



READY, SET, ACTION!
 VIDEO RECORDING SYSTEMS AND BODY
 CAMERAS IN SCHOOLS. WHAT YOU NEED TO
 KNOW AND ACTION YOU MAY WANT TO TAKE



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SEMINAR OVERVIEW

Focus: Video Use as a School District, Public Entity, and Employer

Important Topics:

- The 4th Amendment
- Federal and State Wiretapping and Eavesdropping Laws
- Access to Video Records under FERPA and FOIA
- HOT Topic: Use of Body Cameras by School Resource Officers



THE 4TH AMENDMENT

Constitutional Language

"[t]he right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable searches** and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis added.)

CONCERN: *Unreasonable Searches!*

QUESTION: How can a camera search me?




THE 4TH AMENDMENT

A "search" under the 4th amendment is a governmental intrusion into an area in which an individual has a reasonable expectation of freedom from such an intrusion.

The "capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was reasonable expectation of freedom from governmental intrusion."
Mancusi v. DeForte, 392 U.S. 364, 368 (1968) citing *Katz v. United States*, 389 U.S. 347, 352 (1967) ("the Fourth Amendment protects people, not places.").

TAKEAWAY: The crux of 4th Amendment claims is whether there is a reasonable expectation of privacy where the search took place. A video recording can be an illegal "search" if it is a governmental intrusion into a place where there is a reasonable expectation of privacy.



THE 4TH AMENDMENT

SURVEY QUESTION:
 Do public school students have a reasonable expectation of privacy in public schools when it comes to video surveillance?

SURVEY QUESTION:
 Do public school employees have a reasonable expectation of privacy in public schools in regard to the use of video surveillance?

ANSWER:
 In most circumstances, courts have said NO, with some consistent exceptions.



THE 4TH AMENDMENT

STUDENTS

- "[S]tudents within the school environment have a lesser expectation of privacy than members of the population generally."
Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 656 (1995).
- Includes: hallways, stairwells, classrooms, school busses, and outdoors.
- EXCEPTION:** Restrooms and locker rooms. Students have a "significant privacy interest in their unclothed bodies . . ." *Brannum v. Overton County Sch. Bd.*, 516 F.3d 489, 496 (6th Cir. 2008)




THE 4TH AMENDMENT

Employees

- No reasonable expectation of privacy in hallways, stairwells, classrooms, school busses, and outdoors.
- Reasoning: Classrooms in public schools are public places that are open to the public, and which are not under the exclusive use and control of the teacher/employee.



SURVEY QUESTION: What about break rooms?

SURVEY QUESTION: What about teacher/employee offices?

ANSWER: Fact-specific. Depends on how open and public the area is and whether it is under the exclusive use and control of an employee or small group of employees. Other legal considerations regarding break rooms under CT law.



THE 4TH AMENDMENT

BEST PRACTICES regarding 4th Amendment Concerns & Issues

- Video surveillance should *not* be installed where it can record, or potentially record, the inside of restrooms and locker rooms.
- Video surveillance should *not* be installed where it can record, or potentially record, private offices or areas used by only one, or a few, employees, and in CT, not in employee-only lounges or similar rest areas (discussed *infra*).
- If video surveillance is to be installed in a place where an employee might reasonably have an expectation of privacy, the use of video surveillance should be open and unambiguously stated. Secret or unannounced surveillance may be permissible, only under extenuating circumstances, and with carefully articulated restrictions.




AUDIO RECORDING IN SCHOOLS

SURVEY QUESTION:
How many of you have video surveillance in your school(s)?

SURVEY QUESTION:
Of those of you with video surveillance, how many record audio with video?

THE CONCERN:
Audio recordings may violate Federal and State Wiretapping and Eavesdropping laws




AUDIO RECORDING IN SCHOOLS- FEDERAL LAW

Federal Wiretapping Laws

- It is illegal for any person "to use any electronic, mechanical, or other device to intercept any oral communication"
- "Oral communication" is defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation"



TAKEAWAY: Like the 4th amendment, illegality of audio recording under federal wiretapping law depends on the individual's reasonable expectation of privacy.



