No. _____

In The Supreme Court of the United States

SCOTT PITTA,

Petitioner,

v.

DINA MEDEIROS, individually and in her Official Capacity as Administrator of Special Education for the Bridgewater Raynham Regional School District, and BRIDGEWATER RAYNHAM REGIONAL SCHOOL DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, father of a public school student with special needs, wanted to video-record a "virtual" meeting between himself and school employees that he attended "virtually" from his home. Petitioner sought to video-record this meeting because Respondents omitted important information from minutes of previous meetings. But Respondents refused. Petitioner sued, arguing that he has a First Amendment right to record government employees engaged in their duties. But while many circuits, including the First Circuit, recognize this right in a general sense, the court here announced that the First Amendment only protects recording government officials while they are performing their duties in a *public space,* and only if the recording would serve the public interests. It based this conclusion on a proposition over which the circuits are divided, namely that video-recording is not "inherently expressive."

The questions presented are:

1. Whether the act of recording a government employee engaged in his or her duties is inherently expressive activity entitled to First Amendment protection.

2. Whether a citizen has a presumptive right to record government employees when that individual is lawfully present.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Scott Pitta was the plaintiff in the Massachusetts District Court and appellant in the First Circuit.

Respondents Dina Medeiros, in her official capacity as Administrator of Special Education for the Bridgewater Raynham Regional School District, and the Bridgewater Raynham Regional School District, were defendants and appellees below.

Defendant Dina Medeiros, in her individual capacity, was a defendant in the district court but was not a party on appeal.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

The case arises from the following proceedings:

Pitta v. Medeiros, No. 23-1513, 1st Cir. (Jan. 4, 2024) (affirming defendants' motions to dismiss for failure to state a claim).

Pitta v. Medeiros, No. 22-11641-FDS, D. Mass (May 19, 2023) (granting defendants motion to dismiss for failure to state a claim).

RELATED PROCEEDINGS—Continued

There are no other proceedings in state or federal trial or appellate courts, or in this Court, related to this case under Supreme Court Rule 14.1(b)(iii).

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The January 4, 2024, opinion of the Court of Appeals, reported at 90 F.4th 11 (1st Cir. 2024), is set out at App. 1–28. The May 19, 2023, opinion of the District Court, reported at 2023 WL 3572391 (D. Mass. 2023), is set out at App. 30–50.

JURISDICTION

The decision of the Court of Appeals was entered on January 4, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Reproduced at Appendix 52.

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Reproduced at Appendix 52.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

The First Amendment protects more than just "speech." It also protects conduct that is inherently expressive—conduct that itself expresses a message, or that cannot be separated from the communication of a message. *See*, *e.g.*, *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018); *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017). This right has become increasingly important with the proliferation of video-enabled smart phones and virtual meetings through online platforms such as Zoom or Google Meet that allow virtual "attendees" to record those meetings.

These innovations have generated important new questions, including: (1) whether the act of video-recording an event is *itself expressive*, and thus constitutionally protected; and (2) whether the right to record is limited to situations where the public officials are in public—as with police officers on a sidewalk—or whether it applies wherever *the recording party is lawfully present*, such as in his own home.

The Courts of Appeals have reached conflicting answers to these questions, and this case presents a good opportunity to resolve those conflicts and provide a unified framework for lower courts to apply in determining whether the First Amendment protects an act of video-recording.

Petitioner is the father of a child with a learning disability. He tried to video-record an online meeting with public school employees about his child's special education needs. He sought to do this because those school employees omitted key information[1] from the minutes of previous meetings with him. Recording the meeting—which he "attended" from his own home—would not have disrupted or affected the meeting in any way. In fact, it would have been beneficial because it would have preserved information relevant to his child's educational needs. It also would have conveyed

[1] In the earlier meeting, the school had announced its view that Petitioner's son no longer needed special services, but some of the school employees at the meeting said they disagreed with this. When the official minutes of the meeting arrived, however, they contained no mention of this fact, which would aid Petitioner in establishing that the school's official decision is incorrect.

a message of distrust to the school employees. But rather than allow the recording to occur, the school employees terminated the meeting and refused to continue meeting with him *solely because* he insisted on video-recording the meeting. Respondents continue to maintain that their policy prohibits video recording. App. 25, 38.

Petitioner sued, arguing that the termination of the meeting on the sole basis that he wanted to record the meeting(s) violated his First Amendment rights. The First Circuit rejected that argument, holding that the First Amendment protects video-recording *only* when the government employee is performing official duties in an indisputably public place, in full public view, and when the recording would be in the "public interests"; it thereby implicitly rejected the idea that video recording can be inherently expressive. App. 22.

This holding exacerbates a circuit split that only this Court's intervention can remedy. The First, Fourth, Fifth, Eighth, Eleventh, and D.C. Circuits have held that the Constitution protects video-recording public employees in the performance of their duties only when the recording is of a type or of such inherent public interest that it will be used in future communications of public import—whereas the Third, Seventh, Ninth, and Tenth Circuits have held that recording public employees doing their jobs is *inherently* expressive, and therefore constitutionally protected *per se*. Only this Court can resolve that disagreement.

It ought to do so here. This case comes to the Court with a simple record, with no factual disputes, making it a clean vehicle to address the questions. It is undisputed that the government's action in terminating the meeting was entirely due to Petitioner's attempt to video-record the meetings.

Moreover, three circumstances demonstrate why the First Circuit's newly announced rule is problematic and warrants this Court's review.

First, the meeting was held (virtually) *in Petitioner's own home*—a new reality of the post COVID-19 world. The court below held, for the first time, that the right to record government officials engaged in their duties is confined to situations in which officials are in "indisputably public places in full view of the public, and even then, only when the act of filming . . . would serve public interests." App. 22. But that rule would have the drastic consequence that a person would be effectively forbidden from recording something that occurs in her own home, where she has the greatest possible interest in making such a recording, and the government the least possible interest in prohibiting that.

The First Circuit's newly distilled rule, that recording is only protected where the public official is acting in public, conflicts with this Court's longstanding recognition that the home is a place of "special [constitutional] solicitude," *New York v. Harris*, 495 U.S. 14, 18 (1990), where the First Amendment "takes on an

added dimension." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (First Amendment rights are at their strongest in the home). And it's unworkable in an era in which citizens increasingly interact with government agents from their own homes, through virtual or online meetings.

It's certainly anomalous to say that a person has a constitutional right to record an interaction with a government official on the sidewalk outside her home—but not *inside* her home. In fact, egregious constitutional or legal violations are more likely to occur inside the home—warrantless searches, for example—and are more likely to escape notice absent the homeowner's ability to record them, because nobody else will be in a position to record them. Consequently, the citizen has a heightened interest in recording interactions with government employees inside her home; correspondingly, the government has the *least possible* legitimate interest in denying her that right. *Cf. Stanley*, 394 U.S. at 564 (right to possess "obscene" recordings in one's own home); *Payton v. New York*, 445 U.S. 573, 589 (1980) ("The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home."); *see also Hils v. Davis*, 52 F.4th 997, 1005 (6th Cir. 2022) ("[citizen] would have the right to record a police officer who enters their home during the execution of a warrant.").

Under the rule announced below, a person would have no right to video-record a police officer who unlawfully enters her home and searches it without a warrant—because the officer would not be in a "public space"—whereas she would be perfectly within her rights to record that same officer outside her home ticketing her for improper parking.

Second, federal law *requires* the meeting that Petitioner attempted to video-record. The Individuals with Disabilities Education Act ("IDEA")[2] requires schools to consult with parents to create an Individual Education Program ("IEP") to ensure that a child subject to its provisions receives the Free and Appropriate Public Education ("FAPE") to which he or she is entitled. Petitioner participated in such meetings in good faith. But once school employees omitted from the minutes of prior meetings information relevant to a dispute between the Petitioner and the school—leaving out information relevant to the Petitioner's attempt to ensure his child receives the FAPE to which he is entitled—he sought to make his own record to ensure an accurate record while simultaneously conveying a message of distrust to the government employees. While this case is not about IDEA itself, the fact that the meeting in question was *statutorily required*—not a happenstance encounter with a police officer on a street—bolsters Petitioner's First Amendment right-to-record claim. And given that the meeting was necessary to develop the IEP for the child, the school had no

[2] 20 U.S.C. §§ 1400–1481.

legitimate interest in preventing the creation of an accurate record of the meeting.

Third, the recording in question inevitably touches upon Petitioner's "fundamental right . . . to make decisions concerning the care, custody, and control of [his] child[]." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). This is not just a right, but also a "high duty." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). While this case does not concern parental rights *per se*, the fact that Petitioner was seeking to discharge that high duty reinforces his right to record his interaction with government employees engaged in their official duties with respect to IDEA. A parent discussing his child's IEP with public school employees, as required by federal law, is engaged in an inherently expressive activity that cannot be waved away on the grounds that the officials are not "carrying out their duties in public." App. 22.

Finally, lower courts need guidance. Virtual meetings have become an ordinary fact of life; this Court even held oral arguments virtually between March 2020 and September 2022, with both the Justices and counsel attending from their homes. Use of Zoom virtual-meeting software reached 350 million daily participants in December 2020.[3] While the increase in these numbers has likely tapered off somewhat in recent years, countless "virtual" interactions between

[3] *See* Mansoor Iqbal, *Zoom Revenue and Usage Statistics*, Business of Apps (Jan. 8, 2024), https://www.businessofapps.com/data/zoom-statistics/. Zoom has not made more recent numbers public.

citizens and government officials still occur every day. Cases in which citizens seek to record such interactions are therefore only going to become more common. This case presents a clean opportunity for the Court to establish a framework for analyzing the right to record government actors engaged in their duties, especially when the individual is at home—where constitutional protections are at their "zenith." *United States v. Scott*, 450 F.3d 863, 871 (9th Cir. 2006); *Woollard v. Gallagher*, 712 F.3d 865, 874 (4th Cir. 2013).

The court should grant certiorari to provide lower courts with guidance and to establish a framework for evaluating whether the act of video-recording can be inherently expressive and thus enjoys First Amendment protections on its own.

STATEMENT OF THE CASE

A. Factual History

Scott Pitta is the father of a child ("J.J.") who has a learning disability. J.J. attends school in the Bridgewater Raynham Regional School District and receives an IEP under the IDEA. That law requires public schools to take certain steps to ensure that a child with learning disabilities receives an education tailored to his or her individualized needs. A child's IEP is created by the members of a child's "team," who meet regularly to assess and discuss the needs of the child. 20 U.S.C. § 1414. That team generally includes the school employees who interact with the child, the

school special education professional, and the child's parents.

This case begins and ends with a series of three IEP Team meetings that occurred between Petitioner and Respondents—all of which took place virtually, through the online platform "Google Meet." Because of the Pandemic, the School District used Google Meet to hold many meetings which traditionally took place in school buildings. On February 15, 2022, and again on March 8, 2022, the parties met to discuss J.J's IEP. No party recorded these meetings; instead, school employees drafted written meeting minutes of their own, which summarized the conversations.

These minutes were incomplete, however. At both the February 15 and March 8 meetings, Respondents asserted that J.J. no longer required an IEP. Petitioner firmly disagreed. And at both meetings, some school employees made statements supporting Petitioner's view that J.J. *is* still entitled to an IEP. Specifically, they admitted during the meetings that they had no data on which to base their view that J.J. no longer requires an IEP, and indicated that teachers who had reached the conclusion that an IEP *was* still necessary had been instructed by their District superiors to "'double check' their evaluation[s]." App. 80.

Because Petitioner thinks the District is wrong to remove J.J. from the IEP, he sought to preserve a record of these admissions. They were material statements directly affecting his claim. Yet when he received copies of the official minutes of the meetings (by

email on March 10, 2022), these statements were omitted. App. 81. This concerned Petitioner as the omission of those statements directly affected his claim that J.J. was still entitled to an IEP.

Petitioner noticed this omission and requested that the minutes be amended to accurately reflect those statements. App. 81. Respondents refused. App. 4.

Based on that refusal, Petitioner informed Respondents that, due to Respondents' "failure to produce accurate minutes of prior meetings and refusal to correct those errors despite obligations to maintain accurate records," he would video-record the meetings himself using Google Meet's record function. App. 75.[4] Respondents, however, refused to video-record the meetings themselves, and balked at Petitioner's insistence that he would do so. App. 75–76.

