If It Works For Reality TV, Why Can’t It Work for Us?
Virtual Tryouts During the Coronavirus Pandemic
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Distance learning has presented myriad challenges for districts over the last several months, and as administrators gear up for adjustments to summer and even fall operations, one topic has provided an interesting iteration of various legal issues at play during this pandemic: virtual tryouts. Both athletic and non-athletic extracurricular programs use tryouts as their initial activity, and while submitting Shakespearean monologues may initially seem a bit simpler than having students record themselves running football drills, a number of concerns apply to any sort of virtual tryout.

First and foremost, the format and permanence of the virtual tryout could create record considerations the district. If a tryout is conducted live over a service like Zoom and not recorded, the district has not created a public or educational record subject to retention and access rules. On the other hand, if students are submitting pre-recorded videos, or if the live tryout is recorded for later review, those recordings would be records subject to both FERPA and state law as well as the district’s record retention schedule. Under FERPA, an education record is one that directly relates a student and is maintained by an educational agency like a school district. A student’s video tryout clearly satisfies both of those requirements, so care should be taken to treat such videos as educational records and maintain them in accordance with the applicable standards.

Additionally, there are a number of smaller but still important issues to consider, including:

- **Video Conferencing Security**: Some teachers may have already had the misfortune to have an unwanted guest in their virtual classes. Informally called “Zoom bombing,” the issue often arises when URLs, meeting IDs, and other such info are reused by the same district or teacher. Generate new IDs and passwords as your chosen platform allows, and make sure the staff members participating in virtual tryouts are thoroughly familiar with the hosting and security tools available to them.

- **Documentation for Supplemental Pay**: The Auditor of State has recently stressed that districts should maintain as much documentation related to supplemental contracts and pay as possible. Consider having coaches and directors use timesheets if they do not already, and collect and retain them in accordance with your records retention policy.

- **Access and Equity**: As with distance learning generally, remember that some students will not have easy access to technology. Remain flexible in your approach, and address such situations similar to how you have been addressing access issues in regular instruction. This might mean extending deadlines, allowing the use of district equipment, and providing support or accommodations to ensure that students with disabilities have an equal opportunity to participate in the virtual tryout.

- **Copyright Issues**: While virtual auditions are an exciting method to keep activities operating as close to normal as possible, there are some potential copyright issues to consider. Specifically, concerns about copyright infringement may arise for tryout videos featuring copyrighted music or performances. The safest course of action is to avoid using
such music or performances or to receive permission to use a song or performance in an audition. However, some uses of copyrighted material may fall under a doctrine called “fair use” which limits the rights of a copyright owner’s exclusive control over the work. Copyright laws contemplate the fair use of copyrighted material for the purposes of “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” The Copyright Act of 1976 provides four factors to consider when determining if use of copyrighted material is “fair.” These factors are:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.


Assuming that a school would use audition videos solely for the purpose of selecting participants in a school-related activity and not for commercial use, the four factors weigh in favor of establishing fair use to avoid infringement. Limiting the public exposure of an audition (i.e., avoiding posts on YouTube; avoiding any site that generates ad revenue) using copyrighted work would also favor fair use. The school could also take additional steps to avoid copyright issues including: having audio removed from performances to recorded music if possible, seeking permission or a license to use the work, limiting the audition to only use a portion of a song or other work, or selecting musical pieces that are available in the public domain.

- **Insurance and Liability**: Ensure that students are submitting all the physical forms and permission slips that would be required for in-person tryouts. Additionally, verify that a virtual tryout is covered under the district’s insurance policies. For tryouts like cheerleading and dance, consider formulating concise guidelines to ensure safety, such as filming outside, requiring the presence of a parent or other adult during the tryout, etc.


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