



ATTORNEY GENERAL OF MISSOURI
ERIC SCHMITT

September 16, 2021

Dr. Dustin Fanning
Superintendent
Moberly School District
926 Shepherd Brothers Blvd.
Moberly, MO 65270
Sent via email to: dustinfanning@moberlyspartans.org

Dear Dr. Fanning,

As Missouri's chief law enforcement officer, I write to you today to express my profound disappointment in your district's current policy regarding parents' right to record IEP/504 meetings. A concerned parent informed my office that your district is requiring parents to sign a "Request to Record IEP/504 Meeting" form that limits or restricts their right to record meetings in which they are a participant. It is my understanding this form is currently being used despite the recent enactment of § 162.686. RSMo. expressly prohibiting such restrictions. Having reviewed the form, I am left with the firm conviction it does not conform to Missouri law. I urge you to change your policy immediately to comply with the law.

Missouri is a one-party consent state. So long as at least one party to a conversation gives consent, that conversation may be lawfully recorded by the participant, or by a third party.¹ This right to record is not contextually limited, nor does it go away during an IEP meeting.² In case there was any doubt on that point, during its most recent legislative session Missouri's General Assembly passed, and the Governor signed into law, House Bill 432 containing § 162.686 expressly codifying parents' right to record their child's IEP meetings.³ When read in harmony with Missouri's general surveillance statute, § 162.686 vests parents with an absolute right to

¹ Making electronic audio recordings of conversations falls under federal and state wiretapping laws. 18 U.S.C. §2511(2)(c) and (d) establish a federal one-party consent framework that Missouri has incorporated into its surveillance statute at §542.402.2(2) and (3). RSMo.; *see also, Phillips v. Am. Motorist. Ins. Co.*, 996 S.W.2d 584, 590 (Mo. App. W.D. 1999)(holding that making a surreptitious audio recording of a conversation to which one is a party constitutes a lawful interception under Missouri law.).

² This letter is concerned only with a parent's right to record IEP/504 meetings. Under recent NRLB rulings, a school district *may* be able to place recording restrictions on its own employees in certain circumstances, but such an analysis is outside the scope of this letter. *See, The Boeing Company*, 365 N.L.R.B. No. 154 (2017).

³ § 162.686 is a short statute and can be read in its entirety at <https://revisor.mo.gov/main/OneSection.aspx?section=162.686>

record IEP meetings to which they are a party, and to retain full and complete control of such recordings.⁴

Of course, the question of a parent's right to record IEP meetings is not a new one. As you are undoubtedly aware, the federal Individuals with Disabilities Education Act ("IDEA") has been around in one form or another since the mid-1970s.⁵ Questions about a parent's right to record IEP meetings arose not long after, and the Department of Education ("DOE") finally opined on the matter directly in 1991. Its position has remained consistent since that time. In short, the DOE reads the IDEA as taking no position on the permissibility of recording IEP meetings. It leaves those decisions to the controlling "public agency," and states only that any limitation or prohibition must "provide for exceptions if they are necessary" to ensure the understanding or implementation of the IEP.⁶ What is so obvious as to go unstated in this direction from the DOE is that *any restriction* placed on recording IEP conferences by a public agency must *first and foremost* comply with the laws of the state in which that agency is located. Your district's consent to record form, in both content and spirit, fails to do so.

I turn now to the form, the very first sentence of which informs readers that you value your relationship with parents and believe that "trust, transparency, and open dialogue" are important to your educational mission. In the very next sentence you accuse any parent who wishes to record their IEP meeting of breaking trust and stifling dialogue. You conclude the sentence by suggesting to parents that, even though you don't think it's a good idea for them to record the meeting, you will not prohibit them from doing so. I remind you, you *do not* have the legal authority to restrict parents from recording in the first place.

In the next sentence you inform parents that, in accordance with "Policy KKB/2420⁷," they are prohibited from recording "any other meeting with school staff." You do not have the authority to enact such a blanket prohibition, and neither does your school board. To the extent Policy KKB/2420 prohibits parents from making audio recordings of meetings to which they are a party, whether made secretly or otherwise, it is in direct conflict with state law and is therefore void.⁸ To

⁴ See generally, *KC Motorcycle Escorts, L.L.C. v. Easley*, 53 S.W.3d 184, 187 (Mo. App. W.D. 2001) ("Statutes relating to the same subject matter are considered in pari materia. The doctrine requires that statutes relating to the same subject matter be construed together even though they are found in different chapters or were enacted at different times. When one statute deals with a subject in general terms and another statute deals with the same subject in a more specific way, the two statutes should be harmonized[.]") (internal citations omitted).

