BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017041029
v.	ORDER ON ADMISSIBILITY OF EXCERPTS OF TRANSCRIPT OF UNLAWFUL AUDIO RECORDING FOR IMPEACHMENT PURPOSES ONLY
SANTA PAULA UNIFIED SCHOOL DISTRICT AND VENTURA UNIFIED SCHOOL DISTRICT.	

Student seeks admission of a transcript of an unlawfully obtained audio recording of Student's November 3, 2016 individualized education program team meeting (Ex. S-23) as rebuttal evidence. For the following reasons, the transcript of the unlawful recording and all excerpts of the transcript are excluded from evidence for any purpose.

During the due process hearing, Student sought admission of an audio recording of Student's November 3, 2017 IEP team meeting secretly recorded by Parent (Ex. S-25). On August 15, 2017, the testimonial portion of the hearing was closed, with the Administrative Law Judge reserving determination of whether any portion of the unlawfully obtained audio recording would be admitted into evidence until the parties filed written closing briefs addressing that issue.

By Order dated August 22, 2017, the ALJ determined that the unlawful audio recording (Ex. S-25) would not be admitted into evidence. The ALJ found that Parent intentionally and surreptitiously audio recorded the confidential November 3, 2016 IEP team meeting in violation of the privacy rights of all other IEP team members. Accordingly, Student's audio recording, and the transcript of that recording were ruled inadmissible to prove or disprove the content of the discussions at the IEP team meeting to meet Student's burden of proof as part of his case-in-chief. (See Pen. Code § 632.) However, the ALJ reserved determination of whether any portion of the unlawfully obtained recording as reflected in the transcript of the recording prepared by Student and tendered as part of Student's hearing exhibits (Ex. S-23) was admissible for the limited purpose of impeachment, i.e., to show that a witness had made a prior specific statement in the illegally obtained recording inconsistent with testimony at hearing.

The Order established a briefing schedule for Student to make an offer of proof for admission into evidence, for impeachment purposes only, specific excerpts of the transcript of the unlawfully obtained recording, and for District to offer objections, if any, with points and authorities on the admissibility of each excerpt. Excerpts were to be designated by reference to lines and pages in the transcript at Student's Ex. S-23. Student was specifically

instructed that his offer of proof would be limited to the transcript of the recording, and that the audio recording itself would not be considered for purposes of determining whether portions of the illegally recorded conversations would be admitted into evidence for impeachment. Student and District timely submitted their briefs on this issue.

APPLICABLE LAW

It is a crime to intentionally audio record a confidential communication without the consent of *all* parties, and evidence obtained in violation of Penal Code section 632 is inadmissible in any administrative proceeding. (Pen. Code § 632(d).) 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 (*Frio*).) 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, 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*.)

DISCUSSION AND ORDER

Student again seeks to admit into evidence the audio recording (Ex. S-25), as well as excerpts from the transcript of the unlawful recording (Ex. S-23), for purposes of impeaching the testimony of two District witnesses who attended and testified at hearing about the November 3, 2016 IEP team meeting.

Significantly, if Parent had wanted to preserve the discussions which occurred during the November 3, 2016 IEP team meeting as evidence in the event of a dispute concerning Student's education, the Education Code mandated a simple procedure to accomplish this purpose. Specifically, Parent was required to *give 24 hours' notice to District of her intent to record the meeting*. By this procedure, the Education Code provides an easy way for parents of disabled children to comply with California's privacy laws while also permitting parents to memorialize the confidential discussions of the team members regarding the child's educational program. (Ed. Code § 56341.1, subd. (g)(1).) Parent knew that she was required to give notice, but consciously chose not to do so. The consequence of Parent's decision to record without notice is that the audio recording of this confidential meeting is now inadmissible in this administrative proceeding to support Student's case-in-chief. (See Pen. Code § 632, subd. (d).) As stated in the prior Order, only transcribed excerpts of prior inconsistent statements will be considered, and only for purposes of impeaching a witness's credibility, which is addressed below.

Inadmissibility of the Audio Recording

Despite the August 22, 2017 Order, which expressly found the unlawful recording inadmissible for any purpose other than impeaching a witness who was contended to have committed perjury and limited Student's offers of evidence for impeachment to excerpted statements form the transcript of the recording, Student continues to seek admission of the recording into evidence to establish facts necessary to carry Student's burden of proof. Student's counsel is strongly admonished for her blatant disregard of the law, and her apparent attempt to condone Parent's criminal conduct, by seeking admission of an unlawfully obtained and inadmissible recording into evidence for purposes of proving the elements of Student's substantive claims.

