

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By KRIS MAYES ATTORNEY GENERAL August 15, 2023	No. I23-006 (R22-013) Re: Surveys requiring parental consent under A.R.S. § 15-117
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To: Jessica S. Sanchez, Udall Shumway
on behalf of Casa Grande Union High School District

Question Presented

You have asked whether a feature of a web-based academic performance platform that allows students to report their present emotional state via selection of an emoji constitutes a “survey” subject to parental consent requirements under A.R.S. § 15-117. You have also asked whether, if parental consent is required, the submitted draft consent form satisfies the statute’s requirements.

Summary Answer

The emoji feature does not constitute a survey subject to the parental consent requirements of A.R.S. § 15-117. Accordingly, we need not address whether the draft consent form satisfies the requirements of the statute.

Background

Casa Grande Union High School District (“the District”) has considered using a web-based platform, the Gnosis IQ program, to “gain real-time insight” into students’ academic performance through the use of scorecards and dynamic reports. A feature of the platform asks students the

question “How are you feeling?” and allows them to report their current emotional state by selecting one of twelve emojis¹ reflecting the following emotions: happy, confident, excited, content, bored, confused, mad, sad, stressed, sick, tired, and depressed. The District reports that this feature is intended as a social-emotional support to encourage students to self-reflect and assist schools in identifying students who may have social-emotional factors affecting their academic performance. A student’s use of the emoji feature would be optional and parents would be able to access their child’s responses to it, along with the student’s academic progress, through a parent portal. Parents also would have the ability to disable the feature at any time through the portal.

Analysis

Arizona law requires schools to “obtain written informed consent” from a student’s parent “before administering any survey that solicits personal information” about the student related to several listed topics, including gun ownership, political beliefs, religious practices, and medical and mental health history and information. A.R.S. § 15-117(A). The statute defines a “survey” as “an instrument that investigates the attitudes, behaviors, beliefs, experiences, opinions or thoughts of a pupil or group of pupils.” A.R.S. § 15-117(O)(2)(a).

First, we must determine whether the emoji reporting feature is an “instrument.” This term is not statutorily defined, so we apply its commonly understood meaning. *See State v. Mahaney*, 193 Ariz. 566, 568 ¶ 12 (App. 1999) (“Unless the legislature clearly expresses an intent to give a term a special meaning, we give the words used in statutes their plain and ordinary meaning.”).

¹ The request indicates that the platform uses “emoticons,” but based on the materials submitted with the request, it appears that the platform utilizes “emojis.” “An *emoticon* is a sequence of keyboard characters used to illustrate a facial expression (or to render some kind of picture or symbol), such as :) for a smile, : (for a frown, XD for a laughing face, or O O for surprise. An *emoji* is a small image used alongside or in place of text.” *emoticon vs. emoji: What’s the difference?* Dictionary.com, <https://www.dictionary.com/compare-words/emoticon-vs-emoji?root=emoticon> (last visited Aug. 3, 2023).

“[T]he ordinary meaning [of a word] can be found by referring to an established, widely respected dictionary.” *Sierra Tucson, Inc. v. Pima Cnty.*, 178 Ariz. 215, 219 (App. 1994). An instrument is broadly defined as “a means whereby something is achieved, performed, or furthered.” *Instrument*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/instrument> (last visited Aug. 3, 2023). Because the emoji feature is the means by which the platform acquires information about the student’s emotional state, it is an instrument.

Next, we must determine whether the question (“How are you feeling”) “investigates” a student’s “attitudes, behaviors, beliefs, experiences, opinions or thoughts” by “solicit[ing] personal information about the pupil” about one of the listed topics. A.R.S. § 15-117(A), (O). It does not. The question “How are you feeling” asks about a student’s general emotional state. It does not ask students to provide personal information about the student’s attitudes, beliefs, experiences, opinions, or thoughts regarding a particular subject, much less any of the topics listed in subsections (A)(1) through (14).

The closest listed topic to a question about a student’s current emotional state is “mental health information.” A.R.S. § 15-117(A)(7). The Merriam-Webster Dictionary provides two alternate definitions of “mental health.” <https://www.merriam-webster.com/dictionary/mental%20health> (last visited Aug. 3, 2023). The first is “the condition of being sound mentally *and* emotionally that is characterized by the absence of mental illness and by adequate adjustment especially as reflected in feeling comfortable about oneself, positive feelings about others, and the ability to meet the demands of daily life[;] the general condition of one’s mental *and* emotional state.” *Id.* (emphasis added). The second definition is “health care dealing with the promotion and improvement of mental health and the treatment of mental illness.”

Id. The second definition often applies when the term is “used before another noun,” such as in “mental health professionals” or “mental health clinic.” *Id.*

In the context of a survey collecting information on “mental health history or mental health information,” the second definition is the most applicable. The statutory provision includes the additional nouns of “history” and “information” after the term “mental health,” indicating the term is likely being used to reference healthcare related to mental health issues. A.R.S. § 15-117(A)(7). Also, “[m]ental health history or mental health information” is listed in the statute directly below “[m]edical history or medical information.” *See id.* § 15-117(A)(6)–(7). The proximity and similar structure of these two related terms further supports the interpretation that “mental health information” refers to “health care dealing with the promotion and improvement of mental health.” *Mental Health*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/mental%20health>; *see Stambaugh v. Killian*, 242 Ariz. 508, 509–10 ¶¶ 7, 11 (2017) (“Words in statutes should be read in context in determining their meaning.”).

The federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), Pub. L. 104-19, 110 Stat. 1936, also protects access to healthcare information and uses the term “mental health information” to refer to records such as psychotherapy notes, treatment plans, and prescriptions for psychiatric medications. U.S. Dep’t of Health and Human Services, Office for Civil Rights, *HIPPA Privacy Rule and Sharing Information Related to Mental Health*, <https://www.hhs.gov/sites/default/files/hipaa-privacy-rule-and-sharing-info-related-to-mental-health.pdf> at 1-2 (last visited Aug. 3, 2023).

Under HIPAA, parents have certain rights over their child’s mental health information, and are generally considered to be the personal representative of their minor child. *See id.* at 4. It makes sense then that § 15-117(A)(7) would require parental consent before a school official may

ask a student about their private mental healthcare information. *See Sierra Tucson*, 178 Ariz. at 221 (looking to “nearly congruent” statute to help determine “common, ordinary meaning” of statutory term).

In contrast, a student’s present emotional state alone does not implicate the same privacy concerns, as students convey this information regularly (and even unwittingly) through conversation, facial expressions, and body language. It would make little sense, for example, to require a teacher to obtain written parental consent every time they wished to ask a student “How are you today?” Surely this is not what the legislature intended. Such a reading would be absurd, and courts avoid statutory interpretations that create absurd results. *See State v. Estrada*, 201 Ariz. 247, 251 ¶ 17 (2001) (“A result is ‘absurd if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion.’” (citation omitted)).

Accordingly, the Gnosis IG emoji feature allowing reporting of a student’s current emotional state is not a survey soliciting “mental health information” for purposes of § 15-117.

Conclusion

The Gnosis IG emoji reporting feature is not a survey subject to the parental consent requirements of A.R.S. § 15-117.

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