⁵ See generally History of the IDEA, available at <https://sites.ed.gov/idea/about-idea/#IDEA-History>

⁶ See OSEP Memorandum 91-24, and explanatory letter dated June 04, 2003, available at <https://www2.ed.gov/policy/speced/guid/idea/letters/2003-2/redact060403iep2q2003.pdf>. See also, OSEP letter to Dianna M. Savit, Esq. dated January 19, 2016 again reiterating the OSEP's position from Memorandum 91-24, available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/savit-dcps-policies1-1-19-2016.pdf>

⁷ Moberly School Board Policy KKB as adopted may be read in full at:

<https://simbli.eboardsolutions.com/Policy/ViewPolicy.aspx?S=398&revid=Pn49plusu5z39uR3a1oKhqw3A==&ptid=amIgtZiB9plushNj16WXhfiOQ==&secid=1QSfUuz8WRJ5slsh0xnyVwukQ==&PG=6&IRP=0>

⁸ A political subdivision's policies cannot conflict with state law. See *City of St. Peters v. Roeder*, 466 S.W.3d 538, 543 (Mo. banc 2015) ("When [an] ordinance conflicts with a statute, the ordinance is void."). According to the Missouri Supreme Court, "The powers granted a [political subdivision] must be exercised in a manner not contrary

the extent the policy further restricts transmission by a parent to a third party of a lawfully obtained audio recording of a meeting in which they are or were a participant, it is also void and of no binding effect.⁹

You next instruct parents that if they wish to record an IEP/504 meeting they must provide written notice “at least 24 hours prior” to the meeting.¹⁰ This directive misstates Missouri law in at least two ways. First, it places preconditions on a parent’s ability to record a meeting. As stated above, you cannot do that. Parents have an absolute right to record meetings to which they are a party whether they notify you or not. You cannot rescind that right by policy. Second, you appear to misread the time constraints of subsection three of § 162.686. The statute prohibits you from imposing a notification requirement of *more than* twenty-four hours. Your letter requires parents to give *at least* twenty-four hours’ notice. That is the precise inverse of what you are permitted to do. If you choose to institute a notice requirement under subsection three’s permissive framework, you cannot require parents to give you more than twenty-four hours’ notice. Remember also that any pre-meeting notification requirement you choose to adopt will be voluntary only. When read in harmony with Missouri’s other audio recording statutes, subsection three permits the creation of merely noncompulsory notice guidance that parents are free to either adhere to or reject as they see fit.

The form’s opening paragraph finishes with two sentences that can only be read as some sort of veiled threat or intimidation tactic. You first warn parents that making “secret recordings” without providing notice is a “violation of policy,” implying that doing so will earn them some sort of demerit or, worse, jeopardize their child’s benefits.¹¹ You then follow that with the declaration that if parents decide to record you then you’re going to record them as well. The tone of that sentence is deeply troubling. Striking such an ominous posture against parents trying to protect the educational interests of their children is unconscionable, and I urge you to take a more constructive approach.

The request form concludes with a list of ten “Rules for Recording IEP/504 Meetings” that lays out the ground rules parents must follow if they wish to record a meeting. The list is troubling on a number of fronts. First, nearly every directive misrepresents the law and, for the reasons already stated, is legally void and unenforceable. Second, at least two of the “rules” raise substantial constitutional concerns that may expose your district to liability under 42 U.S.C. § 1983.¹² Finally,

to the public policy of the state and any provisions in conflict with prior or subsequent state statutes must yield.” *Morrow v. City of Kansas City*, 788 S.W.2d 278, 281 (Mo. banc 1990).

⁹ *Id.*

¹⁰ I note here that §162.686.3 should be read as merely permissive authority. Schools are not obligated to institute notification requirements at all, but they are permitted to do so if they choose.

¹¹ It is worth noting here that IDEA confers constitutionally protected entitlement benefits on qualifying students that are cloaked in robust due process safeguards. *See, Atkins v. Parker*, 472 U.S. 115, 128 (1985) (holding that rights created under entitlement programs are treated analogously to property rights and are afforded similar constitutional protections.).

¹² Of particular concern are those “rules” that purport to restrict parents’ First, Fifth and Fourteenth Amendment rights as it relates to what they may or may not do with a lawfully obtained audio recording of a conversation to which they were a party.

when read as a whole, it is clear that the primary, if not the sole, purpose of the list is to intimidate parents into relinquishing their right to fully participate in their child's education by recording their IEP meetings. To say I am disheartened by such a breach of public trust is an understatement.

Let me be clear. Neither you, nor the Moberly School Board, have any authority whatsoever to limit a parent's ability to make an audio recording of an IEP meeting to which they are a party. The right to record such meetings is vested in the parent, and they may exercise it as they see fit regardless of any restrictions or prohibitions you would prefer be in place. I urge you in the strongest possible terms to revisit this policy immediately and either rescind it in its entirety, or revise it in a manner that complies with Missouri law.

Very truly yours,



Eric S. Schmitt.