When the IEP team met again on September 20, 2022, Petitioner again requested that the meeting be video-recorded because he did not trust that the Respondents' own minutes would accurately reflect the relevant statements. *Id*. Respondents again refused, instead offering to *audio*-record the meeting. App. 76. But Petitioner found this offer unsatisfactory, because only a video-recording would indicate who was speaking. Respondents, however, continued to insist that

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[4] Specifically, Petitioner cited Massachusetts state regulations which require school districts not only to maintain student records, but also amend student records when requested by a parent. *See* 603 CMR 23.08, App. 70–71.

video-recording would be "invasive" and prohibited under the District's policy. *Id.* They have never explained how a video-recording would be "invasive" while an audio recording would not be.

When on September 20, 2022, Petitioner announced at the beginning of the meeting that he was video-recording it through the Google Meet built-in function, due to Respondents' refusal to do so, Respondent Medeiros threatened to terminate the meeting unless he ceased recording. *Id.* Petitioner refused. So, Respondent Medeiros terminated the meeting. *Id.*

B. Procedural History

Petitioner filed a complaint alleging a violation of his First Amendment rights on September 28, 2022. He sought a declaration that the prohibition on video-recording of IEP meetings violated the First Amendment, and an order permanently enjoining Respondents from prohibiting individuals who are lawfully present from recording government employees carrying out their official duties.[5]

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[5] Petitioner also pursued a claim for a failure to provide a FAPE through the administrative procedures required under the IDEA as carried out under Massachusetts law. That claim was settled after the granting of an expedited hearing. As that settlement related only to administrative remedies and issues that could have been asserted before the Board of Special Education Appeals, which only handles IDEA claims—which this is not—the First Amendment claim addressed here was not included in the settlement of the administrative claims.

The District Court dismissed the suit for failure to state a claim and the Court of Appeals affirmed that dismissal on the following grounds.

First, the Court of Appeals held the First Amendment protects video-recording "of government officials performing their duties only in indisputably public places in full view of the public." App. 22. The court found that the meeting did not occur in an indisputably public space because the IEP Team meeting was not open to the public. Instead, it was password-controlled and therefore "under the control of a public school official." App. 19. The court also explained that the content of the meeting—"discussions of personal, highly sensitive information about a student"—was not typical of a conversation in a public space. App. 21.

Second, the court said that allowing video-recording would hinder the IEP Team members in performing their duties because it would "risk . . . suppressing the sensitive, confidential, and honest conversations necessary when discussing or developing a child's IEP." *Id*. It did not explain how this risk of suppression was present only with *video* recording and not with the *audio* recording that Respondents themselves offered to provide.

Third, the First Circuit said that the right to record is "linked to the right of the public to receive this information." App. 23. The court explained that video-recording is an "important corollary" to the prohibition on government limiting information, so that the right to record is part of the right to gather news from lawful

sources. App. 24. Specifically, the court explained that the First Amendment only protects video-recording "when the act of filming would . . . serve [the] public interests." App. 22. The court concluded that as the meeting was private in nature and not typical of the type that would be discussed within earshot of the general public, the recording would not serve the public interest.

Fourth, the court held that even if the First Amendment generally protects the right to record, the District's prohibition on recording was content-neutral and narrowly tailored to a significant government interest. App. 25. The court did not address, however, the message Petitioner was seeking to *convey* by recording the meeting—his distrust of their actions—or the fact that the District had itself offered to make an audio-recording, thereby undermining any possible fit between the rule against recording and a government interest in prohibiting recordings (whatever that interest might be).

Finally, the First Circuit "quickly dispatch[ed]"—in a footnote—Petitioner's central argument: that the First Amendment right to record officials in the conduct of their duties is a function not of whether the government employees are themselves in a public place, but of whether the individual is lawfully present. App. 20. It rejected this argument on the grounds that there are times and places where an individual may be lawfully present, but where recording is rightfully prohibited, such as the jury room. *Id.* But this ignored the fact that Petitioner has a *greater* First Amendment

interest in his *own home* than he would in a courthouse. Nor did it address the significantly different government interests that favor limiting recording in a jury room but are nonexistent here.

Plaintiff timely petitioned for certiorari.

REASONS FOR GRANTING THE PETITION

I. The First Circuit's newly announced rule exacerbates a standing circuit split regarding the right to record government employees engaged in their duties.

The First Circuit rejected Petitioner's First Amendment claim that he had a right to video-record the virtual IEP meeting about J.J. In doing so, the court distilled its precedent and formally announced a new rule: that the First Amendment protects recording "government officials performing their duties *only* in indisputably public places in full view of the public, and even then, only when the act of filming . . . would serve public interests." App. 22 (emphasis in original). In short, the court held that the First Amendment does not protect the act of recording itself, but only as a corollary "to the right of the public to receive [the] information." App. 23.

This rule stands in stark contrast with the holdings of other circuits. The circuit courts are currently and irreparably divided over whether the act of video-recording is expressive conduct entitled to full First Amendment protection *per se*, or whether it is only

protected as a corollary to other activities that the First Amendment protects, such as the dissemination of information and the discussion of governmental affairs.

In *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018), the Ninth Circuit held that an Idaho statute that prohibited entering a private agricultural production facility and video-recording conduct in the facility restricted speech, because "[t]he act of recording is itself an inherently expressive activity." *Id*. at 1203. It reasoned that since a video, like a book, is protected speech, the act of creating a video must also be an act of speech.

The idea "that the act of creating an audiovisual recording is not speech," it said, would be like arguing "that even though a book is protected by the First Amendment, the process of writing the book is not." *Id.* Since the recordings are "'organ[s] of public opinion'" it would "def[y] common sense to disaggregate the creation of the video from the video or audio recording itself." *Id.* (citation omitted). What's more, "decisions about content, composition, lighting, volume, and angles" at which a video is made "are expressive in the same way as the written word or a musical score," so it could not be the case that the act of creating a video is not protected by the First Amendment. *Id*. Because the restriction was content based restriction on protected speech, the court struck down the law. *Id*. at 1205.

Last year, that same Circuit upheld the rights of a conservative organization that gained fame by making

secret videos of liberal activists and organizations, after Oregon enacted a statute to prohibit such recordings. *Project Veritas v. Schmidt*, 72 F.4th 1043, 1050 (9th Cir. 2023).[6] Citing *Wasden*, the court determined that "conduct in making an audio or video-recording . . . qualifies as speech." *Id*. at 1054. It clarified that the First Amendment protects the act of video-recording because "the recording itself is protected speech," and enjoys First Amendment protection. *Id.* at 1055.

The Third, Seventh, and Tenth Circuits have also held that the act of video-recording can be inherently expressive. In *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017), two people sued Philadelphia alleging that the city retaliated against them for recording officers while engaged in their official duties. One recorded an officer who arrested a protestor, and although she was not interfering with the arrest, the officer threw her up against a pillar and held her there. *Id.* at 356. The other recorded officers breaking up a house party, and although he, too, did not interfere with the officers (and was in fact 15 feet away), the officer ticketed him for "Obstructing Highway and Other Public Passages." *Id.* The court reversed the district court's decision that only using the video in a future communication warranted First Amendment protection, holding—in an echo of the Ninth Circuit's *Wasden* and *Schmidt* rulings—that since the First Amendment "protects actual photos, videos, and recordings," and

[6] The Ninth Circuit recently granted en banc review in this case and vacated the panel opinion. 2024 WL 1171650 (9th Cir. Mar. 19, 2024)

"for this protection to have meaning the Amendment must also protect the act of *creating* that material." *Id.* at 358 (emphasis added).

In *Irizarry v. Yehia*, 38 F.4th 1282, 1285 (10th Cir. 2022), a journalist tried to film a police officer making a traffic stop, only to have another officer stand in front of him to obstruct the filming. When the plaintiff objected, the officer assaulted him. *Id.* at 1286–87. The Tenth Circuit found that "videorecording is '*unambiguously*' speech-creation, not mere conduct." *Id.* at 1289 (citation omitted, emphasis added). This was for two reasons. First, the very act of "[f]ilming the police and other public officials as they perform their official duties," the court said, "acts as 'a watchdog of government activity' and furthers debate on matters of public concern." *Id.* (citation omitted). Second, "the creation of speech"—not just the transmission of that speech—must be constitutionally protected, because if it were not, "the government could bypass the Constitution by simply proceeding upstream and damming the source of speech." *Id*. at 1289 (quoting *W. Watershed Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017)).

Finally, in *Brown v. Kemp*, 86 F.4th 745 (7th Cir. 2023), the Seventh Circuit held that the act of recording is protected by the First Amendment. Like *Wasden*, the case involved a law prohibiting the video-recording of the killing of animals; in this case, generic hunting activity that animal rights activists wanted to record. The court emphasized that the "activities necessary to produce" speech are protected by the First Amendment. *Id.* at 763. "The 'act of *making* an audio

or audiovisual recording,'" it said, "'is necessarily included within the First Amendment's guarantee of speech and press rights.'" *Id.* (quoting *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012)). The reason is that there is "'no fixed First Amendment line between the act of creating speech and the speech itself.'" *Id.* at 764 (quoting *Alvarez*, 679 F.3d at 596). Thus, as long as "the medium is understood to enable 'expression and communication,'" then the First Amendment must protect "[the] use of that medium." *Id.* at 763. In short, the First Amendment protects activity that is "essential to the creation of speech and also expressive in [its] own right." *Id.* at 779.

In conflict with those circuits, the First Circuit has held that video-recording is not expressive in its own right. Instead, it has held that the First Amendment protects video-recording of public officials doing their duties *only* as a corollary to the right to disseminate information to the public and hold government officials accountable—not as a right standing on its own. In *Gilk v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011), it held that a person has a First Amendment right to record an arrest on Boston Common, but only because "[g]athering information about government officials in a form that can readily be *disseminated to others* serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs." (Emphasis added; internal citations omitted). And in *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020), it again held that the First Amendment protects the secret recording of police officers

when they are in public, because such recording promotes the "cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs." *Id.* at 832 (internal citations omitted).

In so holding, the court implicitly rejected the idea that the act of recording can be inherently expressive—and the decision in *this* case makes that distinction explicit. The ruling against Petitioner hinges specifically on the question of whether recording public employees is protected by the Constitution even if the government employee was *not* in a public space, in full view of the public, and even if the recording is *not* made for the immediate purpose of sharing with the public for purposes of public debate and discussion. App. 22.

The Fourth, Fifth, Eighth, Eleventh, and D.C. Circuits have also said that the First Amendment right to record applies only where the recorder intends to share the recording for purposes of public discussion. In *Price v. Garland*, 45 F.4th 1059, 1070 (D.C. Cir. 2022), *cert. denied*, 143 S. Ct. 2432 (2023), for example, a filmmaker challenged the National Park Service's permit and fee requirements for filming on land it administers, arguing that these requirements violated the First Amendment. The court upheld the requirements, holding that making a film is not protected by the First Amendment absent "communicative activity." *Id.* at 1070. Although the court acknowledged that filmmaking is protected by the First Amendment, it said that filmmaking "is not itself a communicative activity," but "merely a step in the creation of speech that

will be communicated at some other time," and it therefore distinguished cases that involved "[f]ilming a public official performing public duties on public property." *Id*. at 1070. Consequently, it examined the permit requirement under a "'reasonableness standard'" rather than the heightened scrutiny that normally applies in First Amendment cases. *Id.* at 1072.

In cases such as *Sharpe v. Winterville Police Department*, 59 F.4th 674 (4th Cir.), *cert. denied*, 144 S. Ct. 489 (2023); *Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017), *Ness v. City of Bloomington*, 11 F.4th 914 (8th Cir. 2021), and *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000), sister circuits have found that the right to record public officials rises or falls with the recorder's intention to disseminate the recording to others, joining the First and D.C. Circuits in holding that video-recording is not inherently expressive and/or entitled to full First Amendment protection.[7]

It is also worth noting that there is a split on this issue between a State Supreme Court and the Circuit in which that State is located. The Texas Court of Criminal Appeals—the court of last resort in Texas for criminal cases—has held "that a person's purposeful creation of photographs and visual recordings is entitled to the same First Amendment protection as the photographs and visual recordings themselves,"

[7] Neither the Second nor the Sixth Circuit have precedentially answered the question of whether, and to what extent, the First Amendment protects the right to record government employees.

without regard to any intent by the recorder to distribute the recording. *Ex parte Thompson*, 442 S.W.3d 325, 337 (Tex. Crim. App. 2014). But in *Turner*, 848 F.3d at 689, the Fifth Circuit said that the right to record police officers is specifically linked to " 'the free discussion of governmental affairs.' " (Citation omitted).

Because the circuits are split on the question of whether video recording can be inherently expressive and thus entitled to First Amendment protection, this Court should grant this petition and provide a uniform answer.

