Update on the Commissioner of Education's Determination of the Use of Biometric Technology in Schools

On Dec. 22, 2020, New York State Technology Law Section 106-b took effect, which prohibited all school districts, including public, private and charter schools, from using any biometric technology (including but not limited to fingerprint or facial recognition) for any purpose other than: 1) as required by the Education Law, or 2) to identify employees who have consented, individually or through their union, to such use. Such prohibition against the use of such biometric technology was to remain in effect until at least July 1, 2022 and until the Commissioner of Education authorized the purchase and utilization of such technology in schools.

On Sept. 27, 2023, the New York State Commissioner of Education, Dr. Betty Rosa, (Commissioner) issued a determination: (1) prohibiting the use of facial recognition technology in public, private and charter schools; and (2) permitting the use of other types of biometric technology in schools, provided schools consider various factors.[1]

In making this determination, the Commissioner reviewed the recommendations of the Use of Biometric Identifying Technology in Schools Report which was researched and drafted by the New York State Office of Technology Services.[2] This report considered the privacy implications of collecting, storing and/or sharing biometric information of students, teachers, school personnel and the general public while on school property, and the impact that biometric identification could have on student civil liberties and civil rights. Further, this report identified concerns regarding the use of facial recognition technology and higher rates of "false positives." The report found that facial recognition technology disproportionately relayed inaccurate readings of people of color, nonbinary and transgender people, women, the elderly and children. The Office of Technology also evaluated the legal implications of schools using such technology without parental consent, finding that the use of biometric technology could potentially create risks under FERPA.

As such, the order prohibits schools in New York from purchasing or utilizing facial recognition technology. Schools that have already purchased facial recognition technology products or products with facial technology capacities using Smart School Bonds Act funds before Dec. 20, 2020 must discontinue the use of this technology and certify that such use has been discontinued. Schools that purchased facial recognition technology products after Dec. 20, 2020 will not be reimbursed with Smart Schools Bond Act funds.

However, the Commissioner found that the benefits created by other types of biometric identification (i.e., fingerprinting software) outweighed most privacy concerns. Schools maintain the ability to decide

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1 https://www.nysed.gov/sites/default/files/programs/data-privacy-security/biometric-determination-9-27-23.pdf
2 https://its.ny.gov/system/files/documents/2023/08/biometrics-report-final-2023.pdf

whether to use biometric identifying technology other than facial recognition so long as they consider the technology's privacy implications, impact on civil rights, parental input and effectiveness.

The practical impact of this technology in schools is dependent on its use and intended result. The use of biometric identification for school security purposes poses different legal concerns than if such technology were to be used for employee time keeping purposes. If schools intend to implement some type of biometric identification technology, they should review all existing privacy and security policies and collective bargaining agreements to avoid risks of litigation.

If you have any questions about this information memo, please contact Hilary L. Moreira, Emily A. Fallon, any attorney in Bond's labor and employment practice or the attorney at the firm with whom you are regularly in contact.

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