

National **School Boards** Association



# Recording Devices in Schools

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Presented at the 2018 School Law Seminar, April 5-7, San Antonio, TX

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2018 School Law Seminar, April 5-7, San Antonio, Texas

*Abstract: As cameras and other recording devices increasingly find their way into the public school classroom, legal disputes about this issue are also on the rise. This paper reviews the topics of student privacy and technology for a look at applicable federal law, an examination of state law trends (including laws requiring video cameras in special education classrooms), practical tips for advising schools in this area, and an expected ruling from the 1st Circuit.*

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## I. Introduction

As cameras and other recording devices proliferate in our society, educators have many questions about how these devices impact the public school environment. Without a doubt, these devices raise philosophical questions about a student's right to privacy versus the right to be safe at school. The presence of new technology in the classroom can also lead to more practical concerns. This paper will review the legal issues presented by security cameras and other recording devices in public education with an emphasis on how school officials can work with parents to strike a balance between the district's need to ensure privacy and safety with the benefits that technology can provide.

This paper focuses primarily on the use of recording devices that are requested by parents and of which the district is aware. For an excellent examination of a district's rights as a result of a student's or parent's surreptitious recording, please see Erin Gilsbach's 2017 paper entitled *50 Years of School Technology: Lessons Learned from the Past and Legally Defensible Practices of the Future*.<sup>1</sup>

## II. How are recording devices being used in schools?

Parents typically request recording devices in schools for one of three reasons: 1) to enhance student safety, 2) to augment learning opportunities for their child, or 3) to increase access to their child.

### Safety

In response to school shootings, allegations of bullying, and acts of school violence, many districts have turned to recording devices as a proactive method of improving safety in their schools. According to the most recent data reported by the National Center for Education Statistics, more than seventy-five percent of public schools across the nation use security cameras to monitor their buildings.<sup>2</sup> Cameras can help pinpoint the location of a threat and allow for the safe evacuation from other parts of the building. Other districts utilize cameras as a preventative measure to combat bullying, harassment or other abuse, by bringing eyes to those places where students are frequently victimized.

Other electronic devices, such as AngelSense, offer capabilities to provide parents with the opportunity to "listen in" to sense their child's situation and make sure he or she is safe. AngelSense also provides parents with the opportunity to talk to their child at any time, without requiring the child to "pick up" or click anything to connect the call. These features are designed to validate emergency situations and improve special needs child care.

### Learning

Schools across the country are using innovative technologies as a way to enhance or augment the educational services provided to students. A smartpen is one such technology that is gaining popularity. While taking notes, a smartpen records the conversation and digitizes the handwriting, automatically syncing the ink and audio. By later tapping the ink,

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<sup>1</sup> E. Gilsbach. 2017. *50 Years of School Technology: Lessons Learned from the Past and Legally Defensible Practices of the Future*, National School Boards Association. Available to COSA members at: <https://www.nsba.org/50-years-school-technology-lessons-learned-past-and-legally-defensible-practices-future-0>

<sup>2</sup> U.S. Department of Education, National Center for Education Statistics, Fast Response Survey System (FRSS), "School Safety and Discipline: 2013-14."

the smartpen replays the conversation from the exact moment the note was written. Notes and audio can then be uploaded to a computer, where they can be replayed, saved, searched and shared. Smartpens are not only used as assistive technology for students with disabilities, but also allow home-bound students or students who are absent from class to hear and see the lesson at their convenience and as many times as necessary.

Video recordings also find their way into classrooms as a learning tool for teachers. An important component of a teacher's professional development is their ability to analyze and evaluate their own pedagogic practice. Video recordings help teachers enhance this skill and allow teachers to get a general picture of their teaching style and strengths and weaknesses. In addition to using classroom recordings for this type of reflection, many teacher candidates now must record and submit videos of their instruction to independent scorers as part of their annual performance assessments.

Video recordings are also being used to record a child's progress in school. It allows IEP professionals and parents to visually see how a child is behaving and interacting with other students and whether they are making meaningful progress on goals and objectives outlined in their IEPs.