AUDIO RECORDING IN SCHOOLS- STATE LAW

CT Eavesdropping and Voyeurism Laws

- **Voyeurism** is a felony committed when a person, with malice or intent to "arouse or satisfy the sexual desire," knowingly photographs, films, videotapes or otherwise records the image of another person (A) without the knowledge and consent of such other person, (B) while such other person is not in plain view, and (C) under circumstances where such other person has a reasonable expectation of privacy."
 - **Eavesdropping** is a felony committed when a person unlawfully engages in "wiretapping" or "mechanical overhearing of a conversation."
 - "Wiretapping" is limited to telephonic or telegraphic communications
 - "Mechanical overhearing of a conversation means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment."




AUDIO RECORDING IN SCHOOLS- STATE LAW

Is video surveillance voyeurism under CT law?

- "Plain view" and "reasonable expectation of privacy" requirements similar to 4th amendment analysis
- Probably does not meet the intent requirements



Is video surveillance, with audio, eavesdropping under CT law?

- **Maybe.** Mechanical overhearing definition is broad. No intent requirement.
- But is it "unlawful"? Further analysis is necessary...



AUDIO RECORDING IN SCHOOLS- STATE LAW

CT Law regarding Electronic Surveillance by Employers (C.G.S. § 31-48b)

- No employer or agent or representative of an employer shall operate any electronic surveillance device or system, including but not limited to the recording of sound or voice or a closed circuit television system, or any combination thereof, for the purpose of recording or monitoring the activities of his employees in areas designed for the health or personal comfort of the employees or for safeguarding of their possessions, such as rest rooms, locker rooms or lounges.
- Additional prohibition regarding employment contract negotiations




AUDIO RECORDING IN SCHOOLS- STATE LAW

CT Law regarding Electronic Monitoring by Employers (C.G.S. § 31-48d)

- "Electronic monitoring" means the collection of information on an employer's premises concerning employees' activities or communications by any means other than direct observation . . . but not including the collection of information (A) for security purposes in common areas of the employer's premises which are held out for use by the public, or (B) which is prohibited under state or federal law.
- Each employer must give prior written notice to all employees who may be affected, of the types of monitoring. May be satisfied by posting a notice "in a conspicuous place which is readily available for viewing."
- EXCEPTION:** When (A) an employer has reasonable grounds to believe that employees are engaged in conduct which (i) violates the law, (ii) violates the legal rights of the employer or the employer's employees, or (iii) creates a hostile workplace environment, and (B) electronic monitoring may produce evidence of this misconduct, the employer may conduct monitoring without giving prior written notice.



AUDIO RECORDING IN SCHOOLS- STATE LAW

TAKEAWAYS

- Electronic surveillance by employers is implicitly authorized in CT by C.G.S. §§ 31-48b and 31-48d as long as the employees are provided with notice.
- Nevertheless, audio recordings could be considered illegal eavesdropping as "mechanical overhearing."
- Surveillance is never permitted in employee-only lounges, restrooms, locker rooms, and similar areas.

BEST PRACTICES REGARDING VIDEO SURVEILLANCE WITH AUDIO

- The most conservative approach is to never record audio—video only.
- Always provide and post notice that electronic monitoring occurs, and the type(s) of such monitoring—e.g., video, audio, or video and audio.
- Never conduct surveillance in employee-only lounges, restrooms, changing rooms, locker rooms, or similar areas.



SCHOOL SURVEILLANCE RECORDS



Family Educational Rights and Privacy Act ("FERPA")

- Generally prohibits educational agencies from "personally identifiable information" from "education records" without consent subject to exceptions
- Interpreted and enforced by federal Family Policy Compliance Office

Connecticut Freedom of Information Act ("CT FOIA")

- Generally requires a "public agency" to disclose "public records" maintained by a public agency subject to exemptions from such requirement
- Interpreted and enforced by Connecticut Freedom of Information Commission



SCHOOL SURVEILLANCE RECORDS- FERPA

"Education records"

- The term means those records that are:
 - (1) **Directly related to a student;** and
 - (2) Maintained by an educational agency or institution or by a party acting for the agency or institution.
- The term does not include:
 - (1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.
 - (2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99-8. . . .
 - And other specific exclusions (6 total)

TAKEAWAY: The term "education records" is traditionally interpreted as BROAD, but the phrase "directly related" has become important regarding video records.



