

STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

IN THE MATTER OF:

ISSAQUAH SCHOOL DISTRICT

SPECIAL EDUCATION  
CAUSE NO. 2003-SE-0133

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER**

A hearing in the above-entitled matter was held before Administrative Law Judge Michael W. Furtado in Seattle, Washington, on December 5, 2003. The interested parents were represented by Professor James Rosenfeld, and Kim Breitling and David Schwartz, Rule 9 interns. Issaquah School District (District) was represented by Stephanie Pickett, attorney at law. The Administrative Law Judge, having sworn the witnesses, heard testimony, and considered the admitted exhibits and arguments of the parties, hereby enters the following:

**STATEMENT OF THE CASE**

The parent filed a request for due process hearing with the Office of the Superintendent of Public Instruction (OSPI) on October 15, 2003. The parties were served with a copy of a Notice of Hearing setting this matter for hearing. A prehearing conference was convened on October 23, 2003. At the parties' request, the prehearing conference was continued until November 20, 2003, and the hearing until December 2, 2003. At the prehearing conference the parties agreed to continue the hearing until December 4, 2003. The parties agreed to: (1) a hearing location at the District administrative offices; (2) a date for exchange of documents and witness lists; (3) definition of issues; (4) hearing date of December 4, 2003; and (5) extension of the deadline for decision to January 2, 2003.

The parties submitted cross-motions for summary judgment on October 31, 2003, and replies on November 7, 2003. The ALJ issued an Order on Parties' Cross-Motions for Summary Judgment on November 18, 2003, denying both party's motions. The hearing commenced as scheduled. The proceedings were reported by Sandy Barron, Bob Thomas and Associates.

The parties agree that the record and exhibits admitted in the matter of Issaquah School District, Cause No. 2003-SE-0133 should be incorporated into the record in this matter. The District's exhibits D1 through D17 were admitted. The Parent's exhibits P1 through P11, and P13 were admitted. Exhibits P12 and P14 through P 24 were set aside.

## ISSUES

1. Whether IEP meetings are private conversations, and thereby require the consent of all parties to the parents' request to tape record the meeting.
2. Whether the District properly exercised its discretion when it prohibited the Parents from tape recording an IEP meeting held on May 1, 2003.

## FINDINGS OF FACT

1. In late April 2003, the District's former supervisor of special education services learned from members of the student's IEP team that the parents had requested permission to tape record the next IEP meeting, scheduled for May 1, 2003. The parents had tape recorded an IEP meeting held the prior year. On that prior occasion several team members initially objected to the tape recording, but eventually acquiesced and the meeting was tape recorded. During contract negotiations in 2002 with the District's teacher's union, an agreement was reached that prohibited tape recording of IEP meetings if any teaching staff objected to the recording. In this case, members of the student's IEP team objected to tape recording the pending meeting. One staff person suffered from an anxiety disorder, and said that tape recording the session would exacerbate her condition. The former supervisor discussed the issue with the District's director of special education services, who advised her that the District's practice was to deny requests for tape recording IEP meetings if District staff objected.

2. On April 29, 2003, the supervisor of special education services sent the Parents a formal Notice of Action which denied the Parents their implied request to tape record the May 1, 2003, IEP meeting. The Notice explained that team members were not in agreement with the proposed audio taping. The District has a policy, found in its Policy and Procedures manual at Section 2161 P, of providing interpreters or other accommodations necessary for parents' participation in IEP meetings. The Notice of Action sent to the parents on April 29, 2003 proposed alternatives to tape recording the meeting that might accommodate the Parents' request, which included the District taking notes that would be shared with the Parents, and that parents' representatives expected to attend the meeting would also be allowed to take notes. The District also proposed providing the parents with an advance copy of the draft IEP prior to the meeting. Neither the Notice of Action nor Notice of Procedural Safeguards contained any information about exceptions to the District's practice that might apply if necessary to the parent's understanding of the IEP meeting.

3. On May 1, 2003, the Parents and their legal representatives attended the IEP meeting. Before the meeting started, they assembled tape recording equipment and placed a microphone on the table around which the team was meeting. The parents confirmed they had received the District's Notice of Action. The supervisor reiterated that IEP team members were uncomfortable with having the meeting audiotaped. The Parents did not offer any reasons at that time why audio taping the meeting was necessary. The District did not ask why the Parents wanted to tape the meeting. The meeting was adjourned without addressing the IEP.