#### Access

Occasionally, parents will also request that their child be allowed to wear a recording device to school so that the parents may gain greater access to what occurred throughout the child's day. This is a more frequent request if the child is non-verbal or has limited expressive communication skills. Recording devices allow parents to hear the announcements and other information that students are expected to convey to their parents, and allow nonverbal students to "tell" about their day at school.

### **III. May we allow recording devices in schools?**

#### **A. FERPA does not allow or prohibit recording in schools, but districts must protect student privacy.**

The Family Educational Rights and Privacy Act (FERPA) prevents districts from disclosing education records that directly relate to an individual student.<sup>3</sup> In 2004, the Family Policy Compliance Office (FPCO)<sup>4</sup> issued a letter stating its initial formal position on the issue of protecting the privacy of student images that appear in a video recording. The letter, which was written in response to a parent who filed a complaint after he was denied access to a video recording of an altercation between of his son and a police officer, applied the strict wording of the Act,<sup>5</sup> and stated the following:

If the education records of a student contain information on more than one student, the parent requesting access to education records has the right to inspect and review, or be informed of, only the information in the record directly related to his or her child. If...your son is the only student pictured fighting in the video...you generally have the right under FERPA to inspect and review the videotape. If, on the other hand, another student is pictured

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<sup>3</sup> 20 U.S.C. §1232g.

<sup>4</sup> FPCO is an office within the U.S. Department of Education with the authority to investigate, process, and review complaints of FERPA violations. 34 C.F.R. §99.60.

<sup>5</sup> 20 U.S.C. §1232g(a)(1)(A).

fighting in the videotape, you would not have the right to inspect and review that portion of the videotape.<sup>6</sup>

For years, this letter represented FPCO's "official guidance" on the issue, and districts were counseled that a parent may view a video recording only if all of the students whose images appeared on the recording consented to the disclosure or the images of the other students were redacted.

Two years after releasing this official guidance, FPCO began to reconsider its position regarding video recordings. In 2006, FPCO issued a letter outlining its "unofficial" position that "routine activities by students ... [are not] 'directly related to' any particular student and, therefore, not an 'education record' under FERPA, even though those students may be 'personally identifiable.'"<sup>7</sup>

In its unofficial guidance, FPCO explained that FERPA would not prevent a district from releasing, without parental consent, an unredacted video recording of routine activities even if the students are personally identifiable, because that recording is not directly related to any student. The letter also stated that if the video recorded an assault or some other altercation, it would be "directly related" to and an education record for the students involved in the assault or the altercation. Today, the following language is included in the typical response that a district or attorney will receive if they reach out to FPCO directly on this issue:

...we believe that the video is "directly related" to, and thus the "education record" of, the student or students who are the focus or subject of the video and not the students merely in the background. By "focus," we mean a student or students are involved in an altercation or some other disturbance that causes them to be the focal point of the video.

In December 2017, the FPCO issued a new letter on the issue of handling surveillance recordings under FERPA.<sup>8</sup> The letter, which centered around a recording that captured a hazing incident involving six perpetrators and two victims, expanded on FPCO's position that "when an education record contains information on more than one student, the parent may inspect and review or 'be informed of' only the specific information about his or her own child."

In its letter, FPCO acknowledged that there may be instances where the information about the other student or students cannot be segregated or redacted without destroying its meaning. In this instance, the district indicated that it could not afford software that would blur the faces of the other students in the video, nor could it segregate the video by showing parents a distinct time period of the video in order to portray the student's singular involvement in the incident. As a result, FPCO allowed the parents of all the students to inspect and review information in the recording, even though it also contained information that was directly related to other students.

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<sup>6</sup> *Letter to Berkeley Cty. School Dist.*, 7 FERPA Answer Book 40 (Feb. 10, 2004).

<sup>7</sup> *Letter re: Magnolia Indep. School Dist.*, 10 FERPA Answer Book 25 (Aug. 23, 2006).

