MARYLAND STATE DEPARTMENT OF EDUCATION
PREPARING WORLD CLASS STUDENTS

Karen B. Salmon, Ph.D.
State Superintendent of Schools

200 West Baltimore Street • Baltimore, MD 21201 • 410-767-0100 • 410-333-6442 TTY/TDD • marylandpublicschools.org

MEMORANDUM

TO: Local Directors of Special Education
Local Preschool Special Education Coordinators

FROM: *Marcella E. Franczkowski, M.S.*
Assistant State Superintendent
Division of Special Education/Early Intervention Services

DATE: October 11, 2016

RE: **Review and Update Policies Regarding Use of Audio/Video Recording Devices**

Introduction

The purpose of this memo is to request that each local school system and public agency (LSS/PA) review and update its policy, if any, regarding the use of audio or video recording devices in the context of individualized education program (IEP) team meetings. Regardless of whether the LSS/PA makes any amendments to its policy, each LSS/PA must forward to the Maryland State Department of Education, Division of Special Education/Early Intervention Services, a copy of the current policy, or alternatively, provide notice to the Division that your LSS/PA does not have a policy.

Please provide your response by March 1, 2017 to Ms. Alma McPherson, Branch Chief for Policy and Accountability, Maryland State Department of Education, Division of Special Education/Early Intervention Services, alma.mcpherson@maryland.gov.

The Individuals with Disabilities Education Act (IDEA) is silent regarding the use of audio or video recording devices in the context of IEP team meetings. As a result, the U.S. Department of Education, Office of Special Education Programs (OSE) has consistently held that each State has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP team meetings. *See Letter to Savit,* 67 IDELR 216 (Jan 19, 2016); 64 Fed. Reg. 12406, 12477 (Mar 12, 1999). Based on that federal guidance, the Maryland State Department of Education has opted not to directly regulate in this area; instead, each LSS/PA may develop its own recording policy under the following conditions:

- If a LSS/PA has a policy, then a copy of the policy must be submitted to the Division of Special Education/Early Intervention Services.
- If a LSS/PA doe not adopt a policy that prohibits or limits the use of recording devices, then the LSS/PA must permit the recording of IEP team meetings.
- If a LSS/PA has a policy that prohibits or limits the use of recording devices, then it must ensure that its policy is consistent with the purposes of the IDEA, any State or federal guidance, and other applicable laws. The policy must also be applied consistently.
- Importantly, a local policy that prohibits or limits the use of recording devices 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 under the IDEA. *See Letter to Anonymous,* 40 IDELR 70 (June 4, 2003).
- Any recording of an IEP team meeting maintained by the LSS/PA is an "education record" protected under the IDEA and the Family Educational Rights and Privacy Act (FERPA), meaning that the recording should not be disclosed without prior consent, and the LSS/PA must comply with a parent's request to access the recording within a reasonable time, but in no case later than 45 days after receipt of the request. *See* 34 C.F.R. Part 99.

Local Response

While there has been no change to the IDEA or State and federal guidance, the availability of recording devices has changed dramatically. During the past decade, technology has progressed such that high quality recordings are everywhere. The days of camera tripods and clunky cassette recorders are gone. Anyone who carries a smartphone has audio and video recording capabilities at their fingertips. As a result, parents may be more likely to seek to record IEP team meetings with little or no notice, or even attempt to bring to the table footage of their child that they captured in other settings (e.g. at home, at the bus stop, on the playground, or in the community). Local recording policies and responses must prepare for and reflect this reality.

In light of the fact that technology often outpaces policy, I ask that you review your local recording policy, if one exists, and update the policy to address audio and video recording as necessary. You may want to consult colleagues outside of special education to confirm whether a generalized recording policy exists within the LSS/PA. If no recording policy exists, then also consider how you respond in the absence of such a policy. **Please note that regardless of whether you make any amendments, you must forward to the Division of Special Education/Early Intervention Services a copy of the current recording policy, or alternatively, provide notice to the Division that you do not have a policy**.

To aid in this review, several guiding questions are listed below that you may wish to consider.

1. Do you have a local policy that prohibits or limits recording in IEP team meetings?
   - If not, are parents and school staff both aware that recording is permitted?
   - If so, does your policy specify whether it allows audio, video, or both?
2. Is notice required before recording?
   - If not, what do you do when a request is made?
   - If so, how much notice is required?
3. Is agreement required before recording?
   - If not, what do you do when someone objects?
   - If so, from whom is agreement required? Is notice required before recording?
4. Do you have a local policy regarding recoding <u>outside</u> IEP team meetings?
   - If not, what do you do when a person begins recording?
   - If so, how does it compare to recording inside IEP team meetings?
5. Does your policy comply with IDEA?
   - Does it provide exceptions when necessary to ensure the parent understands?
   - How do you address a parent whose native language is other than English?
6. Does your local policy comply with FERPA?
   - How do you address the privacy of the student? Other students?
     How do you process requests for a recording maintained by the school?

MEF/CEB:las