II. The First Circuit's newly announced rule will lead to unworkable situations and illogical outcomes.

This Court should grant certiorari not only because the First Circuit's decision widens a circuit split, but also because the decision below will lead to unworkable and illogical results.

A. The First Circuit's ruling will lead only to further conflict.

This rule is **unworkable** because drawing the constitutional boundary at a recording made in a "public place" as opposed to a private place makes little sense in an era where online meetings with government employees are ubiquitous. Further, requiring a recording to "serve the public interest" would require an individual to gauge at the time of recording whether a seemingly private event might later be of public

interest. The better rule would be to hold that recording a public employee engaged in public duties is *inherently* protected by the First Amendment, and that—unless some unusual exception applies, as with the confidentiality of the jury room—the citizen has the right to record in any location where she is lawfully present.

In today's world, government interacts daily with citizens online or by phone in myriad ways. These meetings are conducted not only on Google Meet or Zoom, but through services such as DocuSign, a computer system that enables people to virtually sign legal documents in a manner that is legally binding—and, of course, to keep and print copies of those documents.[8] During the Pandemic, many public schools held classes virtually, over Zoom or similar programs; many teachers recorded these online class sessions. *See* Mark Lieberman, *Zoom Use Skyrockets During Coronavirus Pandemic, Prompting Wave of Problems for Schools*, Education Week (Apr. 3, 2020)[9] ("Teachers liked being able to display two people's screens at the same time, and to save chat transcripts and audio/video recordings for later use."). The Massachusetts Department of Children and Families has even established standardized questions for teachers to ask students during these remote sessions; these guidelines order teachers to report to the Department if they observe, via the

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[8] Federal and state laws even govern the enforcement of these "e-contracts." *See*, *e.g.*, Uniform Electronic Transaction Act, 15 U.S.C. § 7001.

[9] https://perma.cc/QQ9M-VCS8.

video link, any "hazards that create safety concerns in the home." Massachusetts Dep't of Child. & Families, A Tip Sheet for Educators, 3 (June 1, 2020).[10] Indeed, during the Pandemic, students who were seen online breaking school rules in the home were subjected to discipline. *See* Aaron Feis, *Colorado School Calls Sheriff on Boy, 12, Who Showed Toy Gun in Virtual Class*, N.Y. Post (Sep. 7, 2020).[11]

These developments render the traditional public place/private place distinction on which the court below relied obsolete, at least with respect to online meetings such as those concerned here.

The unworkability of that distinction is most obvious in a case in which a police officer searches a home. The homeowner would likely want to record that incident in order to preserve a record for possible litigation, even aside from any considerations of spurring public discussion. The recording may also be of purely private value, such as making sure the police only seize those items identified in the warrant, or even just knowing how to replace the furniture the officers might move. Meanwhile, the government has virtually *no* legitimate interest in prohibiting that recording.

Yet under the reasoning endorsed by the First Circuit here, the homeowner would have no such right because the home is not a public space. App. 18. ("This Circuit's cases have found a First Amendment right to

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[10] https://www.mass.gov/doc/dcf-tip-sheet-for-educators/download.

[11] https://perma.cc/ES98-8BL4.

record government officials performing their duties *only* when those duties have been performed in public spaces." (emphasis in original)).

That cannot be the rule. And the Sixth Circuit—albeit in dicta—agrees. In *Hils*, 52 F.4th 997, police officers and their representative challenged a policy that prevented the officers from recording interviews conducted by the city in the course of investigating the same officers. The court held that the First Amendment did not protect the officers' right to video-record these meetings. *Id*. at 1005. But in so doing, Chief Judge Sutton answered the hypothetical of whether an individual would have a "right to record a police officer who enters their home during the execution of a warrant" stating that "[t]he question answers itself" because "[h]omeowners have a right to be in their home," and therefore they would have the right to record that interaction. *Id.*

Equally unworkable is the First Circuit's theory that the right to record public employees in the performance of their duties only applies "when the act of filming would . . . serve [the] public interests." App. 22. This rule is unworkable because a recorder is often unable to predict at the time whether a recording will serve public interests. Petitioner's situation is a good example. At the moment of recording, a single IEP meeting about one student may not be in the "public interests." But if (hypothetically) it is later discovered that the school has been systematically removing students with special needs from their IEPs without justification, the recording may turn out to be of

significant public import. An individual might not be aware of the larger implications of a recording at one moment, only to have the recording turn out to be useful later.

Indeed, in some cases—including this one—the very purpose of making a recording is to *prevent* wrongdoing that might later become a matter of public debate. The very knowledge that one is being recorded can influence a person's behavior, by conveying to that person a message of distrust, or at least of a desire to keep things above-board. And the consequence of recording in such an instance will be to ensure that the government business is conducted correctly. *See Yehia*, 38 F.4th at 1285. This preventative use of recording is entirely legitimate. Yet the First Circuit's newly announced rule that the right to record only applies when the recording would serve the public interests would not protect this type of preventative recording.

What's more, the idea that the right to record pivots on whether the events occur in a public place, or whether the recording would serve the public interests, is **illogical**. After all, a person always has a First Amendment right to *remember* everything she *witnesses*, even if it is not in a public place. *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 409 (2011) ("[T]he First Amendment protects the right to record images we observe as part of the right to form, reflect upon, and share our memories."). Thus, Petitioner would have a First Amendment right to *remember* what happened

during his Google Meet interaction with Respondents, to later write down that memory, to testify about it, or even to draw it with a sketch pad. It is nonsensical to say he cannot *record* it. Given the heightened protection for individual expression and possession that Petitioner has in his home, it is incomprehensible that he has no First Amendment right to *record* an incident that occurs in his home, due to the very fact that it was not in public.

In fact, the First Amendment protects the right *not* to communicate. *See*, *e.g.*, *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977). It protects communication that lacks any particularized message, such as the "painting of Jackson Pollock, [the] music of Arnold Schöenberg, [and the] Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). And it protects forms of *self*-communication, such as haircuts or tattoos. *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969) (haircuts); *Jucha v. City of N. Chi.*, 63 F. Supp.3d 820, 825 (N.D. Ill. 2014) (tattoos). It is illogical then to say that it cannot protect the right to record a meeting with government employees about an individual's own child, especially when the individual's goal is to ensure that his child receives the education to which he is entitled by federal law.

B. The "alternative holding" offered by the First Circuit is also out of step with this Court's precedent.

The First Circuit also offered what amounts to an alternative holding, explaining that *even if* the First Amendment protected Petitioner's video-recording, the Respondents' prohibition on recording passed constitutional muster. It held that the government has a sufficient interest in prohibiting Petitioner's video-recording of the IEP meeting, that interest being "promoting candid conversations in the discussion or development of IEPs." App. 25. But, in a break with this Court's precedent for applying intermediate scrutiny, it never explained how the Respondents' ban on video recordings is *tailored* to such an interest.

First, the court did not explain how preventing the recording of the meeting by the child's father promoted privacy. Any privacy interests in the meeting belong to J.J.—and through him, Petitioner—not to the school. Nothing the school employees say in this meeting about J.J. is private from the Petitioner. And government employees have no right to privacy in their capacity as public employees conducting public business.

Second, the court never addressed the fact that Respondents *agreed to audio-record the meetings*, and in fact did so at the September 20 meeting. App. 5. The court did not address how the interest in promoting open conversation and candor was *not* thwarted by audio recording but *was* thwarted by video-recording—a question that must be resolved as part of the tailoring

analysis. Self-contradictory government policies fail even the rational basis test's tailoring requirement[12] let alone the heightened scrutiny that applies in speech cases. As this Court said in *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 802 (2011), a speech restriction that is "wildly underinclusive when judged against its asserted justification" fails the tailoring requirement so dramatically that it "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint"—and that "is alone enough to defeat" the restriction.

Yet the First Circuit engaged in no consideration of tailoring. It simply deferred wholesale to the Respondents' assertion that they have a legitimate interest and that that interest is served by prohibiting video-recording. If this method of applying scrutiny is allowed to stand, it will work great mischief in the application of this Court's precedent applying intermediate scrutiny.

The Court then should grant this petition to reject an unworkable and illogical rule that exacerbates an already existing circuit split and to prevent the First Circuit's improper intermediate scrutiny analysis from controlling in future cases.

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[12] *See*, *e.g.*, *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) ("We cannot simultaneously uphold the licensing requirement under due process based on one rationale and then uphold Merrifield's exclusion from the exemption based on a completely contradictory rationale.").

III. A better framework for evaluating whether the First Amendment protects a specific decision to video-record an event, meeting, or interaction is focusing on the location of the individual doing the recording.

Not only is the First Circuit's newly announced rule—limiting the First Amendment right to video-record government employees to cases in which that employee is in an "indisputably public place," and "in full view of the public," App. 22—misguided for the reasons suggested in Section II.B, but there's a simpler and more objective alternative. Courts should look to whether *the person doing the recording* is lawfully present in the place where the recording occurs. This would lead to more logical and manageable precedent—for example, it would clearly allow individuals to film government officials in their own homes—and it would also be more consistent with this Court's tiers of scrutiny jurisprudence, which generally focuses on the location of the individual performing the act—not the location of the individual receiving the act.

First, if the individual is lawfully present in a place, government regulation of her speech must typically survive strict scrutiny. This applies to restrictions on speech in traditional or designated public forums. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009). And, of course, it applies to restrictions in the home. *Gilleo*, 512 U.S. at 58 ("A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special

resonance when the government seeks to constrain a person's ability to speak there." (Citations omitted)).

Second, if the individual is lawfully present for a *limited reason*—as in a courtroom or a schoolhouse—a speech restriction need only survive intermediate scrutiny, with a focus on the nature of that limited reason and the degree to which the restriction is tailored to serve that reason. *See*, *e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (speech restriction in public school classroom may be justified by "a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."); *Cohen v. California*, 403 U.S. 15, 19 (1971) (acknowledging in dicta that state can restrict speech to "preserve an appropriately decorous atmosphere in the courthouse."). This would allow the government to prohibit recording inside a jury room for the same reason that a judge may remove an individual from a courtroom for disrupting proceedings. *See* App. 20.

Third, if an individual is *un*lawfully present in a location, then a restriction on video-recording need only survive rational basis, because the restriction is effectively a function of laws against trespassing, stealing trade secrets, etc. *See*, *e.g.*, *Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646, 655 (D.C. Cir. 1994) ("[One has] no general First Amendment right to trespass.").

This case fits into the first category, as Petitioner was in his home, a location he undoubtedly has a right

to be, and where he has the strongest claim to speech protections. *Hils*, 52 F.4th at 1005; *Gilleo*, 512 U.S. at 58; *Stanley*, 394 U.S. at 564. Even if the Court finds that it should be viewed under intermediate scrutiny due to the hybrid nature of a virtual meeting, the prohibition would still fail: there is no important government interest in preventing a father from recording a meeting with government employees where the sole topic of discussion is his child, especially given the fact that the government itself offered to *audio*-record the meeting.

IV. This case is an ideal vehicle for resolving the questions presented.

This case's procedural posture makes it a particularly good vehicle for addressing these issues. It's an appeal of a lower court decision affirming dismissal of a First Amendment claim, so it presents a pure question of law. There's no dispute of fact, and the lack of trial record will not affect the Court's ability to decide this issue. Further percolation will do nothing to resolve the conflict. And given both the unworkability of the First Circuit's newly announced rule—and the increasing prevalence of online virtual meetings—resolving the questions presented in this case would provide lower courts with the guidance they need to avert a needless series of lawsuits that are certain to arise in the coming years.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 3, 2024

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App. 1

United States Court of Appeals
For the First Circuit

No. 23-1513

SCOTT D. PITTA,

Plaintiff, Appellant,

v.

DINA MEDEIROS, individually and in her official capacity as Administrator of Special Education for the Bridgewater Raynham Regional School District; BRIDGEWATER RAYNHAM REGIONAL SCHOOL DISTRICT,

Defendants, Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. F. Dennis Saylor, IV, U.S. District Judge]

Before

Gelpi, Selya, and Lynch,
Circuit Judges.

Scott D. Pitta, pro se, for appellant.

Peter L. Mello, with whom Murphy, Hesse, Toomey & Lehane, LLP, was on brief, for appellees.

January 4, 2024

LYNCH, Circuit Judge. Scott D. Pitta, the attorney father of a public school student, appeals from the decision of the Massachusetts U.S. District Court granting the motion to dismiss his First Amendment claim against Bridgewater-Raynham Regional School District ("the District") and Dina Medeiros, the District's Administrator for Special Education. Pitta v. Medeiros, No. 22-11641, 2023 WL 3572391 (D. Mass. May 19, 2023).