<sup>8</sup> *Letter to Wachter* (Dec. 7, 2017). Available:

[https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/Letter%20to%20Wachter%20%28Surveillance%20Video%20of%20Multiple%20Students%29\\_0.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Letter%20to%20Wachter%20%28Surveillance%20Video%20of%20Multiple%20Students%29_0.pdf)

FPCO made it clear, however, that if it is possible for the district to blur student faces or disclose only a portion of the video in a way that would fully depict the student's involvement in the hazing incident, then such segregation of information about other students would be required.

The video at issue in the December 2017 FPCO letter directly related to the hazing incident and the group of students involved in that incident. As a result, the letter did not provide FPCO with an opportunity to formally recognize its "unofficial" guidance relating to recordings that capture images of students who are not directly related to the focus or subject of the video.

FPCO's letters on the topic of recordings in school have been largely limited in scope to video recordings picked up by district surveillance cameras in common areas, such as school buses, cafeterias, or hallways. However, as classroom technologies continue to advance, teachers are utilizing video and audio recordings to enhance or augment the educational services provided to students, allow students to catch up on missed work, incorporate lessons and student projects into massive open online courses (MOOCs), or for teacher evaluation purposes.

Even in these seemingly noble contexts, districts must take steps to protect student privacy. If the recording includes only the teacher, it is not an education record and FERPA does not limit its use. However, if the recording includes students asking questions, making presentations or otherwise participating in a way that personally identifies the students and causes them to be a "focal point in the video," it is likely that those portions of the recording constitute protected educational records and can be used only as permitted by FERPA.

There are several ways to use recordings that include protected student participation:

- 1) **Obtain consent.** Inform students (and parents) that a recording is being made and for what reason(s) the recording may be reviewed and by whom. Seek parental consent prior to using or otherwise disclosing the recording. The written consent must specify the records that may be disclosed, state the purpose of the disclosure and identify the party or class of parties to whom the disclosure may be made.<sup>9</sup>
- 2) **Edit the recording.** Recordings can be edited to either omit any student who has not consented to the use of their voice or image, or be edited to de-identify the student in the record (i.e. remove any mention of a student's name, blur student images, alter voice recordings, etc.). Cyberlink PowerDirector is a redaction software tool that has been mentioned several times on the NSBA COSA listserv. There are other free or low-cost redaction software options as well.
- 3) **Limit access to other students in the class.** FERPA does not limit or prevent the use of a recording and does not require prior written consent if access is limited to students in the class to watch or re-watch past class sessions. However, districts should be cautious about making access available to students without the consent of his or her peers if the recordings are able to be downloaded, duplicated or otherwise redistributed by the student viewing the content.

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<sup>9</sup> 34 CFR 99.30(b).

**B. Recording a conversation between two other people can be a crime, but is unlikely to violate wiretap laws in public classroom settings.**

In November 2017, a Virginia mother was charged with a felony after putting a digital audio recorder in her daughter's backpack to catch alleged bullying.<sup>10</sup> School officials found and confiscated the device, which had been in her daughter's desk, recording her school day. Police charged the woman with a felony under state wiretapping laws and with a misdemeanor for contributing to the delinquency of a minor. Although the charges were eventually dropped, the case highlights the importance of evaluating whose consent is needed before a recording device shows up in a classroom.

Both federal and state laws place restrictions on wiretapping and eavesdropping. These laws generally apply to situations where one party listens in on the conversations of others without their knowledge. Twelve states — California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Oregon, Pennsylvania and Washington — generally prohibit individuals from recording conversations unless all parties to the communication consent to the recording. These states are typically referred to as “all-party consent” or “two-party consent” states.

The remaining thirty-eight states, along with the District of Columbia, are considered “one-party consent” states. In these states, individuals may legally record a conversation to which they are a party so long as one of the parties to the communication consents to the recording. Because the consenting party in these states can also be the individual doing the recording, the conversation may be recorded without the knowledge or consent of any other party. This is also the rule under federal law.