SCHOOL SURVEILLANCE RECORDS- FERPA



When do videos become "education records"? (current interpretation)

- NOT automatically an "education record" of all students pictured in video
- Standard: Whether the information is "directly related to" a student, not whether a student is simply "personally identifiable."
- "For example, this Office does not consider a videotape of routine activities by students riding a school bus to be "directly related to" any particular student and, therefore, not an "education record" under FERPA, even though those students may be "personally identifiable." If, however, a videotape of a school bus ride records a student involved in an assault on another student, for example, then that part of the videotape would be considered "directly related to" and, therefore, the "education record" of those two students." *Letter re: Magnolia Independent School District*, 107 LRP 685 (FPCO Aug. 23, 2006).



SCHOOL SURVEILLANCE RECORDS- FERPA

When is a video "directly related" to a student?

- "In the case of a video or other picture image of one or more students and where there are students in the background (walking down the hall, sitting on the bus, eating lunch, etc.), we believe that the video is "directly related" to, and thus the "education record," of, the student or students who are the focus or subject of the video and not the students merely in the background. By "focus" we mean a student or students are involved in an altercation or some other disturbance that causes them to be focal point of the video." *Email re: Arkansas School Boards Association (FPCO May 2007); see also Email re: Westside Community Schools (FPCO May 2007) (identical text except for punctuation differences).*



SCHOOL SURVEILLANCE RECORDS- FERPA

To whom and how can a video that is an "education record" be disclosed?

- **General consent rule:** May freely disclose to third parties with consent of parents of all students for whom it is an education record
- **If only one student in video:**
 - Must disclose to parents, including a copy if requested.
 - Cannot disclose to third parties without consent unless a FERPA exception applies
- **If more than one student:**
 - FERPA regulations § 99.12: "(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student."



SCHOOL SURVEILLANCE RECORDS- FERPA

Former Interpretation

- If a portion of a video is the education record of more than one student, neither parent has a right to inspect and review that portion of the video.
 - See *Letter re Berkeley School District*, 104 LRP 44490 (FPCO Feb. 10, 2004).



Current Interpretation

- If there is a record that is an education record of more than one student, and it cannot be separated easily and remain intelligible (e.g., a video recording), each student's parent(s) must be permitted to inspect and review the record, but the school cannot provide a copy to either parent(s) without consent from all parties.
 - See *Letter re Pleasant Grove High School* (FPCO Mar. 23, 2006).



SCHOOL SURVEILLANCE RECORDS- CT FOIA

CT FOIA generally requires a "public agency" to disclose "public records" maintained by a public agency subject to exemptions from such requirement.

Education-based Exemptions:

- (11) Names or addresses of students enrolled in any public school or college without the consent of [eligible students or parents] . . . ;
- (17) Educational records which are not subject to disclosure under the Family Educational Rights and Privacy Act, 20 USC 1232g;

IMPORTANT NOTE: Exemptions do not exempt the entire document, just the exempt information. Redaction of exempt information is permissible, but record most often must still be produced in some form.



SCHOOL SURVEILLANCE RECORDS

CT FOIC has interpreted the FOIA consistent with FERPA

- Has not required that copies of videos that are the education record of more than one student be disclosed under CT FOIA.
- But has engaged in evaluation of whether a video qualifies as an "education record" according to the FPCO's current interpretation as contained in its informal guidance.
 - See *Linda Lambeck v. Chairman, Board of Education, Bridgeport Public Schools*, Docket #FIC 2013-677 (Oct. 2, 2014).

TAKEAWAY: When video records, or any student records, are requested under CT FOIA, the decision whether to disclose must be mindful of both FERPA and CT FOIA requirements.



POLICE BODY CAMERAS IN SCHOOLS



HOT TOPIC! Many issues!

- Are body cam recordings public records?
- Are body cam recordings education records?
- Who "owns" the videos?
- What privacy protections are required? Who has responsibility for those protections?
- Can they be used for law enforcement purposes?
- Can they be used for disciplinary purposes?