After the District denied his request to video record a private meeting with school district employees to discuss the Individualized Educational Program ("IEP") of his child, Pitta brought suit under 42 U.S.C. § 1983, alleging that he had a constitutional First Amendment right, which the appellees had denied, to video record what was said by each individual at his child's IEP Meeting. The district court held that Pitta, on the facts alleged, did not possess such a First Amendment right, id. at *8, and that is the only issue on appeal. To be clear, Pitta does not allege that he had a right to record an IEP Team Meeting under any federal or state statute or regulation. We affirm the district court's dismissal of Pitta's First Amendment claim.

I.

We first detail the allegations in Pitta's complaint and events in his further filings, on which he relies.

Pitta is a resident of Bridgewater, Massachusetts. His child attends public school in the District and, at the time of the events pled, received IEP services. Appellees are the District, a Massachusetts school district organized under Massachusetts General Laws ch. 71, § 14B, and Medeiros in her official capacity as the District's Administrator of Special Education. Pitta originally sued Medeiros in her individual capacity as well, but this claim was dropped on appeal.

On February 15, 2022, and March 8, 2022, during the COVID-19 pandemic, Pitta and pertinent District employees engaged in two meetings ("IEP Team Meetings") virtually to "discuss and develop a new IEP for [Pitta's] child." During these meetings, although the appellees had previously "argu[ed] to remove [Pitta's] child from IEP based special education services," "several school district employees" admitted "that the [District and Medeiros] had no data upon which to base their opinion" that his child should be removed from these services, and "that teachers who performed evaluations on the child that resulted in findings contrary to the [appellees'] position were later asked by the [appellees] to 'double check' their evaluation, but teachers whose evaluation results supported the [appellees'] position were not asked to do the same." The complaint alleges that "[d]espite lengthy discussions" of these statements, these statements "were not included in the [appellees'] official meeting minutes that were emailed to [him] on March 10[ ], 2022." When Pitta alerted appellees to these "omissions and inaccuracies," he "objected to the [appellees'] minutes as an official record

of the meetings and requested that the minutes be amended to include the omitted portions," but appellees "refused to amend the meeting minutes."

Months later, on September 20, 2022, Pitta attended another IEP Team Meeting, conducted virtually through "Google Meet," to discuss his child's IEP. Pitta requested that the appellees video record the meeting using the Google Meet record function.[1] He did so, he alleges, because of appellees' previous "failure to produce accurate minutes of prior meetings and refusal to correct those errors despite obligations to maintain accurate records under 603 CMR 23.03." Appellees refused his request to make such a video recording, stating that such a recording would be "invasive" and was not permitted by District policy. Appellees did offer to audio record the meeting instead. Pitta then told Medeiros, the IEP Team Meeting chair, that since the District's policy prohibited them from video recording the meeting, he would make his own recording. Once the meeting began, the appellees announced that they were audio recording the meeting, and Pitta stated that he was video recording it. At that point, Medeiros stated that if Pitta did not stop his video recording, she would end the meeting. When Pitta refused to stop the video recording, Medeiros terminated this meeting. Pitta filed this suit on

[1] Both Pitta's complaint and the appellees' brief state that Pitta "requested that the Defendants[] video record the meeting using the Google Meet record function." As the district court noted, Pitta did not specify which District employees, other than Medeiros, attended the IEP Team Meeting. Pitta, 2023 WL 3572391, at *7.

September 28, 2022, within days of the failed meeting, seeking declaratory and injunctive relief.

On October 3, 2022, after Pitta had filed this suit, Medeiros emailed Pitta that the District had "figured out a way to accommodate [his] request to know who is speaking while the meeting is being audio recorded" and was attempting to find a mutually agreeable time "for the educational Team to reconvene from the attempted [IEP] Team [M]eeting scheduled on 9/20/22."[2] She proposed that "[t]eam members will all be audio recorded and participate with the camera off. When speaking, their identity box will be indic[a]ted as the person speaking by lighting around/within the box." She wrote that this would allow Pitta to "be able to tell who is speaking" while "looking at the screen." Pitta agreed to a virtual IEP Team Meeting under these conditions to take place on October 21, 2022.[3]

After filing this suit, Pitta sent a public records request on July 10, 2023, seeking from the District "[a]ll special education policies, procedures, etc[.] regarding the IEP process in effect from January 1, 2022[,] to the

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[2] On a motion to dismiss, we may consider documents which are of undisputed authenticity, official public records, central to the plaintiff's claim, or sufficiently referred to in the complaint. Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993). We will consider the e-mails attached to appellees' memorandum to the district court as documents of undisputed authenticity.

[3] The record does not reflect whether this meeting took place. At oral argument, Pitta stated that after the district court granted the appellees' motion to dismiss in this case, the District rescinded its offer to allow this kind of recording and has since restricted both audio and video recording of IEP Team Meetings.

date of th[at] request"; "[a]ll emails to or from Paul Tsovolos or Dina Medeiros regarding the same information"; and "[a]ll changes or proposed changes to policies, procedures, etc[.] requested." On July 24, 2023, the District provided Pitta with a copy of the Bridgewater-Raynham Regional School District Special Education Policy and Procedure Manual ("Manual").[4]

The Manual explains in detail the District's requirements and policies regarding IEPs, the composition of IEP Teams, and the conduct of IEP Team Meetings. It lists the specific individuals who comprise an IEP Team as: "the student's parent(s); at least one regular education teacher familiar with the student; at least one special education teacher familiar with the student; a representative of the district who has the authority to commit resources[5]; an individual who can interpret evaluation results; other individual(s) who have knowledge or expertise regarding the student; [and] if appropriate, the child."

The Manual states that "[t]he [IEP] Team is charged with managing three important activities:

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[4] Pitta filed a Supplemental Appendix with his reply brief containing the Manual, as well as a June 4, 2003, letter written by Stephanie S. Lee, then-Director of the Office of Special Education Programs at the Department of Education ("DOE"). We take judicial notice of the official documents contained in the Supplemental Appendix, the appellees not having contested their authenticity.

[5] The Manual instructs that "[t]he Director of Student Services, Administrator of Special Education, Special Education Coordinator, Principals and Chairpersons/Department Head have the authority to commit District resources."

Eligibility Determination/ Initial and Reevaluation[;] Development of the IEP[; and] Placement Decision." (Emphasis omitted.) "After finding a student eligible for special education services, the Team develops the IEP." "The IEP must be tailored to the individual student['s] needs as determined through the evaluation process." It explains that "[d]uring an IEP Meeting, Team members share information and discuss the needs of the student in order to gain a comprehensive understanding of the student." IEP development is a "student driven, individualized process," and "[a] well-managed Team meeting" solicits and considers highly personalized information about the student for whom the IEP is being developed, including "parent/student input," "the student's future dreams and goals," "how the student's disability affects the student's learning," and "how the student performs today," as well as "the areas that are affected by the disability" and the "supports and services the student needs for success." Team members must also review "the student's strengths, interests, personal attributes, and personal accomplishments as well as key evaluation results," among other behaviors and personal characteristics of the student.

The Manual states that "[Massachusetts] regulations and [the District] require[ ] attendance at the Team Meeting of the following staff members: (1) Regular Education Teacher[;] (2) Special Education Teacher[;] (3) A representative of the district who is able to commit the resources of the district[; and] (4) An individual who can interpret the instructional implications of [the] evaluation results, who may be a

member described above." In addition, "[t]he Administrator or Coordinator of Special Education is available to attend any meeting where the Team feels it will be discussing resources beyond those which are readily available in their school building." The Manual permits "[a]lternatives to 'physical meetings'" for IEP Team Meetings, "including video conferencing, telephone conferencing, or virtual meetings."

The Manual does not address the topic of video recording these meetings. It does specify, however, how IEP Team Meetings should be documented. The Manual describes the use of an "N1 letter" as "a tool used to formally document the proposed action and justification for that action that a school district will take following a Team meeting." "The N1 letter is the district account and perspective on the proceedings and should outline all perceived viewpoints and responses resulting from the Team discussion," including "a clear student-centered recommendation that allows for the student to receive a Free and Appropriate Public Education," "documentation of the consideration of any rejected factors by the Team," "all district based information (staff input, observation, evaluation)" and "all information obtained from parents or non-district members of the Team (parent observation, outside evaluations, outside service provider input, discharge summary)." The Manual also requires that the IEP Team Members "[u]se the Team Meeting Notes Form to document pertinent information summarizing the [IEP Team] meeting and action plan." It states that "[a]ny formal meeting among Team members,

including parents, should result in either: a completed IEP or the Team Meeting Notes/Summary form in lieu of the completed IEP (if changes are made to the IEP)."

II.

On October 20, 2022, Medeiros and the District moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. After briefing and argument, the district court issued its Memorandum and Order granting the defendants' motion to dismiss on May 19, 2023. See Pitta, 2023 WL 3572391, at *8. It held that the complaint failed to state a claim under the First Amendment because First Amendment protections for "filming government officials engaged in their duties in a public place," as recognized by the First Circuit in Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011), did not extend to video recording an IEP Team Meeting. Id. at *6 (quoting Glik, 655 F.3d at 82). It reasoned that the meeting did not occur in a "public space," its attendees were not included under the definition of "public officials" as the term was used in Glik and a related case, Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999), and it was unclear whether a right to record public officials existed without a corresponding intent to disseminate the recording, which it found Pitta did not allege. See Pitta, 2023 WL 3572391, at *7-8.[6]

[6] The district court's other rulings are not at issue in this appeal.In addition to their motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), appellees also moved to

Pitta timely appealed.

III.

We review de novo a district court's grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6). Lyman v. Baker, 954 F.3d 351, 359 (1st Cir. 2020). "[I]n First Amendment cases, appellate courts have 'an obligation to make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Cheng v. Neumann, 51 F.4th 438, 443 (1st Cir. 2022) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984)).

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dismiss it under Federal Rule of Civil Procedure 12(b) (1) for lack of subject matter jurisdiction due to mootness and failure to exhaust administrative remedies under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482. Pitta, 2023 WL 3572391, at *3-6. In addition, Medeiros moved to dismiss the complaint against her in her individual capacity for insufficient service of process under Fed. R. Civ. P. 12(b) (4) (e). Id. at *8.

The district court declined to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b) (1), holding first that the complaint presented a live case or controversy and second that Pitta's claim was not subject to the exhaustion requirement under the IDEA. Id. at *3-6. The court also dismissed Pitta's Fourteenth Amendment claim for failure to state a claim under Rule 12(b)(6) because the complaint did not provide detail beyond mere allegations that his due process rights had been infringed or that he had been denied equal protection of the laws. Id. at *8. Finally, the court dismissed the individual-capacity claim against Medeiros under Rule 12(b)(4)(e) for failure to effect proper service. Id.

We accept the complaint's well-pleaded factual allegations as true and draw all reasonable inferences in favor of the non-movant. Id. (citing McKee v. Cosby, 874 F.3d 54, 59 (1st Cir. 2017)). "We do not credit legal labels or conclusory statements, but rather focus on the complaint's non-conclusory, non-speculative factual allegations and ask whether they plausibly narrate a claim for relief." Id.

To survive a motion to dismiss, the complaint must "state a claim to relief that is plausible on its face," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007), that is, its "[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)," id. at 555.

While the plausibility standard is not a "'probability requirement,' . . . it does require 'more than a sheer possibility that a defendant has acted unlawfully.'" Air Sunshine, Inc. v. Carl, 663 F.3d 27, 33 (1st Cir. 2011) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "Determining whether a complaint states a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679. If the complaint fails to include "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory," it should be dismissed. Gagliardi v. Sullivan, 513 F.3d 301, 305 (1st Cir. 2008) (quoting Centro Medico del Turabo, Inc. v. Feliciano de Melecio, 406 F.3d 1, 6 (1st Cir. 2005)).

IV.

"The First Amendment, which applies to the States through the Fourteenth," Mills v. Alabama, 384 U.S. 214, 218 (1966), provides that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. I. In order to determine whether Pitta's First Amendment rights were violated, we first address whether video recording one's child's IEP Team Meeting is protected by this amendment. See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985); see also Project Veritas Action Fund v. Rollins, 982 F.3d 813, 830-31 (1st Cir. 2020). We conclude it is not.

