



April 6, 2020

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

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:

Please accept this reply from New Jersey Special Education Practitioners (NJSEP), Education Law Center (ELC), and SPAN Parent Advocacy Network (SPAN) to the April 3, 2020 letter from the Machado Law Group (Machado letter). While we appreciate the concerns raised by the Machado Law Group, we believe they do not justify the conditioning of essential and required educational services on a waiver of liability.

We are enclosing another copy of the sample "Release of Liability and Hold Harmless Agreement" for your convenience and for Ms. Machado's benefit. The Machado letter explains that waivers are needed "to inform parents of the inherent risks associated with ...online services" and "do not broadly waive their rights to compensatory education or other entitlements." However, by its own terms, the language of the release that we are objecting to has parents waive all rights ("any and all claims"). See Release of Liability and Hold Harmless Agreement p. 2, para. 3. Even more broadly, this release would require that parents indemnify school districts from any claims brought by their child upon turning 18. Id.

The primary concern raised by the Machado letter is the possibility of privacy violations resulting from inadvertent disclosure of a student's information, "such as classification status, accommodations, related services, academic levels and/or skills," to others present in a home. It is important to note

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that this risk is not unique to a virtual setting: parents are routinely present in school classrooms - to observe, to attend events, to assist a teacher - and the risk of disclosure exists there too. Of greater importance, the risk is not one that gives rise to liability. Student's privacy rights are protected by the Family Educational Rights and Privacy Act (FERPA), yet FERPA provides for no private right of action to sue for violations of those rights. Gonzaga University v. Doe, 536 U.S. 273 (2002). To the extent the Machado Law Group fears a tort cause of action being brought against one of its clients for violating a student's privacy rights, it is difficult to imagine that anything short of an intentional violation would give rise to liability, especially under the unprecedented emergent circumstances.

We are in no way suggesting that school districts cannot, and should not, inform parents of any inherent risks that they foresee. Parents should be informed of the risk and should be allowed to opt out and choose alternative services if online instruction appears too risky. What they should not be required to do, however, is to waive "any and all claims" in order to access online instruction.

The Machado letter asserts that requiring waivers for online instruction is no different than requiring releases or waivers when students engage in extracurricular activities. This assertion is completely mistaken since we are talking about access to essential and required educational services.¹ If waivers are allowed under these circumstances, when online instruction is the only game in town, then the State will create precedent for school districts to require waivers when schools reopen.

We have no objection to school districts asking parents not to record instruction or telling them that doing so may constitute a violation of Board policies, if applicable. To say that any such recording "**will** be considered a violation...of New Jersey Wiretapping Law," see Release of Liability and Hold Harmless Agreement, p. 2, para. 2 (emphasis added), is completely inappropriate. Criminal liability under New Jersey Wiretapping

¹ One question to ask is whether these releases and waivers are being sought from the parents of children without disabilities. The enclosed sample appears to be directed to the parents of children receiving special education services. If such waivers are only sought for students with disabilities, then school districts should be concerned about liability for discrimination.

Law is not clear under these circumstances. In fact, the Machado letter's reference to the D'Onofrio case is misleading. In that case, the court found no violation of the Wiretapping Act when a parent consented to the recording of his minor child's conversation with another parent.

Finally, we think it inaccurate to characterize our groups as believing "that parents should be present during virtual instruction, seemingly with no exception." To the contrary, what we oppose is a blanket prohibition on parental presence. While the Machado letter acknowledges that exceptions may be needed on "a case by case basis," we can identify many circumstances when parents should not be prohibited from being in the same room during virtual instruction. These include: when school districts rely on parents to assist with instruction or provide reinforcement; when a student would otherwise have an aide in school; and when a family lacks a room that can be dedicated to instruction for each of the students in the household.

ELC, NJSEP, and SPAN urge you to explicitly and proactively reject waivers of liability as a condition of remote instruction during the COVID-19 emergency. Please do not hesitate to reach out to me at 973-624-1815, ext. 20, or at eathos@edlawcenter.org if you seek further information or clarification.

Respectfully,



Elizabeth Athos, Esq.
NJSEP Moderator
ELC Senior Attorney

Via Electronic Mail

Encls.

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