4. Prior to an IEP meeting held the previous year, the Parents had submitted a request to tape that meeting, by a letter dated May 29, 2002. In that request the Parents cited the "IDEA regulations, Appendix A, question and answer number 21" as the basis for their request. This question and answer interpreted regulations promulgated by the Office of Special Education Programs (OSEP), and allows school districts to prohibit tape recording IEP meetings, and gave examples in which a district must make an exception. The Parents showed a familiarity with the substance of Appendix A, by citing reasons included in question 21 where tape recording an IEP meeting might be necessary. Among other reasons, the Parents cited an unidentified medical disability that would prevent their full understanding of the IEP meeting absent an audiotape. The rest of the letter addressed specific concerns for their child's education, exhibiting an extensive familiarity with educational issues and processes. I conclude that the parents, although not professionals in special education, have a high degree of facility with special education services and the laws and regulations governing special education, and are fully able to participate in the IEP process. More specifically, I conclude the Parents knew of Office of Special Education Programs (OSEP) guidance giving School Districts discretion in allowing tape recording IEP meetings, and the examples of exceptions suggested in that guidance. Given that familiarity with OSEP guidance, I conclude the Parents knew on May 1, 2003, that the District might be obligated to allow tape recording if the Parents alleged specific reasons why tape recording was necessary to their participation in the IEP meeting, but the Parents chose not to articulate any reasons for their request.

5. On May 8, 2003, Parent's counsel requested the District clarify the reason it had denied the Parent's request to tape record the May 1, 2003, IEP meeting. In a written reply dated May 9, 2003, District counsel cited RCW 9.73.030, a Washington state regulation that prohibits tape recording private conversations unless the parties consent, as the basis for the denial. District counsel further stated that the District generally declines to allow tape-recording of IEP meetings. The reply did not identify any exceptions to the practice.

6. The school district's written policies addressing the tape recording of an IEP meeting were, as of the May 1, 2003, limited to Policy 2161P, which ensures the District will provide accommodations necessary for a parent's participation in meetings. 2161P

complies with WAC 392-172-15700(5), which requires the District to take "whatever action is necessary to ensure that the parent or adult student understands the proceedings at an IEP meeting...." The District had a normal practice, beginning in May of 2003, of prohibiting tape recording IEP meetings. The District complies with OSEP guidelines, and will allow tape recording when parents cannot understand English, or have a disability that limits their ability to take notes. The District is currently drafting a Policy that will specifically address recording IEP meetings, and plans to draft Procedures on the subject once the Policy is approved by the School Board. This Policy will reference relevant OSEP guidance.

7. The parties reconvened the IEP meeting for 2003 on May 19. The meeting was not tape recorded, but a District representative took five pages of detailed notes. The Parents actively participated in the meeting, asking questions of, or reporting to, the IEP team on numerous occasions. The Parents legal representatives were also observed taking notes. Although the Parents do not remember if they were given a copy of the District's notes, I credit the District's assertion that copies were given to the Parents. The Parents then, and now, have not objected to the Notes contents.

8. All issues had not been addressed by the end of the scheduled time for the meeting on May 19, 2003. A follow-up meeting was held on May 28, 2003. The District again took notes, which showed the Parents actively participated in the meeting. The notes were later shared with the parents. The Parent's legal representatives were present. The student's IEP for 2003 was finalized at that meeting, and was approved by the parents.

9. The Parents do not allege their participation in the IEP meetings in May, 2003, was impaired by not being able to tape record the meetings, although the Parents speculate the plan could have been improved. At the time of the meetings in May of 2003 and throughout the hearing process the Parents made no assertions that they have any condition or circumstance that makes tape recording an IEP meeting a necessity for their understanding of or participation in the IEP meeting, or that the District's notes were incorrect. The Parents asserted no reasons for their request to tape record in May, 2003. During the hearing the Parents identified areas in which a tape recording would be helpful, would assist the Parents, might be more reliable, but made no reference to tape recordings as necessary to their understanding or participation. The Parents are satisfied with their child's IEP. I therefore conclude neither the Parents nor the Student were harmed by being prohibited from tape recording IEP meetings.