In Glik v. Cunniffe, this court held that an onlooker possessed a constitutionally protected right under the First Amendment to video tape police officers as they performed an arrest in the Boston Common. 655 F.3d at 82-84. As the appellant in that case was walking through the Common, he caught sight of three police officers arresting a young man. Id. at 79. "Concerned that the officers were employing excessive force to effect the arrest, Glik stopped roughly ten feet away and began recording video footage of the arrest on his cell phone." Id. at 79-80. This court found that First Amendment protections "encompass[] a range of conduct related to the gathering and dissemination of information," and that "[t]he filming of government officials engaged in their duties in a public place,

including police officers performing their responsibilities, fits comfortably within" this range.[7] Id. at 82.

This court also recognized on the facts therein a First Amendment right to video and audio record police officers in Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014), and in Project Veritas, 982 F.3d. Gericke held

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[7] In making its determination, the Glik court commented that "we have previously recognized that the videotaping of public officials is an exercise of First Amendment liberties," citing Iacobucci, 193 F.3d. But Iacobucci did not raise a First Amendment claim. Rather, the case involved a 42 U.S.C. § 1983 claim for false arrest brought by a local journalist who was arrested while attempting to film commissioners of the Town of Pembroke's Historic District Commission in the Pembroke Town Hall after a public meeting of the Commission. Iacobucci, 193 F.3d at 17-18. Iacobucci attended the Commission meeting to videotape it for "a weekly news program that he produced and broadcast via a cable television outlet." Id. at 17. He refused to stop recording the meeting despite repeated requests by the commissioners and by police officers eventually called to the scene. Id. at 17-18. After the meeting ended, Iacobucci noticed that the commissioners were speaking with a man in the Town Hall corridor and began filming their conversation "on the assumption that he was witnessing a de facto resumption of the adjourned meeting." Id. at 18. Although the commissioners again asked him to stop filming, Iacobucci persisted. Id. Eventually a police sergeant stepped in front of his camera lens and demanded he cease and desist, but Iacobucci continued video recording, even after he was given the ultimatum of "sit down or be arrested," until the sergeant took his camera and placed him under arrest. Id. The criminal charges were eventually dismissed, but Iacobucci filed a pro se civil action which included the false arrest claim against the sergeant. Id. The opinion stated in dicta that because Iacobucci's "activities were peaceful, not performed in derogation of any law, and done in the exercise of his First Amendment rights, [the defendant police sergeant] lacked the authority to stop them." Id. at 25 (emphasis added).

that an individual has a right to record police officers "carrying out their duties in public" while conducting a traffic stop on the side of the road. 753 F.3d at 34, 7 (quoting Glik, 655 F.3d at 82). Gericke was driving on the highway in Weare, New Hampshire, at approximately 11:30 pm when a police officer stopped her friend's car, which she had been following. Id. at 3. Gericke pointed a video camera at the police officer and announced that she was going to audio-video record the officer while he interacted with her friend, who had exited his vehicle. Id. When the police officer ordered Gericke to return to her car, she immediately complied, though she continued to point her camera at the officer despite knowing it was not recording.[8] Id. This court held that the "constitutionally protected right to film police . . . discussed in Glik" applied to Gericke's case as well, because "[i]n both instances, the subject of filming is 'police carrying out their duties in public,'" id. at 7 (quoting Glik, 655 F.3d at 82), though the court

[8] Gericke eventually put away the camera in her car's central console on her own accord. Id. When Gericke refused to tell another police officer who had arrived on the scene where she had put the camera and to produce her license and registration upon his request, the officer arrested her for disobeying a police order. Id. at 3-4. The Weare police then filed criminal complaints against Gericke, including unlawful interception of oral communications. See id. at 4; N.H. Rev. Stat. Ann. § 570A:2. Although town and county prosecutors declined to proceed on the charges against her, Gericke brought an action under 42 U.S.C. § 1983 against the defendant police officers, the Weare Police Department, and the Town of Weare, alleging that "the officers violated her First Amendment rights when they charged her with illegal wiretapping in retaliation for her videotaping of the traffic stop." Gericke, 753 F.3d at 4.

acknowledged that the circumstances of filming a traffic stop were "substantially different" than filming an arrest in a public park, id. at 5. In doing so, this court emphasized that this holding did not mean "an individual's exercise of the right to film a traffic stop cannot be limited." Id. at 7. "The circumstances of some traffic stops . . . might justify a safety measure – for example, a command that bystanders disperse – that would incidentally impact an individual's exercise of the First Amendment right to film." Id. at 8.

In Project Veritas, this court held that this First Amendment right to record "police officers discharging their official duties in public space" included the right to make "secret, nonconsensual audio recording[s]." 982 F.3d at 817. Project Veritas involved challenges made by two sets of plaintiffs – two Boston civil rights activists, K. Eric Martin and Rene Perez and a national undercover investigative journalism organization, Project Veritas Action Fund – to Massachusetts General Laws ch. 272, § 99 ("Section 99"), which criminalized secret audio recordings made without prior permission by the recorded party. Id. Martin and Perez "allege[d] that Section 99 violate[d] the First Amendment insofar as it criminalizes the secret, nonconsensual audio recording of police officers discharging their official duties in public spaces." Id. Project Veritas, in contrast, challenged Section 99 "insofar as it bans the secret, nonconsensual audio recording of any government official discharging official duties in public spaces, as well as insofar as it bans such recording of any person who does not have a reasonable expectation of privacy

in what is recorded." Id. (emphasis added in part). Project Veritas also argued that Section 99 should be "struck down in its entirety" due to overbreadth. Id.

This court upheld judgment for Martin and Perez, finding that Section 99's prohibition on "secret, nonconsensual audio recording of police officers discharging their official duties in public spaces" violated the First Amendment. Id. More significantly for present purposes, the court vacated on ripeness grounds the district court's grant of summary judgment to Project Veritas's challenge that Section 99 "violate[d] the First Amendment insofar as that statute bars the secret, nonconsensual audio recording of government officials discharging their duties in public." Id. at 817-18. Project Veritas sought to challenge Section 99's prohibition on recording "government officials" in general, which it defined as "officials and civil servants," including persons "employed in a department responsible for conducting the affairs of a national or local government," also known as "public employee[s]." Id. at 843, 843 n.5 (citing Official, Black's Law Dictionary (10th ed. 2014); Civil Servant, Black's Law Dictionary (10th ed. 2014)). But its plans to record government officials and police officers were too "narrow[]" to raise the much broader issue of whether Section 99's prohibition on recording all "government officials discharging their duties in public spaces" violated the First Amendment. Id. at 843. Importantly, this was because "government officials," as defined by Project Veritas, "cover[ed] everyone from an elected official to a public school teacher to a city park maintenance worker." Id.

(emphasis added). This court rejected that definition. Id. Indeed, the court held that the "First Amendment analysis might be appreciably affected by the type of government official who would be recorded;" for example, "a restriction on the recording of a mayor's speech in a public park" would differ from "a restriction on the recording of a grammar school teacher interacting with her students in that same locale." Id. (emphasis added).

Pitta's First Amendment claim rests, as the district court recognized, on a misreading of this Circuit's precedents in Glik, Iacobucci, Gericke, and Project Veritas. These cases do not support his argument that a First Amendment right to record exists whenever "public officials" are operating in "public spaces." Among other things, his argument ignores limitations imposed both explicitly and implicitly by these cases. A student's IEP Team Meeting, whether virtual or in person, is ordinarily not conducted in a "public space." Further, this meeting could not be public because only members of a student's IEP Team may attend an IEP Team Meeting, and because IEP Team Meetings involve the discussion of sensitive information about the student. Nor are school district employees attending these meetings akin to the "public officials" in the cases cited by Pitta. In most of these cases, those "public officials" were law enforcement officers performing their duties in obviously public places. We hold, as did the district court, that Pitta possesses no First Amendment right to video record IEP Team Meetings and do so for a variety of reasons.

To start, an IEP Team Meeting does not ordinarily occur in a space open to the public. Pitta argues that whether the recording occurred in a public space or non-public space "[i]s [i]rrelevant [f]or [t]he [p]urpose [o]f [a] [m]otion [t]o [d]ismiss" because "[t]he specific forum merely identifies the level of scrutiny applied to the government officials[‘] restriction of First Amendment activity." He argues from this that "[a] finding that the specific forum is a non-public forum" does not foreclose a finding that he had a First Amendment right to video record.

This Circuit's cases have found a First Amendment right to record government officials performing their duties only when those duties have been performed in public spaces. See Glik, 655 F.3d at 84 (protecting under the First Amendment a recording made "in the Boston Common, the oldest city park in the United States and the apotheosis of a public forum"); Gericke, 753 F.3d at 7; Project Veritas, 982 F.3d. at 844. In Project Veritas, we noted that "[o]ur cases have fleshed out the contours of [the public space] category":

> traditional public fora, such as public parks like the Boston Common (which was the site of the recording in Glik, 655 F.3d at 84); the sites of traffic stops, including those that occur on the sides of roads, see Gericke, 753 F.3d at 8 . . . ; and other "inescapably" public spaces, id. at 7, such as the location of the recording that occurred in Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999), which concerned a journalist's arrest for openly recording members "of the Pembroke Historic District Commission"

> that were having a conversation in "the hallway" of the town hall immediately following an open public meeting, id. at 17-18.

Id. at 827. The setting of an IEP Team Meeting could hardly be more different from these public spaces identified in Project Veritas.

The IEP Team Meeting occurred in a password-protected virtual meeting room under the control of a public school official. Even if the IEP Team Meeting were not virtual, but in person, the general public is not free to walk into a school and enter a meeting of educators. Even parents, apart from the general public, have no constitutional right to attend a meeting to which they were not invited. See Carey v. Brown, 447 U.S. 455, 470-71 (1980) (finding that the Constitution does not leave state officials "powerless to pass laws to protect the public from . . . conduct that disturbs the tranquility of spots selected by the people . . . [for] buildings that require peace and quiet to carry out their functions, such as . . . schools"); see also Hannemann v. S. Door Cnty. Sch. Dist., 673 F.3d 746, 755 (7th Cir. 2012) (holding "members of the public do not have a constitutional right to access school property"); Lovern v. Edwards, 190 F.3d 648, 655 (4th Cir. 1999) ("School officials have the authority to control students and school personnel on school property, and also have the authority and responsibility for assuring that parents and third parties conduct themselves appropriately while on school property."); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 724 (2d Cir. 1994) (finding appellant, a Board of Education

member, "did not have an unrestricted right to enter the school classrooms or hallways during school hours"); Worthley v. Sch. Comm. of Gloucester, No. 22-12060, 2023 WL 2918981, at *5 (D. Mass. Apr. 12, 2023) (holding plaintiff, "as a member of the public, does not have a constitutional interest to access the school during school hours").[9]

The public did not, and could not by law or District policy, have access to an IEP Team Meeting. Attendance is limited to members of a student's IEP Team. See 20 U.S.C. §§ 1414(d)(1)(B), 1414 (d) (1) (C) (defining the members of the IEP team and policies for IEP

[9] We quickly dispatch Pitta's argument that this court should utilize what he calls a "Lawfully Present" standard to define what is a "public space." He argues that if a "member of the public was lawfully present while recording government officials," that space should be deemed public. None of the cases to which Pitta cites support his argument for a "Lawfully Present" standard. There is good reason for this. To give an example, a member of the public called for jury duty, and thus lawfully present in a jury room, does not have a First Amendment right to video record their fellow jurors during deliberations, nor the proceedings of the courtroom from the jury box. See 18 U.S.C. § 1508(a) (banning "record[ing], or attempt[ing] to record, the proceedings of any grand or petit jury in any court of the United States while such jury is deliberating or voting"); Fed. R. Crim. P. 53 ("Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."); Liviz v. Sup. Ct. of U.S., No. 18-12532, 2018 WL 6592093, at *2 (D. Mass. Dec. 14, 2018), aff'd, No. 18-2252, 2019 WL 2537955 (1st Cir. Mar. 19, 2019) ("To the extent [the plaintiff] contends that there is a First Amendment right of camera access to the Supreme Court and other federal courts, such a right has not been recognized.").

Team attendance); 34 C.F.R. 300.321 (outlining policies for IEP Team composition and attendance).

In addition, the IEP Team Meetings not only take place in non-public spaces and are closed to the public, but by their nature involve discussions of personal, highly sensitive information about a student. According to the Manual, these topics include "the student's future dreams and goals," "how the student's disability affects the student's learning," and "how the student performs today," as well as "the areas that are affected by the disability" and the "supports and services the student needs for success," so that all attendees at the meetings can "gain a comprehensive understanding of the student" and discuss or develop an IEP "tailored to the individual student." See also 20 U.S.C. § 1414; 603 C.M.R. 28.05 (outlining the requirements for the IEP development process under Massachusetts law).