As a general matter, a person's ability to record a conversation initially turns on whether a reasonable expectation of privacy can be attached to the conversation. If there is no expectation of privacy to the conversation, anyone is generally free to hit the record button. Courts have identified a non-exclusive list of factors that determine whether an individual's expectation of privacy in his or her oral statements is objectively reasonable. These factors include:

- 1) The volume of the statements;
- 2) The proximity of other individuals to the speaker, or the potential for others to overhear the speaker;
- 3) The potential for the communications to be reported;
- 4) The actions taken by the speaker to ensure his or her privacy;
- 5) The need to employ technological enhancements for one to hear the speakers' statements; and
- 6) The place or location where the statements are made.

Districts usually have a difficult time demonstrating that there is a reasonable expectation of privacy in public school spaces:

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<sup>10</sup> D. Simon, "Mother faces felony charge after using recorder to thwart school bullies," CNN, 28 Nov. 2017. [Online]. Available: <http://www.cnn.com/2017/11/28/us/virginia-mother-bullying-arrest/index.html>.

- **School bus:** In 2008, the Supreme Court of Wisconsin was asked to rule whether the tape-recorded threatening statements directed by a bus driver to a student with disabilities aboard a public school bus were unlawfully intercepted in violation of state and federal wiretapping laws. The court found that “school bus drivers endure a...diminished expectation of privacy inside the school buses they operate.”<sup>11</sup> In so holding, the court reasoned that the school bus was not a private space, but rather a “public conveyance, in which the bus driver is surrounded by others and in view of the public through the bus’s windows.”
- **Public classrooms:** On a number of occasions, courts have held that teachers do not have a reasonable expectation of privacy in their classrooms. In 2007, a district court in Illinois held that:

A classroom in a public school is not the private property of any teacher. A classroom is a public space in which government employees communicate with members of the public. There is nothing private about communications which take place in such a setting. Any expectations of privacy concerning communications taking place in...classrooms such as those subject to the proposed audio monitoring in this case are inherently unreasonable...<sup>12</sup>

Other courts have agreed, finding that the activity of teaching in a public classroom does not “fall within the expected zone of privacy,”<sup>13</sup> and that there is no basis to have a reasonable expectation of privacy in a public school room.<sup>14</sup>

While it is unlikely that an individual being recorded on a school bus or in a public classroom has any reasonable expectation of privacy in their communications, it is an incorrect conclusion that wiretap laws are *never* implicated in schools. Communications by students and teachers in some contexts (e.g. the bathroom, personal office, etc.) may be considered more private.<sup>15</sup> Similarly, if the recording device relies on an ultra-sensitive microphone to pick up part of a whispered conversation that he or she may not otherwise have overheard, there may be wiretap law implications.

### C. State law or local policies may prohibit recording

When considering whether a specific instance of recording is allowed, school attorneys should be sure to check state laws and local school district policies. In Texas, for

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<sup>11</sup> *Wisconsin v. Duchow*, 310 Wis.2d 1, 2008 WI 57, 749 N.W. 2d 913 (2008).

<sup>12</sup> *Plock v. Bd. of Edn. of Freeport School Dist. No 145*, 545 F. Supp. 2d 755, 2007 U.S. Dist. LEXIS 93141 (N.D. Ill. Dec. 18, 2007).

<sup>13</sup> *Roberts v. Houston ISD*, 788 S.W. 2d 107 (Tex.App.1990).

<sup>14</sup> *State of New Hampshire v. McLellan*, 144 N.H. 602, 744 A.2d 611 (1999).

<sup>15</sup> See, e.g., *Brannum v. Overton Cty. School Bd.*, 516 F.3d 489 (6th Cir. 2008) (holding video surveillance in school locker room violated students’ reasonable expectation of privacy); *Helisek v. Dearborn Pub. School*, 2008 U.S. Dist. LEXIS 25514, 2008 WL 896066 (E.D. Mich. 2008) (finding employees had a reasonable expectation of privacy in shared staff locker room/office where they changed clothes); but see *Marriott v. USD 204*, \_\_\_ F.Supp.3d \_\_\_, 2017 WL 3970776 (D. Kan. 2017) (finding teacher had no reasonable expectation of privacy in locked classroom where he and his family members changed clothes).



example, the Education Code generally requires written parental consent before a school employee may make or authorize the making of a videotape of a child or a recording of the child's voice.<sup>16</sup> (Multiple exceptions apply, including exceptions for safety and instruction.)

