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## **Youth Protection and Liability Concerns in Remote Learning**

In response to the COVID-19 public health emergency, many nonprofits that serve youth are moving their programs to a digital platform and engaging youth in different ways online. Whether it is group sessions, one-on-one mentoring or recorded materials or presentations without live interaction, remote learning presents a number of legal risks, including, but not limited to, exposure to liability for actions or inaction by, or on behalf of, the organization. This Legal Alert will discuss organizational liability when providing online programming to youth as well as policies and practices to have in place to limit liability.

### **Organizational Liability and Remote Learning**

The primary circumstances where an organization might face liability for an injury to a child in a digital space are the same as in a physical classroom: either as a result of intentional action or negligence. Traditional examples of an intentional action would be physical abuse or harassment. In a digital world, this could be cyberbullying or online discrimination, and could be the result of an interaction between or among students, employees, or both.

An organization may be liable for negligence if an unreasonable action or inaction causes an unintentional injury, if four elements are met:

- 1) the organization owed a legal *duty* of care towards the person claiming to be injured,
- 2) the organization *breached* its duty (*i.e.*, the organization failed to fulfill its “duty of care”),
- 3) the organization’s breach of duty *caused* the injury, and
- 4) the injured person *suffered damages* as the result of the injury.

In digital spaces, negligence might include failing to safeguard students’ personal information, failing to put the appropriate protections in place to prevent cyberbullying and harassment, or failing to adequately screen employees who have access to children, even online. An organization may also be liable for negligent hiring if it fails to use reasonable care in selecting employees. Note that negligent hiring or supervision can also apply to volunteers’ actions.

### **Policies and Documents to Limit Liability in a Remote Learning Environment**

#### ***Parental consents / participation waivers and releases***

With all of the changes happening, organizations should be proactively communicating with staff, participants, parents, and guardians to provide updated information based on the continuously evolving circumstances. As organizations settle into a new format for digital programming, they should take time to create and distribute updated documents like parental consents and participation waivers/releases that reflect the new normal. Parental consents provide a way for organizations to keep parents and guardians informed, while at the same time obtaining a document that may be helpful in limiting liability if necessary. In a shift to remote learning, organizations should make sure parents are aware of the kinds of material and content that will be offered and consent to their child’s participation.

*Q: If we send out an email informing parents about an upcoming online class, does that constitute consent?*

Consent requires an active response from parents. If your organization sends out an email with information about the next scheduled meeting, you should request an active confirmation of consent – your organization’s email will not constitute consent without the parent’s response.

*Q: What do we do now that parents aren’t able to get us physical signatures?*

Electronic signatures are fine, and there are many tools that will allow parents to do this. Organizations should just be sure that it is clear what is being signed. A signed document is best, but if you are asking for consent in an email, make sure that the language in the email is specific.

Organizations should obtain a signed participation waiver/release for each program participant (signed by a parent for those who are under 18 years-old) that describe the activities to take place and any risks, specifically noting the online setting. For example, a participation waiver/release for an online one-on-one mentoring session should include information about the parameters and timing of the online sessions, what platform will be used, what information can be exchanged (or not) in the sessions, and the extent to which conversations will remain confidential. For group meetings using a video chat platform, the waiver should clearly state any privacy and security measures that will be in place. While waivers and releases have limited enforceability, they are nonetheless an important practice for a nonprofit organization, as they may serve as a deterrent to litigation and provide evidence that the parents were informed of the circumstances of the programming.

*Q: If our activities online involve students participating in physical activities, could we still be liable even if the student is in their own home?*

If your organization offers, for example, fitness or dance classes, physical injury could occur if the student falls in his or her own home while following instructions in the class. Because of this additional risk, you should ensure that your organization’s waiver/release covers the possibility of physical injury as a result of participation in the class. A disclaimer at the beginning of a video is also useful, but keep in mind that it’s not the same as getting consent.