Next, unlike the public officials in Glik, Gericke, and Project Veritas, the IEP Team Members were not performing their duties in public, but rather at a virtual meeting with no public access. The District has effectively argued that video recording IEP Team Members would hinder their performance of their duties, as it carries a high risk of suppressing the sensitive, confidential, and honest conversations necessary when discussing or developing a child's IEP. Public school teachers and administrators carrying out their IEP obligations also do not wield the same "power of suppression" as police officers, see Glik, 655 F.3d at 82 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 n.11 (1978)), nor have they been "granted

substantial discretion that may be misused to deprive individuals of their liberty," as law enforcement officials have, id. Unlike police officers, IEP Team Members are not "expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." Id. at 84.

We thus also reject Pitta's overbroad argument that the references to "public officials" or "government officials" in Glik, Project Veritas, and Gericke, where these terms were used to refer to police officers, extends to anyone employed by a government. This court has never held that the test is whether an individual sought to be video recorded in the course of his or her job is a government official. Pitta's argument ignores established limitations in First Circuit law, which permit recording of government officials performing their duties only in indisputably public places in full view of the public, and even then, only when the act of filming would not hinder officials in the performance of their public duties and would serve public interests.

For example, in Glik, the court considered what it called the "fairly narrow" First Amendment issue of whether "there [is] a constitutionally protected right to videotape police carrying out their duties in public." Id. at 82 (emphasis added). "The same restraint demanded of law enforcement officers in the face of 'provocative and challenging' speech must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces." Id. (emphasis added) (quoting City of Houston v. Hill, 482 U.S. 451, 461 (1987)).

In Gericke, the "government officials" at issue were also police officers "carrying out their duties in public" while conducting a traffic stop on the side of the road. 753 F.3d at 34, 7 (quoting Glik, 655 F.3d at 82). This court held that the officer, however, could prevent the recording if he "c[ould] reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties." Id. at 8.

Project Veritas also does not support Pitta's argument. This court held that individuals have a First Amendment right to make "secret, nonconsensual audio recording[s]" only of "police officers discharging their official duties in public spaces." See 982 F.3d at 817. It also reaffirmed that "[t]he government is under no obligation to permit a type of newsgathering that would interfere with police officers' ability to do their jobs." Id. at 836. There, the record showed no evidence that secretly recording police "would appreciably alter their ability to protect the public either in gross or at the retail level of more individualized interactions." Id.

There is yet another reason Pitta's claim fails. Our cases have repeatedly framed the right to record public information as linked to the right of the public to receive this information. Glik held that recording government officials in public spaces was a protected First Amendment right because "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" 655 F.3d at 82 (quoting Mills, 384 U.S. at 218). Because "'the First

Amendment . . . prohibit[s] government from limiting the stock of information from which members of the public may draw,' . . . [a]n important corollary to this interest in protecting the stock of public information is . . . [the] 'right to gather news from any source by means within the law.'" Id. (emphasis added) (first quoting First Nat'l Bank, 435 U.S. at 783, then quoting Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (internal citations omitted)). Similarly, Project Veritas recognized First Amendment protection for secretly recording police officers (extending from prior precedent that protected the open recording of police, see Glik, 655 F.3d at 84; Gericke, 753 F.3d at 7), because these recordings promote the "cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs," among other grounds, 982 F.3d at 832 (emphasis added) (internal citations omitted). No such interest is served by video recording an IEP Team Meeting because such a recording is not intended to be disseminated to the public.

Finally, we add that even if Pitta had a First Amendment right to video record his child's IEP Team Meeting, which he does not, his claim would fail. "Even protected speech is not equally permissible in all places and at all times." Cornelius, 473 U.S. at 799; accord Glik, 655 F.3d. at 84 (holding a First Amendment right to video record "may be subject to reasonable time, place, and manner restrictions"); Gericke, 753 F.3d at 7 (holding "[r]easonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them"). Here, the District's

prohibition on video recording these meetings is content neutral and narrowly tailored to its significant governmental interest in promoting candid conversations in the discussion or development of IEPs in order to provide students with a "free appropriate public education" ("FAPE") under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482. The policy also leaves open several alternative channels for collecting and recording information from IEP Team Meetings.

On the record before us, the District's policy is content neutral.[10] The policy does not "'draw[] distinctions based on the message a speaker conveys.'" Rideout v. Gardner, 838 F.3d 65, 71 (1st Cir. 2016) (quoting Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163 (2015)). The policy also does not "discriminat[e] among viewpoints" or "regulat[e] speech based on 'the specific motivating ideology or the opinion or perspective of the speaker.'" Reed, 576 U.S. at 168 (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)). "The government's purpose is the

[10] Pitta argues to us that the District's prohibition on video recording was a viewpoint-based restriction because in his view it was "in direct response to [his] revealing the highly unethical and potentially unlawful actions of the school district['s] administrator" and because there was no written policy on video recording at the time. Policies need not be written and Pitta has not argued that other parents were not subjected to the same policy. Further, as Gericke held, a "[r]easonable restriction[] on the exercise of the right to" record may take a variety of forms, including not only a "preexisting statute, ordinance, regulation, or other published restriction with a legitimate public purpose," but also "a reasonable, contemporaneous order[.]" 753 F.3d at 7-8.

controlling consideration" for whether a restriction is content neutral, and here, the policy "serves purposes unrelated to the content of expression." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). It thus "require[s] a lesser level of justification" than a content-based restriction. Rideout, 838 F.3d at 71.

Content-neutral regulations "are subject to intermediate scrutiny, which demands that the law be 'narrowly tailored to serve a significant governmental interest.'" Id. at 71-72 (quoting Ward, 491 U.S. at 791). "A speech restriction is sufficiently narrowly tailored so long as the 'regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" Signs for Jesus v. Town of Pembroke, 977 F.3d 93, 106 (1st Cir. 2020) (quoting Ward, 491 U.S. at 799). "The application of intermediate scrutiny also accords with the approach that we took in Glik and Gericke, even though neither case explicitly named the level of scrutiny deployed." Project Veritas, 982 F.3d at 835.

The purpose of the District's video recording prohibition is to serve its "significant governmental interest," see Rideout, 838 F.3d at 72, in meeting its responsibilities under the IDEA. The IDEA provides federal funding to states to assist them with educating children with disabilities and imposes requirements, including that schools must provide all children with disabilities with a FAPE "'in conformity with the [child's] individualized education program,' or IEP." Parent/Pro. Advoc. League v. City of Springfield, 934

F.3d 13, 19 (1st Cir. 2019) (alteration in original) (quoting 20 U.S.C. § 1401(9)(D)).

The IDEA requires that IEP Team Members create a written IEP tailored to the "unique needs" of the student that expressly addresses a number of sensitive and personal issues and questions. 20 U.S.C. §§ 1400, 1414. These include "a statement" regarding "how the child's disability affects the child's involvement and progress in the general education curriculum," "a statement of measurable annual goals, including academic and functional goals," "a description of how the child's progress toward meeting the annual goals . . . will be measured," and "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child . . . to advance appropriately toward attaining the annual goals." 20 U.S.C. § 1414. As the appellees argue, "as an integral component to their ability to facilitate the sort of earnest discussion necessary to yield an appropriate IEP, IEP meeting participants must enjoy wide latitude to engage as comfortably as possible in a candid exchange of observations and ideas."

Promoting candor and protecting sensitive conversations in IEP Team Meetings are "purposes unrelated

to the content of expression." Ward, 491 U.S. at 791.[11] The District's policy prohibiting video recording of these meetings, which could stifle these discussions, also "promotes a substantial government interest that would be achieved less effectively absent the regulation." Id. at 799.

V.

For these reasons, we **affirm** the judgment of the district court.

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[11] Pitta, allegedly relying on a DOE guidance document, argues for the first time in his reply brief that he needs to video record his child's IEP Team Meeting to meaningfully assert his parental rights protected by the IDEA. In any event, this is not a First Amendment claim and is waived. His belated claim is an administrative claim subject under the IDEA to exhaustion before it may be brought as a civil action in federal court. See 20 U.S.C. § 1415(1) (holding that "before the filing of a civil action . . . seeking relief that is also available under [the IDEA], the [IDEA's administrative] procedures . . . shall be exhausted"); see also Parent/Pro. Advoc. League, 934 F.3d at 2021.

United States Court of Appeals
For the First Circuit

No. 23-1513

SCOTT D. PITTA,

Plaintiff, Appellant,

v.

DINA MEDEIROS, individually and in her official capacity as Administrator of Special Education for the Bridgewater Raynham Regional School District; BRIDGEWATER RAYNHAM REGIONAL SCHOOL DISTRICT,

Defendants, Appellees.

JUDGMENT

Entered: January 4, 2024

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's judgment is affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc: Scott D. Pitta, Peter Louis Mello

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SCOTT PITTA, Plaintiff v. DINA MEDEIROS and BRIDGEWATER-RAYNHAM REGIONAL SCHOOL DISTRICT, Defendants.	**Civil Action No. 22-11641-FDS**

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION TO DISMISS

(Filed May 19, 2023)

SAYLOR, C.J.

This lawsuit arises out of a dispute between a school district and the parent of a disabled child. Plaintiff Scott Pitta is the parent of a child who receives individualized education program ("IEP") services in the Bridgewater-Raynham Regional School District. After the District allegedly omitted certain facts from the official minutes of an IEP meeting, Pitta sought to video record future meetings with District staff. The District denied his request, citing its policy against video recording. Pitta then sued the school district and the Administrator of Special Education, Dina Medeiros, under 42 U.S.C. § 1983, alleging a violation of his First Amendment right to record government officials in the performance of their duties. He is proceeding *pro se*.

Defendants have moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons stated below, the motion will be granted.

I. Background

A. Factual Background

The facts are set forth as alleged in the complaint.

Scott Pitta is a resident of Bridgewater, Massachusetts, and the parent of a child who receives IEP services. (Compl. ¶¶ 1, 7).[1]

Dina Medeiros is the Administrator of Special Education for the Bridgewater-Raynham Regional School District. (*Id.* ¶ 8). The Bridgewater-Raynham Regional School District (the "District") is organized under Mass. Gen. Laws ch. 71, § 14B. (*Id.* ¶ 9).

On February 15 and March 8, 2022, Pitta met virtually with employees of the school district to discuss

[1] "IEPs are 'comprehensive plan[s]' developed by the child's teachers, school officials, and parents" to ensure that disabled children receive a "free appropriate public education" under the Individuals with Disabilities Education Act ("IDEA"). *Parent/Pro. Advoc. League v. City of Springfield, Massachusetts*, 934 F.3d 13, 19 (1 st Cir. 2019) (quoting *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 391 (2017)). At a minimum, "[e]ach IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (citing 20 U.S.C. § 1414(d)(1)(A)).

a new IEP for his child. (*Id.* ¶ 15). According to the complaint, District employees sought to remove his child from IEP-based special education services, but made several "statements of facts that were harmful to [their] argument" during the meetings. (*Id.* ¶ 16). For example, the employees allegedly admitted that they "had no data upon which to base their opinion," and that teachers whose evaluations of Pitta's child did not support removal from the IEP program had been asked to "'double check' their evaluation," while teachers whose evaluations supported removal were not asked to do the same. (*Id.*). The official meeting minutes e-mailed to Pitta on March 10, 2022, allegedly did not include those statements, despite "lengthy discussions" during the meeting. (*Id.* ¶ 17). The complaint alleges that Pitta "objected to the Defendants' minutes as an official record of the meetings and requested that the minutes be amended to include the omitted portions of the meeting." (*Id.*). According to the complaint, the District refused to amend the meeting minutes. (*Id.* ¶ 18).

On September 20, 2022, Pitta attended another IEP meeting by "Google Meet." (*Id.* ¶ 1). Citing the District's earlier failure to produce accurate meeting minutes (allegedly in violation of 603 Mass. Code Regs. § 23.03), Pitta requested that the meeting be video recorded using the Google Meet recording function. (*Id.*). According to the complaint, the District denied his request on the basis that a video recording was "invasive" and against District policy. (*Id.*). However, the District permitted "an external audio recording operated

and controlled" by its employees. (*Id.*). Pitta allegedly informed the meeting chair, Dina Medeiros, that because "school policy prevented her from making a video recording of the meeting, [he] would [] make his own recording." (*Id.*). Medeiros ended the meeting after Pitta refused to stop recording. (*Id.*).