10. The Parent's expert witnesses did not have any familiarity with the Parents, or their ability to participate in IEP meetings. The expert witness testified that she does not recommend tape recording IEP meetings, as she takes notes. In her experience in

meetings where the parties are contesting issues, which is characteristic of the cases where the expert is involved, teachers are frequently uncomfortable with tape recorded IEP meetings, and may refuse to participate in those meetings.

### CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 U.S.C. Section 1401 et seq. (Individuals with Disabilities Education Act (IDEA)), Chapter 28A.155 RCW, Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 CFR 300 et seq., and Chapter 392-172 WAC.

2. The Individuals with Disabilities Education Act (IDEA) (formerly the Education for All Handicapped Children Act) and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and condition such funding upon a state's compliance with extensive goals and procedures. In Hendrick Hudson District Board of Education vs. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

First, had the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.

103 S. Ct. at 3051.

A "free appropriate public education" consists of both the procedural and substantive requirements of the IDEA (formerly the EHA). The Rowley court articulated the following standard for determining the appropriateness of special education services:

According to the definitions contained in the (Education for All Handicapped Children Act) a 'free appropriate public education' consists of education instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the state's regular education, and comport with the child's IEP. Thus, if

personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items of the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act. 103 S. Ct. at 3041, 3042.

3. Are IEP meetings private conversations under RCW 9.73.030?
4. The parties raise an issue of State law and regulations that is not related to IDEA. As this issue is beyond the scope of my jurisdiction, I will not make a ruling on it.
5. Did the District properly exercise its discretion when it prohibited the Parents from tape recording an IEP meeting held on May 1, 2003.
6. The IDEA is silent on tape recording IEP meetings.
7. OSEP guidance on tape recording IEP meetings, initially found in 34 CFR Ch. III, Pt. 300, App. A, recently was reiterated in an OSEP letter dated June 4, 2003. OSEP guidance provides: "(A)n SEA, or public agency, therefore has the option to require, prohibit, limit or otherwise regulate the use of recording devices at IEP meetings." Letter to Anonymous, 103 LRP 49595 (OSEP 2003).
8. The guidance continues in a separate paragraph: "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."
9. The Parents argue that the discretion whether to tape record a meeting or not should rest with a parent. OSEP guidance vests that discretion with the District. The District had a practice of prohibiting tape recording IEP meetings, and a written policy the accommodations would be made when necessary for a parent's participation in IEP meetings. I conclude the District has the discretion to prohibit tape recording IEP meetings.
10. Although the District had the authority under OSEP guidance to develop the practices and exceptions noted above, did the District deny the Parents their right to meaningfully participate in the IEP meeting, by failing to notify the parents of the exceptions to its tape recording practice? 34 CFR 300.345 requires a district to take whatever action is necessary to ensure the parent understands the proceedings at an IEP meeting. Although notifying parents of the options available to assist parents in an IEP meeting is not among the procedural safeguards listed in 34 CFR 300.129, the analysis appropriate for procedural error is helpful here.

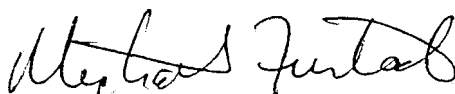
11. Generally, procedural error will constitute a denial of a free and appropriate public education (FAPE) only where it results in the loss of educational opportunity, or seriously infringes the parents' opportunity to participate in the IEP formulation process. See *W.G. v. Board of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479 (9th Cir. 1992); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994, (1st Cir. 1990), cert. den., 499 U.S. 912, 111 S.Ct. 1122 (1991); *Hall by Hall v. Vance County Bd. Of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985).

12. Here, there is no allegation that the parents were unable to meaningfully participate in the IEP meeting, or that there was a loss of educational opportunity. The parents knew of OSEP guidance on tape recording, prior to the meeting on May 1, 2003. The parents actively participated in the May, 2003 IEP meetings. The parents are satisfied, even months later, with the abundant assistance of legal counsel, with the IEP plan developed in May, 2003. I therefore conclude the District did not violate IDEA or OSEP guidance, or abuse its discretion, in prohibiting the Parents from tape recording their May 1, 2003 IEP meeting.

#### ORDER

1. The District properly exercised its discretion under IDEA to prohibit tape recording an IEP on May 1, 2003.

Dated at Seattle, Washington this 10<sup>th</sup> day of , 2003.



Michael W. Furtado  
Administrative Law Judge  
Office of Administrative Hearings