Student's first argument for substantive consideration of the unlawful recording as evidence, despite its illegality, is that the recording is a more accurate record of the meeting than the memories of the participant witnesses. However, the California legislature has balanced the accuracy of unlawfully obtained recordings against the privacy rights of its citizens, and favored the protection of privacy rights at the expense of the truth seeking function at trial by excluding what is arguably the best evidence of the speaker's communication. (*Frio*, *supra*, 203 Cal. App. 3d at p. 1496.)

Student's second argument for substantive consideration of the illicitly obtained recording is that it will demonstrate that the Spanish language interpretation that occurred at the IEP team meeting was inaccurate. This argument fails for multiple reasons. First, again, the recording was obtained without the knowledge or consent its participants, in violation of their privacy rights, and is inadmissible to establish what occurred at that meeting. Second, Student did not identify interpretation inadequacies as an issue in his due process filing, and thus, that is not an issue for this proceeding. Third, Student did not address the issue of interpretation accuracy at the November 3, 2017 IEP team meeting as part of his case-in-chief, and so cannot now seek to admit evidence regarding inaccurate interpretation in rebuttal. Fourth, Parent brought a Spanish-speaking advocate from the office of Student's counsel to interpret for her at that IEP team meeting, and the advocate could have contemporaneously pointed out any discrepancies in interpretation or requested further clarification for Parent. Lastly, transcript excerpts of the recording are being considered for admission for the sole purpose of impeachment, and the accuracy of Spanish language interpretation for Parent at the meeting is irrelevant to whether or not witnesses made prior inconsistent and perjured statements.

Student belatedly argues that the ALJ should listen to the audio recording rather than read the transcript submitted by Student because the transcript contains errors and was just a "draft" transcription of the recording, prepared by someone who did not speak Spanish, for the required exchange of evidence five days prior to the hearing. (See Ed. Code, § 56505, subd. (e)7).) Student also seeks to use Spanish language statements by Ms. Friend for impeachment. However, Parent possessed the audio recording for close to seven months prior to filing Student's complaint, and 10 months prior to the due process hearing, had ample opportunity to prepare the transcript and review it for errors, and to address any

inaccuracies found in the transcript during the hearing. Clearly, Student intended to rely on such evidence at hearing. It is inexcusable that Student's counsel failed to fully prepare Student's evidence in time to meet mandatory deadlines imposed on all parties in due process proceedings. After a transcript has been exchanged and marked, and the testimonial part of the hearing has been completed, it is too late for Student to remedy the gross inadequacy of the transcript he prepared and proffered at hearing. Student's inability to cite to specific statements made during the IEP team meeting in support of his offer of proof on admissibility for impeachment because of the inaccuracies in the transcript are of his own making. Counsel's dilatory conduct and lack of diligence do not warrant admission of an unlawfully acquired audio recording.

Student maintains that the Secondary Evidence Rule (Evid. Code § 1521) requires the ALJ to listen to the audio recorded excerpts rather than refer to the transcript, because the audio recording is more accurate. This is a circular and specious argument. The transcript is itself secondary evidence of the audio recording. Student cannot circumvent exclusion of the audio recording as mandated by Penal Code, section 632, subdivision (d), by offering it as "secondary" evidence of the transcription of that recording. Further, the Secondary Evidence Rule requires that secondary evidence of a writing be excluded if a genuine dispute exists concerning the material terms of the writing and justice requires exclusion, or if admission of the secondary evidence would be unfair. (Evid. Code, § 1521, subds. (a) and (b).) Here, the conversations of the members at a confidential IEP team meeting were recorded without consent, in an intentional invasion of each team member's right to privacy, and the accuracy of the transcription is questioned by Student who himself failed to prepare a complete transcript. Under these circumstances, the audio recording must be excluded as unfair to the witnesses recorded without their consent, and because Student cannot be permitted to benefit from a dispute over the accuracy of the transcription he prepared and tendered for hearing, after having had the recording in his possession for 10 months.

Student also contends that the federal Best Evidence Rule 1002 applies. However, due process hearings are State proceedings conducted under the procedural rules governing tribunals in the State of California (Ed. Code, § 56505), and federal rules of procedure do not apply.

