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LEGAL UPDATE

September 21, 2020

To: **Superintendents, Member School Districts (K-12)**

From: **Monica D. Batanero, Sr. Associate General Counsel** MDB

Subject: **Recording Classroom Instruction and Legal Issues with Virtual "Breakout" Rooms**
Memo No. 53-2020

Our office has received numerous requests for legal guidance regarding the following two issues:

1) What is the legality of recording virtual instruction for viewing by other students?

2) What level of supervision is required during a virtual "breakout" room during synchronous video instruction?

What is the legality of recording virtual instruction for viewing by other students?

In most instances, it is permitted to video record in-class or remote instruction for the purpose of providing to absent students in lieu of direct instruction; however, many Local Educational Agencies ("LEAs") will want to obtain teacher consent to do so, except as discussed below. Two concerns arise when discussing recording of classroom instruction: pupil privacy laws and employee rights.

Pupil Privacy Laws
Typically, recording of classes will not require written consent from parents/guardians. On March 30, 2020, the Student Privacy Policy Office ("SPPO") of the U.S. Department of Education conducted a webinar that addressed the Family Educational Rights and Privacy Act ("FERPA") and the use of virtual learning tools during school closures related to the COVID-19

pandemic.[1] The SPPO stated that it was permissible to record classes and share the recording of virtual classes to students who were unable to attend.[2]

When recording classes, teachers should be cautious to not disclose any personally identifiable information ("PII") from individual student records. FERPA generally permits the nonconsensual disclosure of designated "directory information," including name, class enrollment, and grade level.[3] A local educational agency ("LEA") should identify in its policies which directory information categories it may release without parent consent. Examples of information that should not be disclosed is which students receive special education services or who has been absent from school. If PII from individual student records is disclosed on a recording, that information should be redacted prior to sharing the recording with absent students.

That recording could then be shared with absent students. LEAs would need to ensure that the recording is only shared with students enrolled in the class, and that the recording was deleted and not maintained beyond the period of instruction. Continuing to maintain the recordings could create education records for all identifiable students.[4] LEAs should work with their IT departments to ensure teachers know how to limit access to and delete instructional videos.

A recording solely of a teacher lecturing would not raise any FERPA-related concerns.

It is recommended that a notice be provided to all enrolled students that they will be recorded.[5]

The notice could state:

Instruction in this classroom may be recorded for the purposes of instructing absent members of the class. No confidential personally identifiable information will be included in any recording provided to students for classroom use. Such recordings will be deleted after their educational purposes have concluded.

Employee Rights

Section 51512 of the Education Code, enacted into law and effective as of April 30, 1976,[6] prohibits surreptitious "electronic listening or recording" in "any classroom" without the prior consent of the teacher and the principal of the school. Section 51512 provides that any electronic listening or recording must promote an educational purpose and must not impair the teaching

[1] Presentation slides are available here: https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPAandVirtualLearning.pdf.
[2] *Id.* at slides 22-23.
[3] If a parent/guardian has opted out of the disclosure of directory information, that student may have to be redacted from any recording. However, FERPA always permits disclosure of a student's name, identifier, or email address in any class in which the student is enrolled. 34 C.F.R. § 99.37(c)(1).
[4] Educ. Code § 49061(b); 82 Ops.Cal.Atty.Gen. 146.
[5] California law requires that every party to a recorded conversation reasonably expect that the conversation will be recorded. Pen. Code § 632.
[6] In 1976 the Legislature repealed the entirety of the Education Code and adopted the structure of the Education Code that exists now. Section 51512 has not been amended since its enactment.

process or student discipline. Students violating Section 51512 are subject to appropriate disciplinary action, while other persons are guilty of a misdemeanor criminal offense.

Based on Section 51512, the California Teachers Association ("CTA") had argued that LEAs do not have the authority to force teachers to provide either synchronous or asynchronous video instruction.

With the passing of Senate Bill ("SB") 98, it was not clear whether recording class instruction could occur without teacher consent since SB 98 did not specifically reference Section 51512. However, on September 18, 2020, Governor Newsom approved SB 820, which amends Section 43503 regarding distance learning for the 2020-2021 school year (and references Section 51512). Specifically, clarifying language has been added to address the requirement of prior consent of the teacher or school principal in the use of video for distance learning:

"Notwithstanding Section 51512 or any other law, the prior consent of the teacher or the principal of a school is not required for the adoption or implementation of the use of synchronous or asynchronous video for purposes of distance learning." [Emphasis added].

In addition, SB 820 prohibits any person, including parents, from making any audio, video, or digital recording of a local educational agency's live or synchronous distance learning instruction. Parents should therefore be reminded that they are not allowed to record in any manner live distance learning instruction.

What level of supervision is required during a virtual "breakout" room during synchronous video instruction?

A teaching strategy used by many teachers during this time of distance learning is the use of "breakout" rooms. Zoom® has explained on its website[7] that breakout rooms allow a meeting host to choose to split participants of the meeting into separate sessions. This would then allow a teacher, for example, to group students in different breakout rooms and switch between these breakout rooms at any time.