On October 3, 2022 (after the complaint in this case was filed), Medeiros sent an e-mail to Pitta indicating that the District had "figured out a way to accommodate [his] request to know who is speaking while the meeting is being audio recorded." (Defs' Mem. Ex. A at 4).[2] Medeiros proposed that team members would participate with their cameras off, but when a participant spoke, their identity would be indicated by lighting around the box containing their name on the screen. (*Id.*). Pitta agreed to the meeting, and it was scheduled for October 21, 2022. (*Id.* at 2).

B. Procedural Background

In the meantime, on September 28, 2022, Pitta filed the complaint in this case, alleging a claim under 42 U.S.C. § 1983 for violations of the First and Fourteenth

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[2] On a motion to dismiss, the court may properly take into account four types of documents outside the complaint without converting the motion into one for summary judgment: (1) documents of undisputed authenticity; (2) documents that are official public records; (3) documents that are central to plaintiff's claim; and (4) documents that are sufficiently referred to in the complaint. *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993). The Court will consider the e-mails attached to defendants' memorandum as documents of undisputed authenticity.

Amendments. Specifically, the complaint alleges that the District's policy prohibiting parents from video recording IEP meetings "violates the First Amendment by causing [Pitta] to refrain from constitutionally protected information gathering." (Compl. ¶ 24). The complaint seeks declaratory and injunctive relief.[3]

Defendants have moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.[4] Medeiros has also moved to dismiss the complaint against her in her individual capacity for insufficient service of process under Fed. R. Civ. P. 12(b)(5).

II. Legal Standard

On a motion to dismiss for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), "the party invoking the jurisdiction of a federal court carries the burden of proving its existence." *Murphy v.*

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[3] The complaint is unclear as to whether plaintiff also seeks monetary damages.

[4] Defendants frame their argument that plaintiff failed to exhaust administrative remedies as a jurisdictional issue. The First Circuit does not appear to have addressed the question of whether failure to exhaust administrative remedies under the IDEA is an issue of subject-matter jurisdiction, or an affirmative defense to be addressed on the merits. *See Weber v. Cranston Pub. Sch. Comm.*, 245 F. Supp. 2d 401, 410 n.8 (D.R.I. 2003) (collecting cases addressing the issue under Fed. R. Civ. P. 12(b)(1) and 12(b)(6)). Regardless of how that issue is characterized, defendants have also moved to dismiss for mootness, which raises an issue of subject-matter jurisdiction.

United States, 45 F.3d 520, 522 (1st Cir. 1995) (quoting *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57, 60 (1st Cir. 1993)). When ruling on a 12(b)(1) motion, the court "must credit the plaintiff's well-[pleaded] factual allegations and draw all reasonable inferences in the plaintiff's favor." *Merlonghi v. United States*, 620 F.3d 50, 54 (1st Cir. 2010).

On a motion to dismiss made pursuant to Rule 12(b)(6), the court "must assume the truth of all well-plead[ed] facts and give the plaintiff the benefit of all reasonable inferences therefrom." *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 5 (1st Cir. 2007) (citing *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999)). To survive a motion to dismiss, the complaint must state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In other words, the "[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555 (citations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556). Dismissal is appropriate if the complaint fails to set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Gagliardi v. Sullivan*, 513 F.3d 301, 305 (1st Cir. 2008) (quoting *Centro Medico del*

Turabo, Inc. v. Feliciano de Melecio, 406 F.3d 1, 6 (1st Cir. 2005)).

Because plaintiff is proceeding *pro se*, the complaint, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice."); *see also Instituto De Educacion Universal Corp. v. United States Dep't of Educ.*, 209 F.3d 18, 23 (1st Cir. 2000). Where the court cannot ascertain the nature and basis of any legitimate claims, however, it is under no obligation to rewrite the pleadings on his behalf. *See Lampkin-Asam v. Volusia Cnty. Sch. Bd.*, 261 Fed. App'x 274, 276-277 (11th Cir. 2008) ("While a trial judge is to employ less stringent standards in assessing *pro se* pleadings than would be used to judge the final product of lawyers, this leniency does not permit the district court to act as counsel for a party or to rewrite deficient pleadings." (alterations and citation omitted)).

III. Analysis

Defendants have moved to dismiss the complaint on three grounds: (1) mootness; (2) failure to exhaust administrative remedies under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*; and (3) failure to state a claim for violations of the First Amendment. For the reasons set forth below, the complaint presents a live case or controversy,

and plaintiff's claim is not subject to the exhaustion requirement under the IDEA. Nevertheless, the complaint fails to state a claim under the First Amendment and will be dismissed on that basis.

A. Mootness

Because "[f]ederal courts lack jurisdiction to decide moot cases," the first question is whether plaintiff's claims for injunctive and declaratory relief have been rendered moot by the IEP meeting held after the filing of the complaint. *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983).[5] "The doctrine of mootness enforces the mandate 'that an actual controversy must be extant at all stages of the review, not merely at the time the complaint is filed.'" *American Civ. Liberties Union of Mass. ("ACLUM") v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 52 (1st Cir. 2013) (quoting *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003)). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* (quoting *D.H.L. Assocs., Inc. v. O'Gorman*, 199 F.3d 50, 54 (1st

[5] While "[i]t is settled law that a claim for monetary relief . . . may survive events that moot injunctive or declaratory relief," the complaint is unclear as to whether plaintiff seeks monetary damages. *Town of Portsmouth, R.I. v. Lewis*, 813 F.3d 54, 60 (1 st Cir. 2016). And a claim for attorneys' fees and costs, which plaintiff does assert, is "insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Harris v. University of Massachusetts Lowell*, 43 F.4th 187, 193 (1 st Cir. 2022) (quoting *Davidson v. Howe*, 749 F.3d 21, 27 n.7 (1st Cir. 2014) and citing 13C Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 3533.3 n.75 (3d ed.)).

Cir. 1999)). "A party can have no legally cognizable interest in the outcome of a case if the court is not capable of providing any relief which will redress the alleged injury." *Gulf of Maine Fisherman's All. v. Daley*, 292 F.3d 84, 88 (1st Cir. 2002).

The complaint seeks a declaration "that the Defendant's prohibition on parents' video recording IEP team meetings is unconstitutional," as well as an order "permanently enjoining Defendants from preventing or interfering with Plaintiffs or others who are lawfully present, from video recording government officials engaged in their official duties." (Compl. at 7-8). Defendants contend that plaintiff's case is moot because they voluntarily provided "precisely the result that he asks this Court to impose via an injunction" when they hosted a video-recorded IEP meeting after the filing of the complaint. (Defs.' Mem. at 12). Plaintiff does not dispute that he was eventually allowed to video record the IEP meeting. (Pl.'s Opp'n at 7). However, the District policy prohibiting recording apparently remains in place, and plaintiff states that IEP meetings "must occur, at a minimum, annually." (*Id.*).

A one-time exception to an allegedly unconstitutional policy does not moot a First Amendment claim because (among other reasons) the court could grant further relief by enjoining the District from enforcing the policy in the future, or issuing a declaratory judgment on the policy's constitutionality.

Furthermore, at least one exception to the mootness doctrine potentially applies here. The voluntary-cessation exception applies where a "'defendant

voluntar[ily] ceases the challenged practice' in order to moot the plaintiff's case, and there exists 'a reasonable expectation that the challenged conduct will be repeated following dismissal of the case.'" *Town of Portsmouth, R.I. v. Lewis*, 813 F.3d 54, 59 (1st Cir. 2016) (quoting *A CLUM*, 705 F.3d at 54-56)). Here, the fact that the District offered to host a video-recorded meeting shortly after the complaint was filed at least plausibly suggests that their actions were made in response to the pending litigation. *See id.* (noting that the exception "ordinarily does not apply where the voluntary cessation occurred for reasons unrelated to the litigation," such as when a policy expires according to a predetermined schedule). And because the policy against video recording is apparently still in effect, defendants cannot meet "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *ACLUM*, 705 F.3d at 55 (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 US 167, 190 (2000)).[6]

Accordingly, the motion to dismiss on the basis of mootness will be denied.

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[6] It is also possible that the exception applicable to matters that are "capable of repetition yet evading review" applies here. The harm resulting from any individual, unrecorded IEP meeting could arguably be "too short to be fully litigated prior to its cessation," and it is not unreasonable to expect that plaintiff may suffer the same injury again. *See Doe v. Hopkinton Pub. Sch.*, 19 F.4th 493, 511 (1st Cir. 2021).

B. Failure to Exhaust Under IDEA

Defendants next contend that the complaint alleges a "quintessential IDEA" claim that plaintiff was required to exhaust by administrative review prior to filing suit in this court.

1. The IDEA

The IDEA conditions the provision of federal funds to public schools on compliance with a requirement to provide all disabled children with a "free appropriate public education" ("FAPE"). *See Parent/Pro. Advoc. League v. City of Springfield*, 934 F.3d 13, 19 (1st Cir. 2019) (citing 20 U.S.C. § 1412(a)(1)). "As defined in the Act, a FAPE comprises 'special education and related services'—both 'instruction' tailored to meet a child's 'unique needs' and sufficient 'supportive services' to permit the child to benefit from that instruction." *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 158 (2017) (quoting 20 U.S.C. § 1401(9), (26), (29)). The Individualized Education Program ("IEP") is the IDEA's primary means for assuring the provision of a FAPE to disabled children. *Id.* "[T]he services offered in an IEP amount to a FAPE if they are 'reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.'" *C.D. by & through M.D. v. Natick Pub. Sch. Dist.*, 924 F.3d 621, 624-25 (1st Cir. 2019) (quoting *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017)).

If a dispute arises between parents and a school district concerning the application of IDEA to a particular

child, the statute requires the state to convene an impartial hearing. 20 U.S.C. § 1415(f)(1)(A). "Hearing officers can grant substantive relief, such as reimbursement for private school tuition or an order that a school district must offer the student an appropriate educational program." *Parent/Prof'l Advocacy League*, 934 F.3d at 19-20 (citing *School Comm. of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359, 370 (1985)). "But relief may only be granted 'based on a determination of whether the child received a [FAPE].'" *Id.* (quoting 20 U.S.C. § 1415(f)(3)(E)(i)).

2. The Exhaustion Requirement

In Massachusetts, the hearings required by the IDEA are conducted by the Bureau of Special Education Appeals ("BSEA"). *See* Mass. Gen. Laws ch. 71B, § 3; 603 Mass. Code of Regs. 28.08(5); *see also Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 988 (1st Cir. 1990). The BSEA's administrative decision is reviewable in either state or federal court. *See* 20 U.S.C. § 1415(i)(2)(A). However, before such an action may be brought, the party seeking review must exhaust all administrative procedures under the IDEA. 20 U.S.C. § 1415(l); *see also Parent/Prof'l Advocacy League*, 934 F.3d at 20.[7]

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[7] IDEA's exhaustion provision reads:

> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of

The exhaustion requirement "is not limited to claims based directly upon violations of the IDEA"; it also applies to civil actions brought under other federal laws, "so long as the party is seeking relief that is available under subchapter II of [the] IDEA." *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 59 (1st Cir. 2002) (quoting *Rose v. Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000)). Exhaustion is therefore required "if the relief sought is from the denial of a free appropriate public education"—the only remedy available under the IDEA. *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 18 (1st Cir. 2019) (citing 20 U.S.C. § 1415(l)); *see also Fry*, 580 U.S. at 166. In effect, "plaintiffs may not use § 1983—or any other federal statute for that matter—in an attempt to evade the limited remedial structure of the IDEA." *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (1st Cir. 2006). However, if a suit seeks redress for a school's conduct that injures the plaintiff "in ways unrelated to a FAPE," then the exhaustion requirement does not apply. *Fry*, 580 U.S. at 168-69. Furthermore, exhaustion is only required for suits brought under other federal statutes to the extent that a plaintiff seeks relief that is also available under the IDEA. *Luna Perez v. Sturgis Pub. Sch.*, 143 S. Ct. 859, 864 (2023) (holding that the exhaustion requirement did

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> children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(l).

not preclude suit for compensatory damages under the Americans with Disabilities Act, because damages are not available under IDEA).

To determine whether a lawsuit seeks relief for the denial of a FAPE, "a court should look to the gravamen of the plaintiff's complaint—not the labels used in it." *Doucette*, 936 F.3d at 23 (quoting *Fry*, 580 U.S. at 165, 169) (internal quotation marks and alterations omitted). The Supreme Court has identified two "clues" to help courts perform that inquiry:

> The first clue comes from the answers to a pair of hypothetical questions: (1) could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school? and (2) could an *adult* at the school have pressed essentially the same grievance? When the answer to each question is no, the complaint probably does concern a FAPE. On the other hand, if the answers are yes, a FAPE is unlikely the true subject of the complaint. The second clue involves the history of the case; a plaintiff's previous invocation of the IDEA's formal procedures may provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE.

