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LEGAL ASPECTS OF DISTANCE LEARNING

Abstract: The first concepts of distance learning date back to the 18th century. With the development of information and communication technology, the possibilities of this way of teaching and learning have become more accessible and increasingly popular, especially in the context of non-formal education and at the level of tertiary education. Due to the current epidemiological situation related to the spread of COVID-19, the education system has largely moved online and is at least partly on distance. The changed way of teaching and learning and the use of online tools bring a number of challenges, including legal ones.

In this article, we first focus on the legal basis of distance learning during the epidemic and later on one of the area that has been particularly highlighted at this way of teaching, the protection of privacy and personal data. Based on the analysis of normative frameworks and examples from practice, we identify gaps in the regulation of exposed legal aspects of distance learning and during the discussion, we open up possibilities that can lead to new theoretical and practical solutions.

Keywords: *distance learning, privacy protection, copyright, legal frameworks for distance learning.*

INTRODUCTION

Distance learning, also known as e-learning or online learning, is a form of education whose main feature is the physical separation of teachers and students during lessons and the use of various technologies to facilitate communication of student-teacher and students-student (*Encyclopedia Britannica*). Kentnor (2015) says that distance education is not really a new way of teaching, as its beginnings date back to the 18th century. The development of distance education over the last 300 years follows technological innovations and the development of communication technology, which further contributes to the popularity of such a way of learning and teaching.

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In the early 2020s, the world faced a major health crisis caused by the infectious disease COVID-19 epidemic (a global pandemic). Travel restrictions, quarantines, curfew, closing public institutions, controlling workplace risks and postponing or canceling public events have been introduced across many parts of the world to stem the spread of the virus. In order to limit the spread of COVID-19, Member States within the European Union have also introduced restrictive measures to reduce the mass gathering of people. Measures have also affected the education system, as schools, universities and other educational institutions have had to reduce physical attendance or close down altogether. Fortunately, the closure of schools was not fully established, but education did change. Thus, most educational institutions have focused on distance education, using information and communication technology (*Education during COVID-19 report; moving towards e-learning*, 2020). As stated in report (*Education during COVID-19 report; moving towards e-learning*, 2020), at the height of the first wave of the epidemic, almost 1.6 billion children in 195 countries around the world could not attend school from their classrooms.

Although countries have faced the epidemiological situations in various ways and adopted and implemented various measures aimed at curbing the spread of COVID-19, including in the field of education, all countries have in common that distance education has brought forward some (legal) aspects that already existed to some extent before the crisis, but were certainly exacerbated by the sudden transition to distance education. In the article we will focus on one aspect in particular, namely the issue of privacy protection (protection of personal data).

METHODOLOGY

The changed way of teaching and learning and the use of online tools brings many challenges, including legal ones. The purpose of this article is to identify the legal basis of distance learning and to shed light on one area that the changed teaching method emphasises in particularly, namely the protection of privacy and personal data.

The article is based on the descriptive method of pedagogical research. We will use this to describe the situation we are studying. In doing so, we will rely on domestic and foreign literature and legislation. In the article we first focus on the legal basis of distance learning and then focus on one of the areas that has been particularly highlighted at this way of teaching, the protection of privacy and personal data. Based on the analysis of normative frameworks and examples from practice, we identify gaps in the regulation of exposed legal aspects of distance learning and during the discussion, we open up possibilities that can lead to new theoretical and practical solutions.

DISCUSSION

Legal bases for distance training in the Republic of Slovenia

In the Republic of Slovenia (hereinafter RS), the legal basis for the transition to distance education in order to contain and manage the COVID-19 epidemic was represented by the *Ordinance on the temporary prohibition of the collection of people in institutions in the field of education and universities and independent higher education institutions* (hereinafter referred to as the Ordinance¹). The material grounds for the adoption of the ordinance is to be found in the *Infectious Diseases Act* (Official Gazette of the Republic of Slovenia, No. 33/06 – official consolidated text and 142/20), which stipulates in the third paragraph of Article 39 that measures determined by this Act cannot prevent certain infectious diseases from relying on and spreading in the RS, the government orders a ban on gathering people in schools, cinemas, public places and other public places until the danger of spreading the infectious disease ceases. Such a measure was adopted by the Ordinance². With regard to the temporal validity of the measures referred to in Article 1 of the Ordinance, Article 4 of the Ordinance stipulates that the Government shall determine the professional justification of the measures referred to in this Ordinance every seven days and decide, taking into account professional reasons, to continue or abolish and inform the National Assembly and the public³.