Lastly, Student argues that the entire audio recording must be considered to establish that the testimony of the District witnesses was incorrect when they testified that the November 3, 2016 IEP team considered a continuum of placement options for Student, which is the very heart of one of Student's issues. In other words, Student asserts that an unlawfully obtained recording may be admitted into evidence in its entirety whenever parents and school district IEP team members disagree about what occurred at an IEP team meeting. Again, the California legislature has chosen to exclude unlawfully acquired recordings from evidence in administrative hearings, even when more accurate than the witnesses' memories, in favor of protecting its citizens' privacy rights. (See Pen. Code § 632, subd. (d); *Frio, supra,* 2013 Cal. App. 3d at p. 1496.) A simple disagreement in recall of the facts is not sufficient to overcome the provisions of Penal Code, section 632, or the notice requirements of Education Code, section 56341.1, subdivision (g)(1). Student cannot use the recording to

establish key elements of his case; he is limited to using the recording to attack the credibility of witnesses who commit perjury. Moreover, even if one or more of the witnesses were to be found not credible, the unlawful recording itself cannot be used as evidence in support of Student's substantive claims.

The audio recording of the November 3, 2017 (Ex. S-25) is inadmissible and Student's request to have it admitted is denied.

Offers of Proof regarding Perjured Testimony

Adriana Noble

(Ex. S-23, p. 6, last two lines). Student offers to impeach Adriana Noble with an excerpt of the November 3, 2016 IEP team meeting in which Ms. Noble stated that Student had twice been "specifically" removed from a group twice. Student contends that the statement should have been transcribed as Student having been "physically," instead of "specifically," removed from a group, and offers the excerpt to contradict Ms. Noble's testimony at hearing that Student had not been physically restrained.

District objects to admission on the ground that that this is improper impeachment, as her statement is not inconsistent with her testimony, and Ms. Noble was not examined concerning the inconsistency of the offered statement. District also objects on the grounds that the probative value of the statement is outweighed by the undue prejudice to District, and that it lacks foundation, calls for speculation, assumes facts not in evidence and misstates the evidence.

Ms. Noble's testimony at hearing is not inconsistent with the statement in the transcript excerpt. A statement that Student was specifically removed from a group is not inconsistent with Ms. Noble's testimony that Student was not physically restrained. A specific removal can be accomplished without physical restraint, for example, by verbally requesting that Student go elsewhere. In addition, Student's counsel did not give Ms. Noble an opportunity to explain her IEP statement at hearing. Thus, even if Ms. Noble actually used the word "physical" instead of "specifically" as Student contends, his counsel's failure to give the witness the opportunity to explain her statement at hearing itself mandates exclusion of this part of the unlawful recording. Finally, the public policy reasons for excluding illegally obtained recordings far outweigh the probative value of this vague statement in impeaching this witness. District's objections on these grounds are sustained, the remaining objections are overruled, and the offered excerpt is not admitted into evidence.

(Ex. S-23, p. 23, lines 1-13). Student offers an excerpt of Ms. Noble stating that Student's written "fifteen and sixteen the fives...are just a little smooshed" as evidence that Ms. Noble committed perjury when she testified at hearing that she had no concerns about Student's motor abilities beyond his lack of participation in class.

District objects to admission on the grounds that that the excerpted statement is not inconsistent with Ms. Noble's testimony, and that Ms. Noble was not examined concerning any asserted inconsistency with the offered statement. District also objects on the grounds that the probative value of the statement is outweighed by the undue prejudice against the District, and that it lacks foundation, calls for speculation, assumes facts not in evidence and misstates the evidence.

Student acknowledged in his brief that the excerpted statement is consistent with Ms. Noble's testimony on cross-examination that she believed Student's writing was slow and labored due to his frustration during writing assignments. The excerpted statement would not establish that Ms. Noble committed perjury because she had earlier stated that Student's writing was 'smooshed," which is the limited purpose for which such a statement would be admitted. Additionally, Ms. Noble was given no opportunity at hearing to explain any inconsistency asserted by Student, and the lack of probative value this statement would have in impeaching this witness mandates its exclusion. District's objections on these grounds are sustained, and this excerpted statement of Ms. Noble is not admitted into evidence.

Frida Friend.

(Ex. S-23, p. 6, last two lines). Student offers again the excerpt of Ms. Noble stating that Student was "specifically" removed from a group to establish that Frida Friend committed perjury when she stated that she had no knowledge of Student being physically restrained, since Ms. Friend was present at the November 3, 2016 IEP team meeting and allegedly heard Ms. Noble's statement.