*Q: What if we already have prior consent?*

If your organization already obtains parental consents and/or waivers and releases from participants that were broadly drafted, they may already incorporate any activities you are doing remotely. However, you should still review each document to ensure that they are appropriate for the remote learning context and take the opportunity to make sure that parents are fully informed about the change in programming and how it will affect their child.

If your organization has typically relied on third parties for some or all of these documents, you should confirm that these policies still apply. In the same way, if your organization is one that has been “approved” by a school, you should determine whether any existing consents release your organization from liability; if not, draft and obtain your own.

### ***Media releases***

Media releases should ask for permission to use the photo, video, interview, voice, or name of the child participant. Be sure to ask for permission that is broad enough to cover all of the organization's intended uses, including some that may be new— e.g., posting a recording of your virtual meeting for participants who were not able to attend the live session. Organizations may consider asking for permission for “any public use, including” a list of specific uses.

### ***Anti-harassment policy***

Organizations should have a comprehensive, written anti-harassment policy in their employee handbook or code of conduct. These policies should include cyberbullying and other online harassment. Organizations should regularly train their staff on what is included in the policy, including how it applies in a digital environment.

## **Other Policies and Practices to Ensure the Best Protection for Youth and the Organization**

### ***Background checks***

Many youth-serving organizations are already subject to regulations requiring background checks on employees. In an online setting, there is no physical interaction with students, and the risk profile is different from that of an in-person session. However, organizations should follow background check requirements that would apply to in-person events as carefully as possible, especially for any new employees who may be working in smaller groups or more closely with students. Remember, an organization can still be liable for negligent hiring.

*Q: Do we need to do background checks for volunteers or guest presenters?*

While working with children you probably want to be more conservative, so organizations should try to follow regular screening procedures as closely as possible. While it may not currently be possible to fingerprint new volunteers, they can still be screened in other ways (e.g., running their names through the Statewide Central Register of Child Abuse and Maltreatment), and /or ensuring that a staff member who has been screened is present with any new volunteer.

### ***Code of conduct***

Codes of conduct, while not legal documents, can be useful tools for guiding behavior, especially during the unprecedented challenges we are navigating. Organizations can consider codes of conduct for the staff and volunteers who interact with the youth participants, and for the participants themselves.

The staff code of conduct should: (1) include an agreement to follow laws and regulations and to behave professionally, (2) identify the staff member's specific responsibilities, (3) set limits on relationships between staff and youth, and (4) include provisions on privacy and confidentiality, anti-discrimination, and anti-harassment.

A participant's code of conduct should: (1) include an agreement to abide by the rules of the program, (2) explain how misconduct will be handled, and (3) prohibit cyberbullying, and other forms of online harassment.

## ***Privacy and security***

Since students are in their own space, it's impossible to control every aspect of a remote learning session, but it's crucial for nonprofits to make sure they are taking the steps necessary to ensure the privacy of its participants. After all, a nonprofit organization still must fulfill its duty of care to the students in its program, even if that program is online. That means making sure that whatever digital platform is being used is appropriately secure and that any additional security measures are put into place.

*Q: We can't control what a third-party platform is doing; how can we make sure it is safe?*

The user agreement for any online platform should address things like privacy, security, and how data is collected and stored. Major platforms like Google Classroom, Zoom, or YouTube will have information regarding how it complies with data privacy laws like The Child Online Privacy and Protection Act, or COPPA (see more on this below). You will be able to inform parents how and where data is stored based on this. This information could also go into your organization's privacy policy.

Because remote learning requires a student to log on from his or her own computer in his or her own home, it is also advisable to create guidelines for students when joining a class to help protect their privacy. For example, at the beginning of every video class or lesson, hosts should remind parents and students that their homes may be visible/audible and advise parents to turn off digital assistants (e.g., Alexa or Google Home) and to make sure that no personal information is visible or otherwise accessible. These guidelines can also include tips for students—like keeping microphones on mute unless speaking and using a virtual background.

## ***Insurance***

Generally speaking, most organizations should already be protected by their existing insurance coverage. However, it is good practice to notify your malpractice carrier so they are aware the risk profile has changed—although, presumably, the carrier is already generally aware of the changed circumstances!