In the Republic of Slovenia, all educational establishments closed their doors on 16th of March 2020 for education in physical presence and remained completely closed for nine weeks. After this period, the gradual opening began, namely on 18th of May 2020, the students of the first triad of primary school and the final years of secondary schools returned to school. One week later, students from the 4th to the 9th grade of primary school and students of special education programs in primary school and primary school with an adapted program returned to school. For the remaining classes, distance education took place until the end of the school year (Government of the Republic of Slovenia and Križaj, Pristavec Đogić and Eror, 2021). Despite the more promising start of the new 2020/2021 school year, schools

¹ Ordinance on the temporary prohibition of gathering people in institutions in the field of education and universities and in dependent higher education institutions (Official Gazette of the Republic of Slovenia, nos. 25/20, 29/20, 65/20 and 67/20); Ordinance on the temporary ban on the gathering of people in educational institutions and universities and in dependent higher education institutions (Official Gazette of the Republic of Slovenia, Nos. 152/20 and 181/20) and Ordinance on the temporary ban on the gathering of people in educational institutions and universities and independent higher education institutions (Official Gazette of the Republic of Slovenia, Nos. 30/21, 35/21, 40/21, 43/21 and 47/21).

² From the Constitutional Court of RS Decision on the invalidity of government decisions and the decision of the Minister of Education, no. U-I-445 / 20-13 of 3 December 2020.

³ *ibid*

were soon closed again on 19th of October 2020, and measures began to be gradually and slowly released on 26th of January 2021, when several primary schools and kindergartens reopened in some statistical regions. On February the 15th, all elementary school students who did not have a school vacation returned to school. Students in the final years of secondary education and those involved in lower vocational education programs also returned to secondary schools. There was also a partial release of measures in the field of higher vocational schools and in higher education institutions (Križaj et al., 2021).

Of course, Slovenia was not an exception in closing schools due to the coronavirus epidemic. According to data provided by UNESCO⁴, schools were, globally speaking, fully closed for an average of 3.5 months (14 weeks) since the onset of the pandemic. This figure rises to 5.5 months (22 weeks), as is – as UNESCO explain (Križaj et al., 2021) – an equivalent to two-thirds of an academic year. During closure schools switched to distance learning.

PRIVACY PROTECTION AND DISTANCE LEARNING IN CONTEXT OF PERSONAL DATA PROTECTION

Novak (2004) states that modern legal theory “defines privacy as an area of activity of an individual in which no one may interfere without a special (legal) authority” (Novak, 2004: 248). Or, more focused on information privacy, as the definition of privacy is stated by Huang, Liu, Zhu, Chen, Yang, Tlili, Fang and Wang: “Broadly speaking, privacy is the right to be let alone, or freedom from interference or intrusion. Information privacy is the right to have some control over how your personal information is collected and used” (Huang et al., 2020: 19). The authors continue that “in the process of online learning, personal data are produced through the interaction between students/teachers and tools or platforms. Personal data and privacy are the tranquility of the private life of a natural person, and the private space, private activities, and private information that one is unwilling to be known to others” (Huang et al., 2020).

Experience of distance learning during the COVID-19 epidemic has shown a number of potential situations that have inadvertently called into question the protection of the privacy of all participants in the distance learning process. Thus, schools and other educational institutions and other non-profit organizations, based on the experience of distance learning during COVID-19 epidemic, most often developed instructions, recommendations, guidelines and other materials to help raise the protection of the privacy of teaching personnel, children, students and their families. In the Republic of Slovenia one of such recommendations was also

⁴ UNESCO website <https://en.unesco.org/news/unesco-figures-show-two-thirds-academic-year-lost-average-worldwide-due-covid-19-school>.

formulated within the Safer Internet Center Project (Recommendations for schools and teachers in distance education – a safety aspect⁵, hereinafter referred as Recommendations, 2020). As stated in the Recommendations, in terms of general privacy issues, the experience has shown that “students were unnecessarily exposed to various risks due to school assignments, such as various video assignments like ‘Record yourself when you bake cookies, do squats ... or Record yourself in your daily routine’. With such assignments, teachers were able to compromise the privacy of students, their families and their homes and expose them to the potential for abuse of these recordings” (Recommendations, 2020). Recommendations also point out that during videoconferencing, all participants (teachers, students and parents) should be reminded of the background that is visible in the video and can also reveal something that someone may not want to share with others or something that could be exposed to a peer or some other abuse. In addition, the Recommendation (2020) also emphasize that the privacy of other family members in the background during a video conference should also be preserved. This also applies to videos made by students during distance learning. Prior to this, students and parents should be reminded that these images should not show anything they do not want to be visible to others. Different types of assignment that involve recording, always bring with them the risk of exposing privacy a child, family and home. Background objects can provide information that can reveal a home location, habits, or anything else that someone can use against family or against children. As stated as an example in the Recommendation: “A teddy bear on a shelf can trigger teasing from a peer, valuables can attract mischief, and so on” (Recommendations, 2020).

