

WHERE ARE WE HEADED? GPS DEVICES IN THE CLASSROOM

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I. INTRODUCTION

In 2017, this hypothetical situation may be tracking your District:

A parent of a special needs student purchases a GPS device that the student wears beneath their clothing. The device was purchased because the student's disability causes the student to elope (wander off or away from where the student is supposed to be). The elopement may never have been a problem in your classrooms or educational activities. The parent requests that the District not only allow the student to wear the GPS device at school, but that the student's teachers and aides use a software program that allows them to be part of the reporting team that monitors the student's whereabouts. The GPS device that parent purchases includes a feature that transmits wireless audio from the device and through the Internet to a receiving device. The audio feature is advertised as being a useful component of the device to allow the user to better locate the student should the student become lost. This feature can be turned on and off by various members of the reporting team, without notice to the District.

Although the request is seemingly benign, it will cause (and has caused) your attorneys great consternation. This guidance is intended to introduce you to some of the potential issues that stem from the use of a device as described above, and what you need to be prepared for should a student request to use a device at your school.

II. ISSUES AS IDENTIFIED BY THE SCHOOLS LEGAL SERVICE TEAM

A. Is a Student's Physical Presence at a Specific School Site Confidential?

The answer: Maybe. It is "covered information" under SB 1177 - California Business & Professions Code section 22584(i)(3), if it "(3) Is gathered by an operator through the operation of a site, service, or application described in subdivision (a) and is descriptive of a student or otherwise identifies a student, including, but not limited to, information in the student's educational record or email, first and last name, home address, telephone number, email address, *or other information that allows physical or online contact*, discipline records, test results, special education data, juvenile dependency records, grades, evaluations, criminal records, medical records, health records, social security number, biometric information, disabilities, socioeconomic information, food purchases, political affiliations, religious information, text messages, documents, student identifiers, search activity, photos, voice recordings, *or geolocation information.*" (emphasis added)

The geolocation information transmitted by these types of devices, as explained above, constitutes covered information and is likely confidential. Therefore, there are privacy concerns relating to the broadcast, sharing, or distribution of a particular student's geolocation when reviewing the Business and Professions Code. Disclosure of covered information is heavily regulated and, in our opinion, requires a contract between the District and the data tracking company. This contract must, by law, include a number of items to be a valid contract. In our hypothetical, the district is not even offered a contract. While a parent may consent to the release of such data, the GPS-providing parent is not authorized to release data that would be collected as to other students in the immediate location.

Additionally, from a special education perspective, the geolocation information transmitted by the device may also inadvertently identify the student or other students as having a disability or the geolocation information may constitute "special education data" under the law cited above. There are no cases reviewing the above quoted language that confirm whether this is true, and we anticipate that there will be cases addressing these confidentiality issues in the coming years.

B. What about Transmitting the Audio Content of Classrooms?

The answer: California Education Code section 51512 provides that classroom communications are not to be recorded without the permission of the principal and the teacher. It is a misdemeanor to do so without permission. This does not mean that the classroom speech is confidential. In fact, there is California case law interpreting California Penal Code section 632 that holds the exact opposite.

Teacher communications in a classroom environment have been deemed non-confidential speech, and therefore the two-party consent rule - which applies to confidential communications in California - does not apply to classroom speech where a teacher is lecturing or speaking to students.

However, that does not mean that schools are not places where confidential communications can take place. The case law specifically provides that lectures or classroom-based instruction is not meant to be confidential, but most instruction in a special education setting is not lecture format, and there are strong arguments that most special education instruction is intended to be confidential. Also, confidential communications may still take place between students in the play yard or between teachers in the teachers' lounge. There are several areas of a school site where confidential communications are intended, and there is nothing in the law to suggest otherwise. If a student with a GPS device were to transmit otherwise confidential speech because the device may be more sensitive than the human ear, that would be a possible violation of Penal Code section 632.

C. Could the Device End up Transmitting Information That Is Considered Personally Identifiable Information (PII)?

The answer: Possibly, especially if the device had a streaming audio feature, that feature was active, and what information was transmitted and to whom. These devices are intended to transmit audio only in emergency situations and to transmit audio to only authorized users of the device. Depending on the contract that the District may or may not have with the device-maker,

the District may or may not have control over how or when information is transmitted, how it is saved, or to whom it is transmitted. Neither is the District likely to have control over how the receiver rebroadcasts information.

Because of these risks, there is potential that audio transmitting devices may result in disclosure of PII of the student or other students. We know the device discloses covered information.

