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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 6100

September 10, 1982

EAVESDROPPING:

Recording of meeting of individualized educational planning committee not prohibited

SCHOOLS AND SCHOOL DISTRICTS:

Right of parent to record a meeting of individualized educational planning committee

1931 PA 328, Sec. 539a et seq, which prohibits eavesdropping, is not violated by a parent recording an individualized educational planning committee meeting without the consent of all participants.

The parent of a handicapped child has a right to record an individualized educational planning committee meeting.

Honorable Keith Muxlow

State Representative

State Capitol

Lansing, Michigan 48909

You have requested my opinion on the following two questions:

1. Does the eavesdropping statute prohibit the recording of individualized educational planning committee (IEPC) meetings without the consent of all participants?
2. If the answer to the first question is no, does the parent of a handicapped student have a right to record an IEPC meeting?

The eavesdropping statute is a part of the Michigan Penal Code, 1931 PA 328, C 82 Secs. 539a-539i, MCLA 750.539a-750.539i; MSA 28.807(1)-28.807(9). 1931 PA 328, supra, Sec. 539a(2) defines 'eavesdrop' or 'eavesdropping' to mean 'to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse. . . .' (Emphasis added.) 1931 PA 328, supra, Sec. 539c provides, in pertinent part:

'Any person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto . . . is guilty of a felony . . .' (Emphasis added.)

The Education for All Handicapped Children Act of 1975, 89 Stat 773 (1975), 20 USC 1400 et seq, Sec. 1414(a)(5) requires each local or intermediate school district, as a condition to receipt of federal financial assistance, to develop, establish or revise an individualized education program (IEP) for each handicapped child residing in the district at the beginning of each school year. 20 USC 1401(19) defines the term 'individualized education program' as a written statement for a handicapped child developed in a meeting of representatives of the local school district or the intermediate school district, the teacher and the child's parents. The statutory requirement is amplified by federal regulations, 34 CFR 300.340-300.349 and counterpart state administrative rules, 1980 AACRS, R 340.1721b-R 340.1721e and R 340.1722c.

The representative of the school district or intermediate district, the child's teacher and the child's parents collectively form the individualized educational planning committee or IEPC. The IEPC meets to determine whether the child has a handicapping condition which requires special education programs and services and, if so, the specific programs and services which will be provided. See, Board of Education of the Hendrick Hudson Central School District v Rowley, 50 USLW 4925, 4927 (US Sup Ct, 1982).

The reported cases construing the eavesdropping statute involve surreptitious recording or monitoring of conversations without the knowledge of one or more of the participants. See People v Livingston, 64 Mich App 247, 236 NW2d 63 (1975); People v Warner, 65 Mich App 267, 236 NW2d 284 (1975), aff'd by an equally divided court 401 Mich 186, 258 NW2d 385 (1977); Navarra v Bache Halsey Stuart Shields, Inc, 510 F Supp 831 (ED Mich, 1981). In the situation posed in your inquiry, the recording would be made openly with the knowledge of all participants

but without their consent. There is a question as to whether the eavesdropping statute was intended to cover such a situation, but that question need not be addressed to answer your inquiry.

In the situation posed in your inquiry, the recording would be made by a participant in the conversation. The Court of Appeals recently held in Sullivan v Gray, ---- Mich App ---- (decided June 23, 1982), app lv filed (Mich July 8, 1982) (No 69765), that the eavesdropping statute does not prohibit recording of a conversation by a participant in the conversation without consent of all the participants.

In any event, the eavesdropping statute applies only to 'private discourse' and 'private conversation.' The IEPC meeting is a legally required meeting of representatives of a public agency--the school district--and the handicapped child's parents to discuss provision of special education programs and services to the child by the school district. The IEPC is required to develop a written 'individualized education program' which must include, inter alia, the specific special education and related services to be provided to the child and a statement of annual goals, including short term instructional objectives. 34 CFR 300.340 and 300.346 and 1980 AACRS, R 340.1721e. This written document is then utilized by the district's administrators and teachers in assigning and providing services to the child. A legally required meeting of representatives of a public agency to discuss provision of legally required programs and services is not a private discourse or conversation.

Moreover, the written document developed by the meeting is clearly intended to be reviewed and utilized by teachers and other school personnel. The State of Washington has an eavesdropping statute very similar to the Michigan statute. The Washington courts have held that where one expects the substance of his conversation to be communicated to others and not remain confidential, it is not a private conversation within the meaning of the statute. State v Forrester, 21 Wash App 855; 587 P2d 179 (1978) and State v Bonilla, 23 Wash App 869; 598 P2d 783 (1979). The written individualized education program sets forth the IEPC's conclusions and recommendations. Thus, there clearly cannot be any expectation by the participants in the IEPC that the substance of their conversations will remain confidential.

It is my opinion, therefore, in answer to your first question, that 1931 PA 328, Sec. 539a et seq, supra, does not prohibit the recording of individualized educational planning committee meetings without the consent of all participants.

Turning to your second question, the federal statute, 20 USC 1401 et seq, and its implementing regulations, 34 CFR, Part 300, are silent on the question of whether there is a right to record IEPC meetings. The state statutory provisions--School Code of 1976, 1976 PA 451, Secs. 1701-1766, MCLA 380.1701-380.1766; MSA 15.41701-15.41766--and the administrative rules--1980 AACRS, R 340.1701-R 340.1873, are also silent on the question.

In response to the specific question of whether school district representatives or parents may tape record an IEPC meeting, the Bureau of Education of the Handicapped of the United States Department of Education issued a policy letter on December 19, 1979, in which it stated:

'As you know, the use of tape recorders in IEP meetings is not addressed in either the Statute or regulations. Our informal view is that a recorder should be allowed if either the parents or school officials request it . . .

'Although our informal view would permit the use of tape recorders in IEP meetings, we do not have the authority under existing regulations to either require or prohibit their use. . . .' 2 EHLR 211:142.

Subsequently, on January 19, 1981, the United States Secretary of Education issued a formal policy interpretation of IEP requirements which adopted the position taken in the policy letter.

'May IEP meetings be tape-recorded?

'The use of tape recorders at IEP meetings is not addressed by either the Act or the regulations. Although taping is clearly not required, it is permissible at the option of either the parents or the agency. . . .' 46 FR 5460, 5465; 1 EHLR 103.48.

There is no basis for reaching a different conclusion under the state statute and administrative rules.

It should also be noted that if either the parents or the school district disagree with the decision of the IEPC, they have a right to a due process hearing on the matters in dispute. 20 USC 1415(b)(2); 1980 AACRS, R 340.1724. They are entitled to a written or electronic verbatim record of that hearing. 20 USC 1415(d); 1980 AACRS, R 340.1724b(1)(d).

It is noted that in an opinion addressed to Representative William S. Ballenger dated September 14, 1970, it was concluded that a representative of the press, including radio stations, may not be prohibited from making a tape recording of a public meeting of a board of county commissioners so long as the tape recording is made without using county electricity, is made with an essentially silent tape recorder, and is made in such way as not to unduly distract from or intrude upon the meeting of the public body.

Clearly, taping an IEPC meeting is permissible at the option of either the parents or officials of the school district. If the parents desire to tape the IEPC meeting, the school district lacks any lawful authority to refuse to proceed with the IEPC on the ground that such meeting is being taped by the parents.

In answer to your second question, it is my opinion that the parent of a handicapped child does have a right to record an IEPC meeting.

Frank J. Kelley

Attorney General

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