Another key area related to the right to privacy is the protection of personal data. Within the European Union the field of personal data protection has experienced a new era with the introduction of i.e. GDPR⁶ in 2018. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27th of April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (hereinafter the General Regulation) entered into force on 25th of May 2016, and its provisions had to be directly applicable in all Member States within two years of adoption (i.e. 2018). It should be emphasized that the field of personal data protection is regulated differently for the private and public sectors. The latter also includes most institutions in the field of education.

Certainly the sudden transition to distance learning that we have witnessed in the last year and a half presents a unique challenge for the protection of personal data and the privacy of employees, students and their families, which is also pointed

⁵ <https://safe.si/ucitelji/priporocila-za-sole-in-ucitelje-pri-izobrazevanju-na-daljavo-varnostni-vidik>
⁶ [General Data Protection Regulation](#)

out in the opinions and statements of the Information Commissioner of the Republic of Slovenia⁷ (hereinafter referred to as Information Commissioner).

In the following, we highlight some key findings from the reports and opinions of this body, which relate to the protection of personal data in education, during distance education.

In the Annual Report of the Information Commissioner for 2020 (hereinafter the IP Annual Report), the Information Commissioner of the Republic of Slovenia drew special attention to the importance of a coordinated approach to personal data protection, which proved to be especially important in the field of distance learning and education. In the absence of uniform instructions, virtually everyone will make quick decisions about which distance learning tools they will use and which personal data will be processed. The Information Commissioner thus notes that due to the partial nature of the approaches, he has dealt with a number of cases of excessive processing of personal data, e.g. to demonstrate students' sports participation, completed assignments and distance exams. As an example, the report (IP Annual Report) states that due to the emergency situation in 2020, schools conducted distance learning using information technology tools. In one of the cases under consideration in the inspection procedure, a physical education teacher allegedly instructed students to install an application on their smart phones that records sports results about a student's training. Students were also instructed to provide recordings of sports training via an application they would otherwise use in distance learning. According to the Information Commissioner (IP Annual Report) of the application for monitoring physical activity or other smart monitoring devices “send excessive interference with students' right to personal data protection and privacy in order to send training data to the teacher, as applications process a range of highly sensitive personal data” (IP Annual Report, 54). As he continues, in this case the legal basis is consent, but in the case of distance education as a public law task in accordance with the General Regulation it is not an appropriate legal basis. According to the Information Commissioner (*ibid*), the legal basis for the processing of children's personal data in the context of distance learning using online learning tools (such as ZOOM) was point (c) of the first paragraph of Article 6 of the GDPR (*processing is necessary for compliance with a legal obligation to which the controller is subject*) in relation to the regulations governing primary and secondary education (as Primary school Act in Republic of Slovenia). “The Information Commissioner has repeatedly emphasized that schools or teachers are reminded of the principle of the minimum amount of data, according to which no more personal data may be processed than is strictly necessary for the implementation of the educational process (the principle of minimization of personal data). Schools, as controllers of personal data, were obliged to ensure adequate protection of personal data at all stages of the implementation of the distance learning process. The Information

⁷An independent state body established on the basis of the Information Commissioner Act (Official Gazette of RS, no. 113/05, 51/07 – *ZustS-A*). Website: <https://www.ip-rs.si/>.

Commissioner called on the Ministry of Education, Science and Sport to concretize the legal basis with uniform instructions to schools” (IP Annual Report, 54).

From the point of view of the discussed topic, the opinion of the Information Commissioner no. 07120-1/2020/274, dated 6th of April 2020, in which the Information Commissioner responded to questions as to whether the employer could require teachers to record instructions for the implementation of the lesson and then upload the recordings to e-classrooms. According to IP, the processing of personal data of a pedagogical worker, namely the collection, publication and storage of videos of his lessons on a secure web server or learning e-environment, could be permitted under the provisions of labor law⁸, provided that the processing is necessary for the exercise of rights and obligations arising from the employment relationship or in connection with the employment relationship. In such a case, the employer is obliged to prove that it is such personal data of the employee that he needs in the context of the employment relationship.