Under the California Tort Claims Act,[8] a district may be held liable for personal injuries caused by dangerous conditions on school property and for its employees' failure to use reasonable care to prevent foreseeable injuries resulting from school activities. The court in *Dailey v. Los Angeles Unified School District*[9] held that, within the scope of their employment, school staff must exercise the degree of care "which a person of ordinary prudence, charged with (comparable) duties, would exercise under the same circumstances."

Generally, pupils must be under the immediate supervision and control of a certificated employee while pupils are engaged in educational activities. Additionally, Education Code section 44808 states that no school district shall be responsible for the conduct and safety of any pupil at any time when such pupil is not on school property, unless the district has undertaken a school-

[7] https://support.zoom.us/hc/en-us/articles/206476093-Enabling-breakout-rooms.
[8] Govt. Code §§ 810-996.6.
[9] *Dailey v. Los Angeles Unified Sch. Dist.*, (1970) 2 Cal.3d. 741.

sponsored activity off the premises of such school, has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances. In the event of such a specific undertaking, the district, board, or person shall be liable or responsible for the conduct or safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of such district or board.

However, Education Code section 43500 (enacted by SB 98) defines "distance learning" as instruction in which the pupil and instructor are in different locations and pupils are under the ***general supervision of a certificated employee*** of the local educational agency (LEA). "General supervision" was not defined, other than to say that such instruction may include interaction and/or check-ins between teachers and pupils, online interaction, instructional television, video, etc. (Ed. Code section 43500(a)).

Education Code section 43500 further defined "in-person instruction" as instruction under the ***immediate physical supervision and control of a certificated employee*** of the LEA while engaged in educational activities required of the pupil.

So, the question still remains: what level of supervision is required during distance learning when students are not on school property? It is our belief that the Legislature understood that during distance learning, pupils are not under the immediate and direct supervision of a certificated employee because it is not physically possible to do so. We believe that teachers need to exercise reasonable care in supervising pupils during synchronous instruction, and if they choose to use breakout rooms, teachers should first try to utilize instructional aides or parent volunteers to monitor these breakout sessions,[10] and if that is not possible, to consistently and periodically check in with the students in the breakout rooms. Our office also recommends that LEAs ensure that they have a signed acceptable use agreement and release of liability for student use of technology. Our office also recommends that teachers discuss with their students expectations for using district technology safely and responsibly, including the prohibition of cyberbullying.

Lastly, Redwood Empire Schools Insurance Group ("RESIG"), a Joint Powers Authority for self-insurance for public school districts in Sonoma County, provided the attached helpful tips on implementing safety precautions for when school staff provides video instruction to students. If your district is not a member of RESIG, we recommend that you contact your insurance carrier for they may have additional suggestions/tips.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

[10] Please note that the use of parent volunteers to monitor breakout rooms may be subject to negotiation with the relevant bargaining unit.

Zoom Meeting Tips

1. PASSCODE PROTECT YOUR MEETINGS
The simplest way to prevent unwanted attendees and hijacking is to set a Passcode for your meeting. Starting September 27, Zoom will require that all meetings have a Passcode or a Waiting Room enabled for all paid accounts. Meeting Passcodes are already enforced for all free accounts.

2. AUTHENTICATE USERS
When creating a new event, you should choose to only allow signed-in users to participate in the Meeting Options Section.

3. JOIN BEFORE HOST
Do not allow others to join a meeting before you, as the host, have arrived. You can enforce this setting for a group in the Security Line or under Account Settings in the Account Management Tab when creating an event.

4. LOCK DOWN YOUR MEETING
As the Host, once a session has begun, click the Security Tab at the bottom of the screen and click on Lock Meeting. This will prevent others from joining even if meeting IDs or access details have been leaked.

5. TURN OFF PARTICIPANT SCREEN SHARING
No-one wants to see inappropriate material shared by a Zoom bomber, and so disabling the ability for meeting attendees to share their screens is worthwhile. As the Host, this option can be accessed in the Security Tab at the bottom of the screen while in active sessions.

6. USE A RANDOMLY-GENERATED ID
You should not use your personal meeting ID, as this could pave the way for pranksters or hijackers to disrupt online sessions. Instead, choose a randomly generated ID for meetings when creating a new event. In addition, you should not click the Personal Meeting ID button when creating a new event or share your personal ID publicly.

7. USE WAITING ROOMS
The Waiting Room feature is a way to screen participants before they are allowed to enter a meeting. This gives hosts greater control over session security.

8. REMOVE NUISANCE ATTENDEES
If you find that someone is disrupting a meeting, you can kick them out. Click on the Participants Tab at the bottom of the screen, this will bring up the list of participants. Hover over the name, click More, and click Remove. You may also use the Security Tab at the bottom of the screen to remove disruptive participants. This action will prevent them from rejoining the meeting.

9. SUPERVISE BREAKOUT ROOMS
Avoid leaving students unattended in Breakout Rooms. Consider utilizing instructional aids or parent volunteers, if needed, to monitor students during breakout sessions.

10. CHECK FOR UPDATES
To check that you have the latest updates of the Zoom platform, click on the Zoom icon on your computer desktop, click on your profile in the top-right-hand, and select Check for updates.

Every effort has been made to provide the most up-to-date information in this document; however, Zoom regularly updates their system and security protocol. Video tutorials, live training, webinars and the ZoomAcademy for Teachers and School Leaders are all available on the website (zoom.us).