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April 3, 2020

**Via Electronic Mail and Regular Mail**

The Honorable Phil Murphy, Governor  
Office of the Governor  
P.O. Box 001  
Trenton, New Jersey 08625

**Via Electronic Mail and Regular Mail**

The Honorable Lamont Repollet, Commissioner  
New Jersey Department of Education  
P.O. Box 500  
Trenton, New Jersey 08625

Re: COVID-19 Equity Issues for Public School Students

Dear Governor Murphy and Commissioner Repollet:

We hope this finds everyone in good health. Our firm, Machado Law Group, represents approximately 30 school districts across the State of New Jersey. We commend the State for its handling of this very difficult and challenging situation, and the Department for its leadership to our education communities.

We write in response to the correspondence dated March 30, 2020, from the Education Law Center (ELC) on behalf of the New Jersey Special Education Practitioners (NJSEP). A copy of that correspondence is attached here. We have much respect for the ELC and the attorneys / advocates who represent the families and children with special needs, and we value their opinion on these matters.

However, we disagree with the position taken by the ELC regarding what they refer to as "Conditioning Services on Waivers." (See, ELC letter, page 3). Although we do not have a copy of the "Release of Liability and Hold Harmless Agreement" referenced and attached to the ELC letter, we suspect it is similar to, if not the actual form, prepared by our office and recommended to our clients. ELC objects to the requirement that parents execute waivers of liability prior to their children receiving virtual or livestream related service sessions. We believe ELC's position is

short-sighted, overly simplistic, compromises the rights of other parents / students, and fails to address the following issues.

This is an unprecedented time, as is the number of online interactions between teachers and students from their respective homes. These new interactions create novel privacy and functionality questions and concerns for both school districts and parents that require careful consideration of both short-term benefits and long-term consequences. The waivers being sought reflect the need to inform parents of the inherent risks associated with these online services and do not broadly waive their rights to compensatory education or other entitlements.

In terms of privacy, the use of virtual platforms may invade the privacy that may otherwise be expected in one's home. Student information, such as classification status, accommodations, related services, academic levels and/or skills may also be inadvertently disclosed to others present in the home during group sessions or group instruction. Similarly, the nature of virtual group instruction also means that a student's name and live video could potentially be seen by anyone in the background of the other students' homes. These privacy concerns are unique to the COVID-19 closures and parents need to understand and accept such risks. If parents do not accept the risks, then alternate methods of instruction should be discussed with the particular school district.

ELC also opined that the Wiretapping Law is inapplicable to this situation. We disagree. Recording of group instruction or group sessions is considered a violation of Board of Education policies. Such recordings may also be a violation of New Jersey Wiretapping Law, if the parent is recording students who are not their children. Pursuant to N.J.S.A. 2A:156A-1 et seq., it is a crime for an individual to intercept or record a conversation, unless one party to the conversation consents to such a recording. Accordingly, the basic premise of the law is that a person may record a conversation that he or she is having with another, so long as the person recording the conversation remains a party to the conversation. A violation of the law occurs when the person making the recording is not a party to the conversation. Applied to the current situation, if a parent records a session between their child and a teacher, and possibly other children, they are not a party to the conversation they are recording and would be in violation of the law. Additional concerns arise when the party making the recording is a minor. New Jersey courts have expressed concern that, due to their age, children lack the legal capacity to consent to having their conversations recorded under the Wiretap Act. D'Onofrio v. D'Onofrio, 344 N.J. Super. 147, 154 (App. Div. 2001). This is meant to warn parents of the possibility of violating the law if they video or audio record other students. School districts have no way to control or physically prohibit the recording of group instruction, related services and / or any telepractice sessions.

In terms of functionality, the delivery of related services such as speech, occupational therapy, physical therapy, and counseling via a remote or livestream platform may include safety risks, such as, but not limited to, injuries as a result of individual students performing movements without the benefit of in-person direction, and/or being directed incorrectly by their parent/guardian. The possibility of privacy violations also increases the risk for mental or emotional harm. These are all novel risks that parents deserve to be made aware of and districts need to be able to protect against claims regarding. Advising parents of their rights and risks is not a new concept. Parents are required to sign releases / waivers for field trips, athletics, and



administration of medication, even when under doctors' orders. Parents acknowledge the risk and then decide how they wish to proceed; the case is the same here.

Lastly, ELC expressed the belief that parents should be present during virtual instruction, seemingly with no exception. This position is inherently flawed in that it fails to recognize long standing privacy rights of students and staff. It also fails to acknowledge that parental attendance in educational settings is extremely disruptive to the educational process and is typically limited in time and scope for this reason. ELC has failed to articulate any rationale for limiting a school district's right to continue to protect all its students and staff members in this regard. To the extent a parent is necessary to assist in the delivery of instruction during this unprecedented time, we are confident such arrangements can and will be made on a case by case basis.

We agree that school districts may not seek a broad waiver of rights before serving students within the school buildings. However, the concerns raised above do not exist in a regular physical classroom, where teachers and administrators are otherwise reasonably able to:

- Supervise students;
- Control who is in the classroom;
- Control the capability of audio or video recording of other students;
- Maintain confidentiality; and,
- Block inappropriate websites and technology.

Notwithstanding the noted disagreements regarding this issue, we have collaboratively negotiated several waivers with parents' attorneys considering each students' individual needs. Our office welcomes the opportunity to develop a mutually acceptable waiver to address the issues raised here, as well as those of the ELC. To the extent there is an interest, we invite Ms. Athos to contact us.

However, for the State to prohibit a parental waiver or release and acknowledgment of risks, is unreasonable and will provide parents with a false sense of security and leave school districts liable for things beyond their control. Waivers are needed to protect our state's school districts, who are funded entirely by taxpayer money. Waivers will appropriately notify parents to the risks associated with virtual instruction, and allow them to discuss alternate instruction, if not wanting to expose their children to the potential risks.

Finally, with respect to ELC's position on telepractice, we disagree that private "professional associations" need be consulted in order for school districts to effectively implement telepractice services. The teachers, therapist, and other child study team members who work in our school districts and with students day in and day out are far better equipped to make these decisions than third parties with no independent knowledge of the students or of the educational program or process.

Please do not hesitate to contact us if you wish to discuss further. Thank you.

Respectfully  
Machado Law Group



Isabel Machado, Esq.



Jessika Kleen, Esq.

Via Electronic Mail

cc: Assistant Commissioner Peggy McDonald, Student Services  
Matt Platkin, Governor's Counsel  
George Helmy, Governor's Chief of Staff  
Deborah Cornavaca, Deputy Chief of Staff of Outreach  
Elizabeth Athos, Esq., NJSEP Moderator, ELC Senior Attorney

Via U.S. Mail

Laura Console, Governor's Education Policy Advisor