In his opinion, the Information Commissioner emphasized that “the use of information technology in the educational process is certainly not opposed and believes that especially in the current situation, smart and proportionate use of information technology is necessary to implement a quality and stimulating educational process and ensure effective implementation of work obligations of teachers” (Opinion of the Information Commissioner No. 07120-1/2020/274, dated 6th of April 2020). And as he continues: “The distance learning process has been designed by some teachers to require students to use modern information technologies, often involving the processing of personal data. In distance education, children should use various tools for online communication, including tools with video calling and related forms of cooperation, or pupils / students must, according to the teacher's instructions, record the completion of the given task and pass the recording to the teacher” (Opinion of the Information Commissioner No. 07120-1/2020/274, dated 6th of April 2020).

When processing personal data of children for the purposes of distance education, the IP emphasizes (ibid) that the consent of the individual (or legal representative of the child) is not an appropriate or appropriate legal basis on which such processing of personal data should take place. It is essential that distance education is a public service task of the educational institution and not an activity for which parents as legal representatives of children can give free consent – as is traditionally given at the beginning of the school year on a prepared form (for example for publishing photos in the school almanac, etc.). The opinion of the IP thus clearly expresses the position that the issue of recording should be regulated by law or, at least uniform for all educational institutions by the competent ministry (Opinion of the Information Commissioner No. 07120-1/2020/274, dated 6th of April 2020).

⁸ Article 48 of the Employment Act (Official Gazette of the Republic of Slovenia, No. 21/13, as amended).

CONCLUSION

Due to the coronavirus crisis, distance learning has come to the forefront of educational practices. Today, parents, students and teachers across Europe (and the World) are adapting to the “new normal” through distance education. In order to limit the infection, Member States have in fact introduced restrictive measures to reduce “mass gathering”. These measures have also affected the education system, as schools, universities and other educational institutions have had to reduce physical attendance or even close down altogether (Education during COVID-19; moving towards e-learning, 2020). Schools found themselves in sudden, unexpected situation, looking for ideas and solutions on how to provide lessons to students in accordance with pedagogical principles as possible. Thus, most educational institutions have focused on distance education and learning, using information and communication technology, as distance learning has become an increasingly common way for teachers to work with students during the closures related to the epidemic of COVID-19.

As noted in the report *Education during COVID-19; moving towards e-learning* (2020) the health crisis could accelerate innovation in education. Potential innovations include educational applications, platforms and resources. They all work to help parents, teachers, schools and school administrators facilitate student learning, social care and interactions during school closures.

Distance or online learning is generally becoming a norm for everyone to become a life-long learner. Therefore, how to protect the personal data and privacy in online learning is becoming an important issue for students, parents, and administrators. In order to protect personal data and privacy, students should understand how the personal data are produced when they are learning online, and how to preserve the privacy (Huang et al., 2020, Executive summary). Life cases and practical examples from the experiences of distance learning discussed above resulted that individual countries have formed opinions and formal positions that will serve as a basis for the interpretation of existing legal norms in the related field (legal regulation of distance learning and privacy protection) and the possible adoption of new ones. New protocols for the processing of personal data protection and guidelines for the protection of the privacy of all participants in distance education are also being developed. In the article, we presented some of these contents. Certainly, in the coming months and years these contents will take on a more concrete and systematic form and an appropriate legal formal basis, as it seems reasonable to expect, as all indicates, that distance learning is not something that will remain just an emergency exit during a health crisis, but will one way or another become a permanent part of the educational process.

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ПРАВНИ АСПЕКТИ УЧЕЊА НА ДАЉИНУ

Резиме

Први концепти учења на даљину датирају из 18. века. Развојем информационе и комуникационе технологије могућности таквог начина наставе постају доступније и све популарније, посебно у контексту неформалног образовања, а такође и на нивоу терцијарног образовања. Због тренутне епидемиолошке ситуације повезане са ширењем заразне болести КОВИД-19, образовни систем се у великој мери реализује онлајн и барем је делимично заснован на моделу учења на даљину. Промењен начин рада у образовном процесу и употреба мрежних алата доносе низ изазова, укључујући и правне.

У овом раду најпре је осветљена правна основа учења на даљину током епидемије, након чега се пажња усмерава на једно од подручја које је овај модел наставе посебно истакао – заштиту приватности и личних података. На основу анализе нормативних оквира и примера из праксе, идентификоване су празнине у регулисању изложених правних аспеката учења на даљину и отворена многа питања која могу довести до нових теоријских и практичних решења.

Кључне речи: *учење на даљину, заштита приватности, ауторска права, правни оквири за учење на даљину.*