District objects to admission on the grounds that a statement by Ms. Noble cannot be used to impeach Ms. Friend. District also objects on the grounds that Ms. Noble's statement is not inconsistent with Ms. Friend's testimony, and that Ms. Friend was not offered an opportunity during examination to explain any asserted inconsistency between the prior statement and her testimony. District objects on the grounds that the probative value of the statement is outweighed by the undue prejudice against the District, and that it lacks foundation, calls for speculation, assumes facts not in evidence and misstates the evidence

As discussed above, Ms. Noble's statement that a student was "specifically" removed from a group does not establish that she had previously stated that Student was physically restrained. Ms. Noble's excerpted statement would not tend to prove that Ms. Friend committed perjury when she testified that she was not aware of Student being physically restrained, and the excerpt is not admitted into evidence for that purpose. Additionally, Ms. Friend was given no opportunity at hearing to explain any inconsistency between Ms. Noble's statement and her own testimony, and the lack of probative value this statement would have in impeaching Ms. Friend mandates its exclusion. District's objections on these grounds are sustained, the remaining objections are denied, and this excerpted statement of Ms. Noble is not admitted into evidence to impeach Ms. Friend.

(*Ex. S-23, p. 31, line 6 - p. 34, line 6*). Student offers an excerpted exchange of questions and comments by Ms. Friend, made in response to Parent's statements at the IEP team meeting that Parent was taking Student to a doctor for genetic testing for autism and to see whether Student needed behavioral therapy. In that exchange, Ms. Friend states that she did not see Student as autistic. Student contends that these questions and statements will impeach Ms. Friend's testimony that autism was not a suspected disability and that Parent did not discuss with the IEP team that Student required a classroom aide for support.

District objects to admission for impeachment on the grounds that the excerpted questions and statements are not inconsistent with Ms. Friend's testimony, in that questions about what tests a doctor would be performing do not indicate that Ms. Friend herself suspected that Student had autism, or that she committed perjury by testifying that she did not suspect autism as a disability. Similarly, Parent's statement that the evaluator might recommend specific supports would not show that Ms. Friend made a misrepresentation when she testified that there had not been a discussion of Student's then-current need for an aide in the classroom. District objects that the excerpted statements are consistent with Ms. Friend's testimony, and corroborate rather than impeach that testimony. District objects that Ms. Friend was not given an opportunity at hearing to explain her prior statements. District also objects on the grounds that that the probative value of the statements are outweighed by the undue prejudice to District, and that they lack foundation, call for speculation, assume facts not in evidence and misstate the evidence.

The offered statements, as set forth at Ex. S-23, are consistent with Ms. Friend's testimony at the hearing. The excerpted exchange is, at best, Parent stating that she wanted a medical professional to evaluate her son and hoped the result would be an offer of behavioral therapy services, which Ms. Friend questioned. This exchange falls far short of demonstrating that Ms. Friend committed perjury when she testified that autism was not a suspected area of disability or that the IEP team did not discuss whether Student needed an aide in the classroom at that time. Ms. Friend was not examined on her specific statements at the IEP team meeting and given an opportunity at hearing to explain those statements. In addition, the de minimis probative value of the illegally obtained statement in impeaching Ms. Friend's hearing testimony is insufficient to warrant admission as an exception to the Penal Code's exclusionary rule. District's objections on those grounds are sustained, the remaining objections are overruled, and the offered excerpt is not admitted into evidence.

Student includes with his offer of proof regarding the dialogue between Parent and Ms. Friend a declaration from an associate in his counsel's office. In the declaration, the associate states that she speaks some Spanish and used Google Translate to make a new translation of the exchange between Ms. Friend and Parent, in which Ms. Friend makes several statements in Spanish. Student did not submit a complete, or competent, Spanish translation of the proffered excerpt, but instead incorporated newly transcribed statements into his brief. To the extent Student contends that the transcript at Ex. S-23 is inaccurate and seeks consideration of newly translated excerpts in Student's brief for that reason, that request is denied. Student chose not to transcribe the Spanish language portions of the audio recording for hearing, and offered no legal basis for the ALJ to accept as evidence a newly

prepared translation that was neither referenced nor introduced at hearing. A trier of fact cannot consider evidence that was not admitted at hearing, and in a due process hearing the an adverse party has the right to prohibit the introduction of any evidence at hearing that has not been disclosed to that party at least five business days before hearing. (Ed. Code, § 56505, subd. (e)(8); 34 C.F.R. § 300.512(a)(3).) The newly transcribed statements of the November 3, 2016 unlawful recording included in Student's brief were not considered.

In summary, the unlawfully obtained audio recording of the confidential November 3, 2016 IEP team meeting (Ex. S-25) is excluded from evidence and Student's motion to admit it into evidence is denied. The transcript and all excerpts from the proffered transcript of the audio recording (Ex. S-23) are excluded and Student's motion to admit them into evidence is denied.

IT IS SO ORDERED.

DATE: September 11, 2017

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