School boards may also lawfully establish policies that prohibit recording, provided they leave open an exception in cases where such recording may be required by law in order to ensure parental access to meetings and/or school information (see the "Must we allow recording devices in schools?" discussion below). Where such a policy exists though, schools need to be careful to enforce it uniformly and accurately. Recording may need to be addressed in multiple district publications to ensure that an appropriate prohibition applies to both employees and students.

For example, some school districts in Texas have adopted the following policy provisions to prohibit secret, unauthorized recordings by employees:

No employee may make an unauthorized audio or visual recording of a conversation or meeting pertaining to district business unless the employee making the recording notifies all participants in the conversation or meeting of the recording. An employee making an authorized recording shall ensure that the recording device is located in plain view for the duration of the conversation or meeting. Secret recordings shall be prohibited.

These provisions are not intended to limit or restrict recordings involving authorized investigations conducted by District personnel or any meeting recorded in accordance with Board policy, including Board meetings, grievance hearings, and audio recordings of meetings or proceedings at which the substance of an employee grievance is discussed.

School districts may prohibit unauthorized recording by students in a student handbook or code of conduct. For example, the TASB Model Student Handbook requires students to obtain permission before bringing a personal electronic device to school and strictly prohibits the use of a mobile telephone or other device capable of capturing images in locker rooms or restroom areas.

#### **D. Practical concerns may limit a district's ability to utilize recording devices in the classroom.**

Classrooms comprise numerous and mutable configurations of people, objects, and sounds, all within a very small and crowded space. The compact nature of most classrooms can make it difficult to position a recording device and ensure that all of the classroom's occupants are in the shot. Background noise, low-quality microphones, and the inconsistent volume of voices can also hinder the ability to adequately capture and portray what is actually occurring within a classroom.

Recording devices can also be intrusive or distracting. Someone needs to physically start and stop the camera. Time spent on remedying technical issues and glitches can be lengthy and can interrupt the learning process. Obviously, the goal is to create the least possible impact or intrusion on the teaching and learning involved.

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<sup>16</sup> Tex. Educ. Code § 26.009.

Finally, the location and positioning of camera equipment also introduces common sense issues regarding participants' safety. General precautions must be taken to avoid trip hazards from wires or tripod legs or other injuries caused by unsecured or unsafely mounted equipment.

For a more thorough review of some of the practical challenges associated with recording video in classroom settings, as well as some of the technical solutions available to educators working in schools, see *Methods for recording video in the classroom: Producing single and multi-camera videos for research into teaching and learning*.<sup>17</sup>

#### IV. Must we allow recording devices in schools?

##### A. Video cameras in special education classrooms

In 2015, Texas became the first state to require school districts to install video cameras in certain classrooms serving students with disabilities upon request by eligible parents or school officials.<sup>18</sup> In 2016, Georgia passed legislation creating a pilot program for cameras in special education classrooms; however, unlike in Texas, participation in the Georgia camera program is voluntary. In these and other states, parents of students with disabilities have advocated for a change in the law either by allowing or requiring video surveillance due to concerns about bullying or abuse by school personnel.<sup>19</sup>

Nonetheless, advocates are split on whether cameras actually make students safer. The National Autism Association has argued that cameras can improve student safety by providing documentary evidence of suspected abuse.<sup>20</sup> But TASH, another advocacy organization, has argued that cameras divert scarce resources, damage the parent-teacher relationship, and are ultimately ineffective to stop abuse. Interestingly, TASH also points out a tension between the concept of placing cameras in classrooms designed to serve students with disabilities and the requirement in special education to serve students in the least restrictive environment.

