tailored policy guidelines for the impact of AI to education have been introduced.<sup>10</sup>

### WHAT ARE THE MAIN GAPS AND CHALLENGES TO YOUNG PEOPLE’S RIGHT TO LEARN AND EDUCATION?

1. Despite the above measures and guidelines, study reveals that there is yet adequate recognition for the right to learn/freedom of inquiry specifically in the context of AI education.<sup>11</sup>
2. For example, the US report “Artificial Intelligence and the Future of Teaching and Learning: Insights and Recommendations” mentioned three reasons for addressing AI in education, that (1) AI supports learning; (2) AI is raising concerns like ethics and systemic discrimination; (3) AI has unknown consequences.<sup>12</sup> The report also rightly emphasizes the need to consider how AI can affect the equity of learning.

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<sup>8</sup> *Albaum v. Carey*, 283 F. Supp. 3, 10 (E.D.N.Y. 1968).

<sup>9</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

<sup>10</sup> U.S. Department of Education Office of Educational, Artificial Intelligence and the Future of Teaching and Learning: Insights and Recommendations (May 2023), <https://tech.ed.gov/files/2023/05/ai-future-of-teaching-and-learning-report.pdf>.

<sup>11</sup> Martin Kwan, Students’ Right to Free Inquiry vs. A.I. Usage Policy at Schools and Universities, NOTRE DAME JOURNAL OF EMERGING TECHNOLOGIES (2023), [https://ndlsjet.com/wp-content/uploads/2023/12/Martin\\_Kwan\\_Blog\\_Post.pdf](https://ndlsjet.com/wp-content/uploads/2023/12/Martin_Kwan_Blog_Post.pdf).

<sup>12</sup> U.S. Department of Education Office of Educational, Artificial Intelligence and the Future of Teaching and Learning: Insights and Recommendations (May 2023), <https://tech.ed.gov/files/2023/05/ai-future-of-teaching-and-learning-report.pdf>, at p.6.

- 2.1. But “digital equity” is defined mainly from the angle of “algorithmic discrimination” or “bias” of e.g. assessments.<sup>13</sup> The notion of “access” has also been defined narrowly as improving access to “neurodiverse learners”.<sup>14</sup>
- 2.2. What the report has arguably missed out is that, equity should focus more on “access to AI education”. This is a more fundamental question that some students could be prevented from learning AI tools due to affordability, schools’ policies, lack of training opportunities, etc.
3. **Factually**, the challenge and threat of access is evident from the difference of schools and universities’ policies. **Some have imposed more stringent restrictions; whilst some provide their students with more opportunities and freedom.**<sup>15</sup>
4. **If some students can afford AI tools but others cannot, the digital divide and gap will exacerbate.** It is therefore crucial for education policies to intervene to ensure more equal access.
5. The thrust of the issue is that the **access to AI education has not been explicitly emphasized as an indispensable part of the right to learn.** Such right should be utilized as the major legal and normative guidance and justification for strengthening access to AI education: i.e. **the legal justification as to “why” AI education must be duly provided;** and **“what” must be taken into account to the best interest of the students** when schools/universities are exercising their autonomy in formulating any restriction in usage by students.

**Martin Kwan** served as a consultative member to the UNESCO SDG4 Youth Network and was selected for the UNESCO-APCEIU Youth Leadership Workshop on Global Citizenship Education. Contact: martinkwan22@gmail.com

**Wilson So** is a consultant to OBOR Legal Research Centre. He specializes in comparative education policy. Contact: wilsonso.advice@yahoo.com

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<sup>13</sup> Ibid. at p.8.

<sup>14</sup> Ibid. at p.41.

<sup>15</sup> Martin Kwan, Students’ Right to Free Inquiry vs. A.I. Usage Policy at Schools and Universities, NOTRE DAME JOURNAL OF EMERGING TECHNOLOGIES (2023), [https://ndlsjnet.com/wp-content/uploads/2023/12/Martin\\_Kwan\\_Blog\\_Post.pdf](https://ndlsjnet.com/wp-content/uploads/2023/12/Martin_Kwan_Blog_Post.pdf).