BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017041029
v.	ORDER EXCLUDING AUDIOTAPE FOR ANY PURPOSE OTHER THAN IMPEACHMENT AND ORDER FOR SEPARATE BRIEFING ON EVIDENTIARY ISSUES
SANTA PAULA UNIFIED SCHOOL DISTRICT AND VENTURA UNIFIED SCHOOL DISTRICT.	

On the last day of hearing in this matter, before administrative law judge Alexa J. Hohensee, Student sought leave to admit as rebuttal evidence excerpts of an audiotape recording of Student's November 3, 2016 individualized education plan team meeting (Student's Ex. S-25). The Santa Paula Unified School District objected on various grounds. The ALJ deferred determination of whether the audiotape would be admitted into evidence, and allowed questioning of Parent on the circumstances surrounding the audiotaping of the IEP team meeting. The ALJ then ordered the parties to include argument on the admissibility of the audiotape and any exceptions to exclusion in their closing briefs. Upon reflection, the ALJ has determined that this issue should be decided by a separate evidentiary order, and by this order sets a separate briefing schedule for this evidentiary issue.

1. Inadmissibility of Surreptitiously Recorded Audiotape. The California Legislature has found electronic recording devices to be a serious threat to the exercise of personal liberties that cannot be tolerated in a free and civilized society. (Pen. Code § 630.) It is a crime to intentionally audio record a confidential communication without the consent of *all* parties, and the violation is subject to punishment by fines and imprisonment. (Pen. Code § 632.) In addition, someone who had been unlawfully recorded may bring an action against the person who committed the violation for damages $5,000 or three times the amount of actual damages, whichever is greater. (Pen. Code § 637.2). Evidence obtained in violation of Penal Code section 632 is inadmissible in any judicial, administrative, legislative, or other proceeding. (Pen. Code § 632(d).)

The California Education Code expressly provides that, notwithstanding Penal Code 632, parents and school districts have the right to audio record IEP team meetings, which are confidential. (Ed. Code, § 56341.1, subd. (g)(1).) However, to exercise this right, the parents or the district "shall notify the members of the individualized education program team of his, her or its intent to audio record a meeting at least 24 hours prior to the meeting." (*Ibid*.) If the school district initiates the notice, and parents refuse to attend if the meeting is recorded, the meeting may not be recorded. (*Ibid*.)

Parent testified that she was told by one or more knowledgeable persons that she was required to notify Santa Paula if she intended to record an IEP team meeting, and that Parent was aware she was not permitted to record the meeting without such notification. Instead, Parent purchased a small recording device to secretly record the confidential discussions at the IEP team meeting without the knowledge or consent of IEP team members. Parent did not inadvertently fail to notify Santa Paula that she intended to record the meeting, or to give the team less than 24 hours' notice of her intent to record. Parent acted intentionally, surreptitiously and in violation of Penal Code, section 632, and Education Code section 56341.1, subdivision (g)(1). Accordingly, the audiotape of the November 3, 2016 IEP team meeting, Student's Ex, S-25, is inadmissible in this administrative proceeding. Student's motion to admit Ex. S-25 is denied.

A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement if: (i) the statement is inconsistent with the testimony at the hearing (Evid. Code, § 1235), and (ii) the witness was also examined while testifying as to give him or her an opportunity to explain or deny the statement. (Evid. Code, § 770). (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219 (*Johnson*).) The statement must in fact be inconsistent with that witness's hearing testimony, and testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event, unless a witness's claim of lack of memory amounts to deliberate evasion. (*Id.*, at 1219-1220.) Any inconsistent statement made at the November 3, 2016 IEP team meeting offered by Student for impeachment purposes must be inconsistent with the witness's testimony at hearing, and the witness must have been examined regarding that statement and given an opportunity to explain or deny the statement.

The use of unlawfully obtained inconsistent statements limited. The exclusionary rule of Penal Code section 632 effectuates privacy rights, deters future violations and preserves judicial integrity by denying the wrongdoer the fruit of the illegally obtained evidence. (*Frio v. Superior Court* (1988) 203 Cal. App. 3d 1480, 1490). Nonetheless, the right to privacy is not a shield for perjury and does not permit a witness to lie with impunity. (*Id.* at p. 1497.) Therefore, a witness may be impeached with illegally obtained evidence that was not admissible in the party's case in chief. (*Ibid*, citing *United States v. Haven* (1980) 446 U.S. 620, 627-628.) Such evidence is admissible for the limited purpose of impeaching the witness only, and only if that witness makes a specific statement inconsistent with the illegally obtained evidence. (*People v. Taylor* (1972) 8 Cal. 3d 174, 182.) The evidence is not admissible for any other purpose. (*Ibid*.)

Student may not use the unlawfully recorded and inadmissible audiotape offered into evidence to meet his burden of proof. The unlawfully recorded tape may be used only to impeach witnesses, and will be used by the ALJ solely to determine the credibility of those witnesses.

At hearing, Student offered a transcript of the November 3, 2016 recording, which was not admitted into evidence (Student's Ex. S-23). For purposes of a determination of the admissibility of statements made on the audiotape for impeachment, only excerpts of the

transcript, rather than the entire audiotape itself, will be considered for admission into evidence.

2. Submission Schedule. The parties shall submit their proposed post-hearing evidence, objections and moving papers as follows:

(a) By 5:00 p.m. on August 28, 2017, Student shall serve District by fax or email and file with OAH a document containing the transcript excerpts Student intends to offer into evidence, with points and authorities on the admissibility of each excerpt for impeachment purposes. Excerpts shall be designated by reference to lines and pages in the transcript at Student's Ex. S-23.

(b) No later than 5:00 p.m. on August 31, 2017, District shall serve Student by fax or email and file with OAH notice of any asserted transcription inaccuracies, counter transcript excerpts, proposed objections or grounds for exclusion of Student's excerpts, and points and authorities on the admissibility of each excerpt for impeachment purposes.

A separate order on the admissibility of each of the excerpts will be issued on or before September 11, 2017.

3. Closing Briefs. At the joint request of the parties, as set forth on the record, this matter has been continued to 1:00 p.m. on September 5, 2017, for submission of closing briefs only. The schedule for closing briefs is unchanged.

References by Santa Paula in its closing brief to statements made in the audiotape of the November 3, 2016 IEP team meeting, as designated by Student for impeachment, shall not be deemed a waiver of Santa Paula's objections to that evidence for purposes of determining the admissibility of that evidence.

IT IS SO ORDERED.

DATE: August 22, 2017

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Alexa Hohensee
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ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings