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CONFIDENTIAL ATTORNEY-CLIENT WORK PRODUCT

**MEMORANDUM**

TO: Tim Stover

FROM: Kelly H. Andersen

DATE: December 17, 2019

RE: Kimberly School Surveillance

**ISSUES PRESENTED**

1. Can the school conduct audio surveillance?
2. Can the school conduct video surveillance?
3. What guidelines should the school observe if its use of video surveillance?

**RELEVANT FACTS**

Kimberly Schools ("School") would like to conduct audio and video surveillance of their students without consent of the student, parent, or guardian. The School would like information on whether these forms of surveillance violate the law.

## SHORT ANSWERS

1. Audio surveillance without the consent of a party involved in the conversation violates Idaho and Federal law.
2. Video surveillance of public areas on the School campus can comply with Idaho law.
3. The school needs to follow certain steps to ensure compliance with the law.

## ANALYSIS

Idaho Code § 18-6702 limits the interception of “oral communications.” There is an exception for the situation where one of the parties to the communication gives prior consent. I.C. § 18-6702(2)(a). In the context of school surveillance, the parties to the conversation would not be able to provide prior consent to the interception of their communications. Idaho law provides penalties for the unauthorized interception of oral communications. I.C. § 18-6709. These include fines and attorney fees. *Id.* Federal law also limits the recording of oral conversations under the Federal Electronic Communications Privacy Act. 18 U.S.C. § 2511.

The law places fewer restrictions on video surveillance in public places, especially in a school setting. The right to privacy comes from the Fourth Amendment of the United States Constitution. The actions of people in public places in plain view generally do not create a reasonable expectation of privacy. Courts have generally upheld video surveillance recordings in school hallways, stairwells, school buses, school parking lots, and even classrooms.

The standard applied by the courts is whether there is a reasonable expectation of privacy. When considering the issue of reasonableness, the courts consider the school’s “custodial and tutelary responsibility for children.” *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 656 (1995). “Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults. *Bd. of Educ. v. Earls*, 536 U.S. 822, 831 (2002).

While video surveillance can be used by schools, the reasonable expectation of privacy needs to be kept in mind. Teachers and staff would presumably fall under the surveillance as well. The existence of surveillance should be disclosed not only in signs, but also in any employee handbooks. An area like the teacher’s lounge would have a higher expectation of privacy that could be violated by video surveillance. Areas such as restrooms and locker rooms also carry a higher expectation of privacy. The school should carefully avoid such locations.

The School is subject to additional regulations under The Family Educational Rights and Privacy Act (“FERPA”) (20 U.S.C. § 1232g; 34 CFR Part 99). This law applies to all schools that receive funds under an applicable program of the U.S. Department of Education and contains a right to educational records.

It is possible for video surveillance footage in a school to constitute an educational record. This would subject the footage to the terms of FERPA. Recordings of students in general

as opposed to footage focused on a specific footage is not likely to fall under the regulations of FERPA. If the video surveillance is conducted by a school's law enforcement unit, it is also unlikely to fall under FERPA. However, if the video footage is used in specific action against a student, such as discipline, then that footage becomes part of that student's educational record. This creates a right in the student's family to view the record. There is also a general health and emergency exception that would allow for the viewing of the video footage.

Before allowing family to view their student's video record, it is important to remove any identifying footage of other students if reasonably possible. Sources also recommend simply allowing the family to view the record instead of providing a copy of the record to the family.

**Law enforcement may also request access to recordings that contain student misconduct. This is acceptable if the recording is created and maintained by the school's law enforcement unit. Otherwise, the school should obtain consent from the parents of the students in the recording before disclosing it. There are exceptions for health, safety, or in response to a court order or subpoena. These exceptions are spelled out in FERPA.**

## CONCLUSION

The School should not engage in any type of audio surveillance. Such surveillance raises privacy concerns that can only be resolved by consent by at least one party to each conversation that is recorded. The school can proceed with video surveillance. This surveillance should focus on public areas of the school where there is not a reasonable expectation of privacy. Care should be taken to follow the requirements of FERPA due to the situations when a recording can be considered part of the student's record. Access to the videos should also be carefully guarded.