

## **TAPE RECORDING OF IEP CONFERENCES**

*By Jane M. Williams*

The subject of whether or not a parent has the right to tape record IEP meetings frequently arises. Based upon recent guidance contained in appendix A to the 1999 IDEA regulations, it appears that the answer is: "It depends." In order to understand whether an enforceable right to tape an IEP conference exists in a particular situation, one must reference both state and federal law on this issue.

No guidance is offered in the Pennsylvania special education statute, regulations or standards concerning the taping of IEP meetings. In Pennsylvania, the taping of conversations, generally, is covered by the Pennsylvania Wiretapping and Electronic Surveillance Act. That Act prohibits interception of an oral or wire communication through the use of an electronic device, such as a tape recorder, where the person speaking has an expectation that his or her communication is not subject to interception. Violation of the Wiretapping Act is a third degree felony. While the Act prohibits covert taping of an IEP meeting, it provides no affirmative right to prevent taping that is proposed to be done openly' therefore state courts have upheld the right to tape a public meeting.

Turning to federal law, there is clearly no requirement in the IDEA that taping is allowed. This fact was recognized in 1981, when the United States Department of Education Office of Special Education Programs ("OSEP") issued a policy interpretation relating to IEPs. Although OSEP recognized in 1981, that neither federal law nor regulation address IEP conference taping, it noted that the then-current version of P.I. 94-142 did not prohibit taping and adopted an "at the option of either party" informal posture. Subsequently, the subject has come up in more recent inquiries to OSEP. In 1986, OSEP reiterated that taping was permissible at the option of the parents or the LEA. In 1987, in response to two separate inquiries, OSEP advised that either the LEA or the parents could tape without the consent of the other. In response to a 1988 inquiry, however, OSEP modified this approach, advising that the parents could tape over LEA objection. Other OSEP decisions throughout a number of years have stated that local law control. As noted above, the Commonwealth of Pennsylvania has no such controlling local laws.

Recently, in Appendix A to the federal regulations implementing the IDEA, it was made clear that tape recording is not necessarily required. In response to the question, "May IEP meetings be audio - or video tape-recorded?", the appendix provides the following:

Part B does not address the use of audio or video recording devices at IEP meetings, and no other Federal statute either authorizes or prohibits the recording of an IEP meeting by either a parent or a school official. Therefore, an SEA or public agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings.

If a public agency has a policy that prohibits or limits the use of recording devices at IEP meetings, that policy must provide for exceptions if they are necessary to ensure that the parent understands the IEP or the IEP process or to implement other parental rights guaranteed under Part B. An SEA or school district that adopts a rule regulating the tape recording of IEP meetings also should ensure that it is uniformly applied.

Any recording that is maintained by the public agency is an "education record," within the meaning of the Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. 1232g), and would, therefore, be subject to the confidentiality requirements of the regulations under both FERPA (34 CFR part 99) and Part B (§§ 300.560 300.575).

Parents wishing to use audio or video recording devices at IEP meetings should consult State or local policies for further guidance.

Therefore, based upon all of the above, there is no law or regulation that specifically allows or prohibits the taping of IEP conferences. Thus, under its general powers, a school board could, under state law, adopt reasonable rules and regulations sustaining a general prohibition against taping, provided that exceptions were allowed. However, our overall sense of this issue is that a parent could pretty easily establish the need to tape record an IEP conference based upon the vague language contained in the appendix, and a court reviewing this issue would likely give deference to the guidance provided by the United States Department of Education on this issue. Moreover, fighting about this point allows an already emotional situation to escalate quickly into a battle that has nothing to do with the student's educational program. The down side of allowing taping, provided both sides tape or a duplicate is made, is small even though the tape may, in limited circumstance, be reviewed by an administrative hearing officer or judge. As to candor, there really should be no conversation at an IEP conference that is not capable of repeating.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.