## **Other Concerns in Remote Learning**

### ***Adult supervision***

While you may not be running in-person classes, it's still important that you provide adult supervision for classes or sessions that are facilitated by your organization. Regulations that require a certain ratio of students to staff may not be applicable in a remote setting in the same way as they were in a physical space, but you should still continue to follow your typical practices as closely as possible. If any sensitive information may be discussed it might be especially important to have additional adult supervision.

*Q: If we have a group session with the appropriate number of adults but then do breakout rooms, do we still need to have more than one adult in each breakout room?*

Imagine that you are in a classroom where you have two adults supervising 4 children. If you break the group up and ask them to work in pairs, you won't have two adults per pair, but the adults will still be in the room. While it's not an exact parallel, in a breakout room, the host is

still available and able to enter into breakout sessions and monitor. If you aren't able to have more than one adult in each breakout room, make sure that the host is able to regularly check in or monitor each room to ensure supervision during the session.

*Q: Can we facilitate a way for students to chat with each other after the group session without adults present?*

If an organization facilitates a meeting among students as part of its programming, they still owe a duty of care to those students and it wouldn't be advisable to leave students alone in an online room, just like it would not be advisable to leave them alone in a physical room. Something like a breakout room could provide an alternative where there is an adult "nearby"—able to monitor, or be called in, if not actually involved in the conversation—but less obviously present.

### ***Pre-recorded and publically available materials or videos***

Some organizations may be offering recorded materials or videos instead of, or in addition to, live sessions. These materials may be uploaded onto your website or on another platform like YouTube, and some may be pre-recorded while others may initially be live. Even though there is no live interaction, organizations should be sure to inform parents about the content of these materials and when students are expected or encouraged to access them.

*Q: Do we need to get consent from parents for materials where there is no live interaction?*

Even without live interaction, if the online materials are part of your primary programming, just like with in-person programming, you should include them in any parental consent that you obtain. You should be especially careful with any materials that could contain sensitive content. Again, a disclaimer at the beginning of a video is a good idea, but consent is better.

*Q: How can we protect ourselves if a video we made is being shared by other schools or organizations?*

In this case, clearly, it's not possible to get consent from everyone who might see your video, so a disclaimer may be the best way to protect yourself, especially if the video contains instruction for a physical activity where the potential for injury is higher. Organizations should also consider whether the video contains any proprietary intellectual property that needs to be protected.

### ***Recording an online session***

New York is a one-party consent state, meaning that a conversation can be recorded so long as one party has consented. This means that an organization may record an online session without consent of the other party. However, organizations should notify participants and their parents or guardians if the organization plans to record its programming and how the recording will be used. For example, a nonprofit may wish to record a session for security purposes to ensure no improper behavior by staff, or to be made available later to participants who were not available to participate in the live session. If you plan to make the recordings available to anyone outside of those participating in the session, then you should have a media release signed by anyone in the recorded session giving permission to share the recording of the participant. Recordings should not be used for marketing and publicity.

*Q: What's the best way to inform parents and participants that a session will be recorded?*

Parents should be informed ahead of time either as part of the parental consent/participation waiver or in a separate email notification. During the meeting, the host should announce that the meeting is being recorded. Many platforms also have a notification that appears while a meeting is being recorded.

### ***Relevant privacy laws***

There are several privacy laws relevant to engaging with children via digital programming. COPPA applies to the collection of personal information of youth under the age of thirteen. Nonprofits are generally exempt from this law, but the best practice is to comply with its requirements nonetheless—including providing notice and obtaining parental consent, as discussed above. If an organization is a vendor of or getting personal information from New York's public schools, there are likely additional contractual limitations placed on the organizations from the schools. These can include the Family Educational Rights and Privacy Act (FERPA), as well as state and city education privacy laws. Organizations should consult with legal counsel to determine how these laws (and whether other privacy laws) might apply to them.

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