The use of video cameras in self-contained settings undermines the mandate that special education is a service, not a place. Placing video cameras in these segregated settings has the potential to widen the scope of school districts' bias towards these restrictive settings and increase the

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<sup>17</sup> D. Kilburn. 2014. *Methods for recording video in the classroom: Producing single and multi-camera videos for research into teaching and learning*, National Centre for Research Methods, NCRM Working Paper. Available: <https://pdfs.semanticscholar.org/31d5/a9a7013a6ae5abd7784d5def4770ca55a709.pdf>.

<sup>18</sup> 84th Tex. Leg., R.S., S.B. 507 (adding Texas Education Code § 29.022).

<sup>19</sup> In 2017, Nevada's legislature considered Senate Bill 224, which would have created a multi-year program requiring all schools to install cameras in classrooms with a majority of nonverbal students, beginning in 2018-19. (<https://lasvegassun.com/news/2017/mar/08/advocates-bill-video-cameras-special-ed-classrooms/>) In 2016, Missouri legislators also proposed House Bill 2419, similar legislation. (<http://www.house.mo.gov/billtracking/bills161/hrbillspdf/6188H.011.pdf>)

<sup>20</sup> Phillips, Leslie, National Autism Association, *Behind Closed Doors: What's Happening to Students with Autism in America's Public Schools?* (Jan. 25, 2012), <http://nationalautismassociation.org/wp-content/uploads/2013/01/CamerasWhitePaper.pdf>.

impetus to coerce parents to consent to placement in these settings through the rationale that they are “safest” for their children.<sup>21</sup>

Setting aside the philosophical debate over the effectiveness of video surveillance, school districts that have installed cameras in special education classrooms have experienced a host of practical pitfalls and conundrums, ranging from what to do when a camera breaks due to students throwing objects in class to serious legal issues arising when parents request to see the footage of their child.

In Texas, the recordings are considered confidential under state law and may not be routinely monitored or used for any purpose other than promoting the safety of students receiving special education services in a self-contained classroom or other special education setting.<sup>22</sup> Nonetheless, there are times when a district may be required to release a recording to certain individuals. Education Code section 29.022 spells out specific circumstances in which a district must release a recording to an employee or a parent of a student who is involved in an alleged incident documented by the recording for which a complaint has been reported to the district. In addition, district officials may be required to release a recording for viewing by law enforcement, Department of Family and Protective Services, or the State Board for Educator Certification for investigation purposes.<sup>23</sup> Texas Education Agency rules define an *incident* as an event or circumstance that: (1) involves abuse or neglect, as defined by the Texas Family Code, of a student by an employee or a student; and (2) allegedly occurred in a self-contained classroom or other special education setting in which video surveillance is conducted.

Adding to the complexity, a recording of a student in a special education classroom could meet the definition of an *education record* under the Family Educational Rights and Privacy Act (FERPA), if the recording is directly related to the student and maintained by the district. Determining whether surveillance footage is directly related to students can be complicated. For example, if a video camera records all the students in a classroom, but no incident or occurrence is recorded involving any particular student, an argument could be made that the footage is not an education record. As discussed above, the U.S. Department of Education has often expressed this position in informal correspondence with school attorneys regarding video recordings of students taken by security cameras. Parents, however, may feel strongly that a recording of their child receiving special education is different in nature than a recording of students in a school bus or cafeteria. District officials must consider these positions and adopt consistent standards for determining when FERPA applies to recordings of students.

## **B. Meaningful parental participation under the IDEA**

Parents of students receiving special education are expected to have an expanded role in designing and participating in their child’s individualized education program. Special education advocates and parents have argued that “meaningful parental participation” under the IDEA means that the parent of a student with a disability is entitled to greater access to the classroom than the parent of a nondisabled student. If this were the case,

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<sup>21</sup> Amos, Pat, *et al.*, TASH, *Will Cameras in Classrooms Make Schools Safer?: TASH Position Statement on Camera Surveillance in Self-Contained Classrooms* (Jan. 2015), <https://tash.org/wp-content/uploads/2015/01/Cameras-in-School-Final.pdf>.