POLICE BODY CAMERAS IN SCHOOLS



Overview of Recommended Approach regarding Body Cams

- Enter into negotiated and carefully crafted agreement with local police agency for services of School Resource Officers ("SROs") or similar arrangements
- Articulate the SROs purpose, functions, and responsibilities in the district/school(s)
- Conservative approach—NO body cams in school
- If body cams, then agree on the circumstances for use—who, what, where, when, why, and how
- Designate SROs as "law enforcement unit" under FERPA
- Designate SROs as "school officials" under FERPA
- Consider training school staff how body cams work



POLICE BODY CAMERAS IN SCHOOLS

"Law Enforcement Unit" under FERPA

- Excluded from the definition of "education records" under FERPA are records of the "law enforcement unit" of an educational agency or institution.
- "Law enforcement unit" means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to
 - (i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself, or
 - (ii) Maintain the physical security and safety of the agency or institution.
- A component of an educational agency or institution does not lose its status as a "law enforcement unit" if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.



POLICE BODY CAMERAS IN SCHOOLS

Records of law enforcement unit means those records, files, documents, and other materials that are –

- (i) Created by a law enforcement unit;
- (ii) Created for a law enforcement purpose; and
- (iii) Maintained by the law enforcement unit.

TAKEAWAY:

- Records created and maintained by a law enforcement unit "for law enforcement purposes" are NOT "education records" and therefore, are NOT subject to nondisclosure without consent restrictions of FERPA.
- But law enforcement unit records can become education records if records are provided to the district/school
- See Letter re Montgomery Cnty. Pub. Schs. (MD) re Law Enforcement Unit Records (FFCO Feb. 15, 2006).

BEST PRACTICE: In agreements with local law enforcement regarding SROs, specify that SROs shall be designated the law enforcement unit of the school/district, but limit their responsibilities and duties to law enforcement purposes.



POLICE BODY CAMERAS IN SCHOOLS

FERPA generally permits educational agencies to disclose personally identifiable information in education records without consent to "school officials" with "legitimate educational interests"

- (a) An educational agency or institution may disclose personally identifiable information from an education record of a student without . . . consent if the disclosure meets one or more of the following conditions:
 - (1)(i)(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

TAKEAWAY: Teachers and school staff permissibly access student information under the "school official" exception in FERPA



POLICE BODY CAMERAS IN SCHOOLS

FERPA permits third party contractors to be designated as "school officials"

- (B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party--
 - (1) Performs an institutional service or function for which the agency or institution would otherwise use employees;
 - (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
 - (3) Is subject to the requirements of [FERPA] governing the use and redisclosure of personally identifiable information from education records.



POLICE BODY CAMERAS IN SCHOOLS

SROs may be designated as "school officials"

- The district/school has outsourced an institutional function—security and safety
- Therefore, the district/school may share personally identifiable information from education records with SROs when they have a "legitimate educational interest"

Words of caution

- *A "school official" must still have a "legitimate educational interest" in order to permissibly gain access to personally identifiable information under FERPA
- *A law enforcement purpose may not be the same as a legitimate educational interest, although a law enforcement unit's investigation for a law enforcement purpose may be more defensible
- *An SRO may not re-disclose personally identifiable information disclosed to the SRO as a "school official" with a "legitimate educational interest" to the police department

BEST PRACTICE: In agreements with local law enforcement regarding SROs, specify that SROs shall be considered "schools officials" who may receive personally identifiable information when they have a "legitimate educational interest."




POLICE BODY CAMERAS IN SCHOOLS

A Difficult But Problematic Alternative

- Designate policy body cam videos as district/school surveillance and maintain within the district/school rather than permit police department maintenance

Problems

- Video recordings become FERPA-protected education records when "directly related" to a student or students
 - Pro:** District/school better able to restrict disclosure of recordings
 - Con:** District/school cannot share with police department for non-educational reason without subpoena, court order, or similar FERPA exception
 - Con:** Recordings not subject to law enforcement-based CT FOIA exemptions
- Ambiguity whether FPCO would still consider law enforcement unit records
- May suggest that SROs are district employees rather than 3rd party contractors exposing district/school to employment-based liabilities



Questions? Difficulty?

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