III. LEGAL AUTHORITY

A. Federal Educational Right to Privacy Act - FERPA

1. FERPA limits access of educational records containing PII possessed by a school district.

2. FERPA might make the location of the student, or the student's presence at a particular school site, confidential. 20 USC § 1400 and 34 CFR Part 300; 20 USC § 1232(g) and 34 CFR Part 99.

B. California Education Code Section

Education Code section 51512 provides that classroom communications are not to be recorded without the permission of the principal and the teacher. It is a misdemeanor to do so without permission.

C. Confidentiality of Records of Special Education Students

The Individuals with Disabilities Education Improved Act (IDEIA) contains provisions which specifically make confidential a student's disabled status, the fact that the student receives special education services, etc. 20 USC § 1400 and 34 CFR Part 300

D. Potential Penal Code Provisions

1. "632. (a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished . . . "

2. "632(c) (c) The term "confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."

3. "632.7. (a) Every person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless

telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished. . . ."

IV. SPECIAL EDUCATION CONCERNS

The medically necessary use of these types of devices is to locate students who are prone to eloping or wandering and may become lost and who are nonverbal or may have communication difficulties due to their disability.

Most special education programs already have strategies to address eloping. These strategies include but are not limited to:

- ▶ Behavior Intervention Plans to address the causes of eloping and redirect the student.
- ▶ Setup of classrooms to deter or redirect students from leaving the classroom.
- ▶ Staff training to identify and address eloping.
- ▶ Assigned aides to ensure student safety while on campus.

Provided that your programs have strategies to address eloping and student safety, it is not necessarily a requirement that a District allow a student to use the GPS device to receive a FAPE. However, if a student can show that the program put together by a District is unsafe and does not address eloping, then a student might succeed in obtaining an order that requires a District to purchase and use a GPS device for the student.

Additionally, if a student obtains a doctor's prescription or order that indicates the device is medically necessary, then a District may have to accommodate that need. But that does not mean a District can allow surreptitious recording or transmitting of audio. The GPS device used will have to meet strict parameters for the recording or transmitting of confidential information. Furthermore, even if the device is medically necessary, this does not mean that District staff must necessarily be trained in the use of the device or interact with the device in any way, nor is there any requirement that the District contract with the vendor in any way. However, should the District agree to contract with the vendor, AB 1584 and SB 1177 mandate various requirements in any such contract.

V. CONCLUSION

This is a very complicated area of law in which educational confidentiality and contract laws intersect with special education and disability access laws. If you have a student requesting use of one of these devices, contact us for assistance in parsing out the issues that are unique to your situation.

This Mother is Fighting Her Autistic Son's School for the Right to Put a GPS Tracker on Him



Parents of small children have a lot to worry about. The parents of small children who are living with autism and have a tendency to wander away have legitimate reason to be concerned about their child's location at all times, and a GPS tracker can be a godsend. One North Carolina mother says she was ecstatic when she found a GPS tracker specifically designed for special needs kids for her 4-year-old son, but now she says she's fighting the school because they won't let him wear it in class.

[According to ABC News](#), Brianna Stanton's 4-year-old son Zachary has autism and tends to wander away, so Stanton bought a GPS tracker that can pinpoint his exact location and also send her an alert if he leaves a predetermined area. That's pretty great. But it also has a listening function that allows Stanton to call in and listen to whatever is going on around Zachary.

"Let's say Zachary went missing and it lost signal, I could call the listening-in number and I could listen in and hear his surroundings, whether he's near water or a busy street," Stanton said.

But the listening function is against policy at Zachary's school, because it would allow a person to listen in on the other students in his class, and the school says that violates their privacy.

"I don't want people to think I'm fighting the school, like I'm getting back at the school, I'm doing this not just to advocate for him but other children with special needs," said Stanton.

Stanton said she offered to turn the listening feature off, but the school said no because it could always just be turned back on later without their knowledge. If she is OK with turning the listening feature off, then it seems like she would be OK with getting Zachary a GPS tracker for school that does not have a listening function, which the school already said would be just fine.

I totally understand Stanton's desire to keep tabs on her son and make sure he is safe, and it seems pretty far-fetched to think that she'd use the listening device to violate the privacy of other kids. But the other kids and parents in the class have rights too, and if the listening function were not going to be used, then it seems like just getting a device without the listening function would be a decent solution to the problem.

8 months ago by [Elizabeth Licata](#)

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