<sup>22</sup> Tex. Educ. Code § 29.022(h), (i).

<sup>23</sup> Tex. Educ. Code § 29.022(i).

then a parent of a student in special education might have an enhanced right to use recording devices in schools. However, IDEA does not require schools to provide parents of students in special education unfettered access to the classroom.

In 2004, the Office of Special Education Programs (OSEP) responded to a request for an opinion as to whether the IDEA guarantees parents and their representatives a reasonable opportunity to observe the child's classroom and proposed placements. OSEP concluded:

While the IDEA expects parents of children with disabilities to have an expanded role in the evaluation and educational placement of their children and be participants, along with school personnel, in developing, reviewing, and revising the IEPs for their children, neither the statute nor the regulations implementing the IDEA provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement.<sup>24</sup>

Therefore, school districts may follow state law or local policy to determine a parent's right to access or observe the classroom. Nonetheless, OSEP encouraged parents and school districts to work together, adding that in some circumstances the IDEA may require providing access, such as when a parent requests an independent educational evaluation and the evaluation requires classroom observation. If a parent or independent evaluator asks to record a student in class, districts should consult local policy and legal counsel to balance parental access with the privacy of other students. It is unlikely that recording would be necessary to provide meaningful parental participation.

A separate but related question is whether IDEA permits or requires audio or video recording devices to be used in meetings between school district staff and parents, such as IEP meetings or resolution sessions. In *Letter to Savit*, OSEP opined that the IDEA does not address recording in these contexts. States or school boards may, therefore, adopt rules either allowing or restricting such recordings. Schools should be prepared to make an exception to rules that prohibit or restrict recording IEP meetings if necessary to ensure that a parent understands the proceedings. In addition, if local rules require providing notice of recording, the meeting must be scheduled with enough time to allow a parent to give notice of an intent to use a recording device.<sup>25</sup>

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<sup>24</sup> Lee, Stephanie Smith, Director, OSEP, *Letter to Mamas* (May 26, 2004), [www2.ed.gov/policy/speced/guid/idea/letters/2004-2/mamas052604placement2q2004.pdf](http://www2.ed.gov/policy/speced/guid/idea/letters/2004-2/mamas052604placement2q2004.pdf). OSEP has also cited *Letter to Mamas* in more recent guidance. Musgrove, Melody, Director, OSEP, *Letter to Savit* (Feb. 10, 2014), [www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acc-13-009888r-md-savit-evaluation-2-10-14.pdf](http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acc-13-009888r-md-savit-evaluation-2-10-14.pdf).

<sup>25</sup> Musgrove, Melody, Director, OSEP, *Letter to Savit* (Feb. 10, 2014), [www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acc-13-009888r-md-savit-evaluation-2-10-14.pdf](http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acc-13-009888r-md-savit-evaluation-2-10-14.pdf).

**C. A recording device to aid a non-verbal child in “telling” about the school day is not legally required under ADA, Section 504 or the First Amendment...for now.**

In 2012, a family in Maine requested that their son, who was diagnosed with autism and a language disorder that rendered him nonverbal with limited expressive communication skills, be allowed to wear a recording device to school. The parents requested the device as a reasonable accommodation under the ADA for their son’s communication disability. They felt that by allowing their son to carry the device, they could review it daily for announcements and other information that students are expected to convey to their parents. The device would also enable the child to “tell” his parents about his day at school.<sup>26</sup>

The district rejected the parents’ request, citing the district’s personal electronics policies, a state wiretap statute, other students’ personal privacy rights, and the school’s collective bargaining agreement with its teachers. The parents ultimately filed a lawsuit against the district, claiming that the district’s denial violated the ADA, Section 504 and the First Amendment.<sup>27</sup>

The parents claimed that the district violated the ADA because the district’s refusal to allow the child to wear a recording device “deprived [the student] of the opportunity to communicate with his parents about happenings at school as effectively as his peers without disabilities...” Their argument was that the recording device was needed to provide their child with equally effective parental advocacy so that he can enjoy the same quality of public school services as his non-disabled peers.

The court rejected the parents’ ADA claims, finding that the ADA’s mandate for “effective communications” does not extend to parent/child communications taking place outside of the school day. The court also found that the parents did not meet their burden of establishing that the device was reasonable or necessary under the ADA and Section 504, especially in light of the hearing officer’s finding that the recording device would actually be “disruptive and detrimental to the education of [the student] and would interfere with the learning process.”

The parents also alleged that their child had the right to record his entire school day because the record was “information-gathering with a potential expressive use.” The “potential expressive use” was the subsequent dissemination of information obtained from the recording by the parents. Although the district court allowed the First Amendment claim to proceed, a jury subsequently found that the school was justified in not allowing the device based on other students’ privacy rights.<sup>28</sup>

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<sup>26</sup> Pollack v. Regional School Unit 75, D.Me. No. 2:13-cv-109-NT, 2017 U.S. Dist. LEXIS 64611 (April 28, 2017).

<sup>27</sup> The parents did not originally request that their child be allowed to use a recording device through the IEP process, because of their position that their son needed to record interactions with teachers in order to tell his parents what was going on in class rather than to further his education. However, the parents did go back and exhaust administrative remedies through a special education due process hearing after their initial attempt at federal court was rejected.

<sup>28</sup> E. Murphy, "Topsham parents wanted to record their son’s school day – a jury says no," Portland Press Herald, 13 June 2017. [Online]. Available: <http://www.pressherald.com/2017/06/13/parents-lose-suit-to-allow-them-to-record-their-sons-school-day/>.

The decision has been appealed to the U.S. Court of Appeals for the First Circuit. Oral arguments were held before the court on Jan. 8, 2018.

## **V. Practical tips**

### **A. Consider parent's motivations.**

A parent's reasons for wanting to record the school day may inform how the school district should respond. If the request is based on improving educational opportunity for a student with a disability, go through the Section 504/IEP process. Remember, if a device is necessary for FAPE, the district needs to provide it at no cost—this is likely to be a rare situation. More often, districts may need to allow recording as a reasonable accommodation.

If the request is related to learning but the student is not known or suspected to have a disability, consider legal and practical issues and make a decision that balances the best interests of students with the need to maintain a safe, distraction-free educational environment.

For a request related to a safety concern, the parent does not have a right to record at school unless state law provides otherwise. Explain that all students have a right to privacy that might be violated by recording, and that surreptitious recording may even be a crime under state and federal wiretap law. Of course, if the parent's concern is based on alleged bullying, harassment, or abuse, school officials should inquire further to determine what steps to take under local policy to address the parent's concern.

A parent does not have the right to record the school day simply to increase access or involvement with his or her child's education. Be sensitive, however, to potential claims in this area, particularly with regard to students with disabilities.

### **B. Work towards an arrangement that addresses student privacy and minimizes disruption.**

Enter into a written agreement with the parent and student about the use of any recording device in the classroom. The agreement should outline when the recording may take place, what the recordings may be used for, and in cases of personal recording devices, where the recording device will be maintained when not in use and who will be liable for loss, theft or damage to the device. If access to any recording is provided to a student, the student should agree to keep the information confidential and not redistribute or otherwise disclose the information.

If the device relies on a third party to deliver services, be aware that at least in some instances, there is a willingness on the part of the vendor to negotiate the terms of those service agreements. Companies like AngelSense, for example, have agreed to revise their standard "listen in" agreement. In cases where the customer parent has agreed, AngelSense will completely deactivate the "listen in" feature on the device during

designated times of the day and take away the parent's ability to reactivate it.<sup>29</sup>

**C. Be reasonable.**

- Do what's best for students
- Work with your school attorney
- Keep documentation when a parent acts unreasonably.

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<sup>29</sup> For an example of this revision to the standard AngelSense agreement, search "AngelSense" on the NSBA Connect COSA discussion boards, or contact the authors of this paper.