Id. at 23-24 (quoting *Fry*, 580 U.S. at 171-73) (internal quotation marks and alterations omitted).

3. The Gravamen of the Complaint

Here, while plaintiff's claim arises out of the District's conduct during an IEP meeting, the gravamen of the complaint is not the denial of a FAPE—it is the alleged infringement of plaintiff's First Amendment rights. Defendants construe the complaint as seeking relief for procedural violations under the IDEA, which permits a hearing officer to find that a FAPE is inadequate based upon conduct that "significantly impeded the parents' opportunity to participate in the decisionmaking process." 20 U.S.C. § 1415(f)(3)(E)(ii). However, the fact that the "same conduct might violate [multiple] statutes" does not mean that exhaustion is required for all non-IDEA claims. *Fry*, 580 U.S. at 171. And the crux of the complaint is whether the alleged procedural inadequacy—the District's failure to allow video recording—is constitutional. That is a question for which the BSEA's "specialized knowledge" in education is inapplicable, and which the federal courts are well-equipped to decide. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 60 (1st Cir. 2002).

The "clues" identified in *Fry* support the conclusion that exhaustion is not required here. Plaintiff could have brought a similar First Amendment claim had he been denied the opportunity to record public officials in a different public space. *See Fry*, 580 U.S. at 171. And plaintiff not only could, but does, bring suit to enforce his *own* rights, rather than the rights of his child. *See id.* Finally, nothing in the complaint indicates that plaintiff previously invoked the formal procedures of IDEA in response to defendants' actions. *Id.*

at 173. Those factors indicate that plaintiff does not seek relief for the denial of a FAPE. Therefore, he was not required to seek administrative relief from the BSEA prior to filing suit in this court. *See E. T. ex rel. Doe v. Bureau of Special Educ. Appeals of the Div. of Admin. L. Appeals*, 91 F. Supp. 3d 38, 51 (D. Mass. 2015) (holding that exhaustion was not required for section 1983 claims alleging violations of the Fourth and First Amendments).

Accordingly, the motion to dismiss for failure to exhaust administrative remedies will be denied.

C. First Amendment

Finally, defendants contend that the complaint fails to state a claim for violation of the First Amendment.

The first question is whether the conduct plaintiff seeks to engage in—recording the IEP meeting—is protected under the First Amendment. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). The First Circuit held in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), that the protections of the First Amendment "encompass[] a range of conduct related to the gathering and dissemination of information," including "[t]he filming of government officials engaged in their duties in a public place." *Id.* at 82 (holding that a private citizen had a First Amendment right to peaceably film police officers performing an arrest in Boston Common).

There are several reasons to question whether the principles of *Glik* extend to the facts of this case. First, as defendants point out, it is highly doubtful that an IEP meeting—particularly one held by videoconference—qualifies as a "public space." While the First Circuit did not clearly define "public space" in *Glik*, it later indicated that that term includes—but is not coextensive with—"traditional" public forums such as public parks, streets, sidewalks, as well as the hallway of a town hall following an open public meeting. *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 827 (1st Cir. 2020).

The IEP meeting in this case took place on an online videoconferencing platform apparently accessible only to school officials and parents (here, only plaintiff himself). The subject of the meeting was to discuss the learning capabilities of an individual child and whether he was disabled. Normally, that is a highly private and sensitive subject. That context is a far cry from a "traditional" public forum, such as "parks, streets, sidewalks, and the like." *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). And even if the school, rather than the video platform, were the relevant location, a public school during school hours is generally considered to be a non-public forum, unless opened to the public by policy or practice. *Worthley v. School Comm. of Gloucester*, 2023 WL 371034, at *4 (D. Mass. Jan. 24, 2023).

Second, while *Glik* clearly held that law-enforcement officers are "public officials" whose actions the public has an interest in recording—at least when acting

within their official duties—the court did not define who else might fall within that category. *See Glik*, 655 F.3d at 84 (noting that "police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights"); *see also Iacobucci v. Boulter*, 193 F.3d 14, 24 (1st Cir. 1999) (recognizing a First Amendment right to film local historic district commissioners). And it is not clear from the complaint who—other than Administrator Medeiros—attended the IEP conference, or why the public would have a comparable interest in their actions.

Finally, it is uncertain whether a right to record exists where an individual seeks to gather, but not publicly distribute, information about government officials. The court in *Glik* reasoned that the right to record received First Amendment protection because "[g]athering information about government officials in a form that can readily be disseminated to others" promotes "the free discussion of governmental affairs" and "aids in the uncovering of abuses." *Glik*, 655 F.3d at 82 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Other courts that have recognized a right to record have framed it as "specifically, a right to record matters of public interest." *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *see also Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (acknowledging a "right to film matters of public interest").

Here, plaintiff apparently seeks to use the recording primarily for his own purposes, rather than to expose government misconduct to the public. (Compl. ¶ 13 (noting that it is "necessary to create an accurate

record of all statements made during an IEP team meeting" that "may be admitted as evidence in subsequent administrative and legal appeals")).[8] The fact that the recording is of limited public interest lessens the First Amendment value of plaintiff's speech. *Pollack v. Regional Sch. Unit 75*, 12 F. Supp. 3d 173, 199 (D. Me. 2014) ("At a minimum, *Glik* stands for the principle that producing a recording with a plan to share it with others can be a communicative act and carries at least some First Amendment protection.").

If there is additional authority supporting the proposition that plaintiff had a First Amendment right to record the meeting, it has not been brought to the attention of the Court. Under the circumstances, the Court concludes that plaintiff does not possess a First Amendment right to video record a private meeting with school district officials concerning the suitability of an IEP for his minor child. Accordingly, the First Amendment claim will be dismissed for failure to state a claim.

D. Fourteenth Amendment

In addition to the First Amendment claim, the complaint also states that "[t]he Fourteenth Amendment [] guarantees due process and prohibits states

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[8] The complaint does quote *Glik* in noting that recordings can aid in uncovering official abuses and promote discussion of governmental affairs, but it does not allege any specific intent to use the recordings of the IEP meetings for a purpose beyond plaintiff's own affairs.

from denying to any person 'the equal protection of the laws,'" and generally alleges that defendants have violated plaintiff's Fourteenth Amendment rights. (Compl. ¶¶ 22, 25). The complaint does not provide further detail on how his due process rights have been infringed, or how he has been denied equal protection of the laws. Furthermore, plaintiff in his opposition memorandum states that the complaint "raise[s] a single cause of action against the defendant, a deprivation of first amendment rights." (Pl.'s Opp'n at 2). Accordingly, the Fourteenth Amendment claim will be dismissed for failure to state a claim.

E. Service of Process

Medeiros seek to dismiss the complaint against her in her individual capacity for failure to effect proper service under Fed. R. Civ. P. 4(e) or Mass. R. Civ. P. 4(d)(1).

Under Fed. R. Civ. P. 4(e), service upon an individual may be effected by (1) "following state law [here, Massachusetts]"; (2) "delivering a copy of the summons and of the complaint to the individual personally"; (3) "leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there"; or (4) "delivering a copy of each to an agent authorized by appointment or by law to receive service of process." The rules under Massachusetts law track the federal rules: service upon an individual may be made personally, at the individual's

place of abode, or upon an authorized agent. Mass. R. Civ. P. 4(d)(1).

Plaintiff has filed affidavits of service indicating that a summons and complaint for Dina Medeiros was left with Judy MacDougall, Executive Secretary to the Superintendent, at the school office in Bridgewater on September 29, 2022. Plaintiff has not shown that MacDougall was an authorized agent for Medeiros in her individual capacity, or that any other attempt at service was made. Accordingly, it appears that Medeiros was not properly served in her individual capacity, and that claim will be dismissed against her on that basis, pursuant to Fed. R. Civ. P. 12(b)(5). *See Perez-Sanchez v. Pub. Bldg. Auth.*, 531 F.3d 104, 106 (1st Cir. 2008) (finding that service upon agent for defendants in their official capacity was not sufficient for service upon defendants in their individual capacity).

IV. Conclusion

For the foregoing reasons, defendants' motion to dismiss is GRANTED.

So Ordered.

/s/ F. Dennis Saylor IV
F. Dennis Saylor IV
Chief Judge, United States District Court

Dated: May 19, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Scott D Pitta
Plaintiff

V.

Dina Medeiros et al
Defendant

CIVIL ACTION
NO. 1:22-11641-FDS

ORDER OF DISMISSAL

(Filed May 19, 2023)

Saylor, C. J.

In accordance with the Court's Memorandum and Order dated May 19, 2023 (dkt. No. 9), it is hereby ORDERED that the above-entitled action be and hereby is DISMISSED.

By the Court,

5/19/2023
Date

/s/ Flaviana de Oliveira
Deputy Clerk

U.S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of

a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume

or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

603 CMR: DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION

603 CMR 23.00: STUDENT RECORDS

Section

603 CMR 23.00 is promulgated by the Board of Education pursuant to its powers under M.G.L. c. 71, § 34D which directs that "the board of education shall adopt regulations relative to the maintenance of student records by the public elementary and secondary schools of the commonwealth," and under M.G.L. c. 71, § 34F which directs that "the board of education shall adopt regulations relative to the retention, duplication and storage of records under the control of school committees, and except as otherwise required by law may authorize the periodic destruction of any such records at reasonable times." 603 CMR 23.00 was originally promulgated on February 10, 1975, and was reviewed and amended in June, 1995. 603 CMR is in conformity with federal and state statutes regarding

maintenance of and access to student records, and are to be construed harmoniously with such statutes.

23.01: Application of Rights

603 CMR 23.00 is promulgated to insure parents' and students' rights of confidentiality, inspection, amendment, and destruction of student records and to assist local school systems in adhering to the law. 603 CMR 23.00 should be liberally construed for these purposes.

(1) These rights shall be the rights of the student upon reaching 14 years of age or upon entering the ninth grade, whichever comes first. If a student is under the age of 14 and has not yet entered the ninth grade, these rights shall belong to the student's parent.

(2) If a student is from 14 through 17 years of age or has entered the ninth grade, both the student and his/her parent, or either one acting alone, shall exercise these rights.

(3) If a student is 18 years of age or older, he/she alone shall exercise these rights, subject to the following. The parent may continue to exercise the rights until expressly limited by such student. Such student may limit the rights and provisions of 603 CMR 23.00 which extend to his/her parent, except the right to inspect the student record, by making such request in writing to the school principal or superintendent of schools who shall honor such request and retain a copy of it in the student record. Pursuant to M.G.L. c. 71, § 34E, the parent

of a student may inspect the student record regardless of the student's age.

(4) Notwithstanding 603 CMR 23.01(1) and 23.01(2), nothing shall be construed to mean that a school committee cannot extend the provisions of 603 CMR 23.00 to students under the age of 14 or to students who have not yet entered the ninth grade.

23.02: Definition of Terms

The various terms as used in 603 CMR 23.00 are defined below:

Access shall mean inspection or copying of a student record, in whole or in part.

Authorized School Personnel shall consist of three groups:

(a) School administrators, teachers, counselors and other professionals who are employed by the school committee or who are providing services to the student under an agreement between the school committee and a service provider, and who are working directly with the student in an administrative, teaching counseling, and/or diagnostic capacity. Any such personnel who are not employed directly by the school committee shall have access only to the student record information that is required for them to perform their duties.

(b) Administrative office staff and clerical personnel, including operators of data processing equipment or equipment that produces microfilm/microfiche, who are either

employed by the school committee or are employed under a school committee service contract, and whose duties require them to have access to student records for purposes of processing information for the student record. Such personnel shall have access only to the student record information that is required for them to perform their duties.

(c) The Evaluation Team which evaluates a student.

Eligible Student shall mean any student who is 14 years of age or older or who has entered 9th grade, unless the school committee acting pursuant to 603 CMR 23.01(4) extends the rights and provisions of 603 CMR 23.00 to students under the age of 14 or to students who have not yet entered 9th grade.

Evaluation Team shall mean the team which evaluates school-age children pursuant to M.G.L. c. 71B (St. 1972, c. 766) and 603 CMR 28.00.

Parent shall mean a student's father or mother, or guardian, or person or agency legally authorized to act on behalf of the student in place of or in conjunction with the father, mother, or guardian. Any parent who by court order does not have physical custody of the student, is considered a non-custodial parent for purposes of M.G.L. c. 71, § 34H and 603 CMR 23.00. This includes parents who by court order do not reside with or supervise the student, even for short periods of time.

Release shall mean the oral or written disclosure, in whole or in part, of information in a student record.

School-age Child with Special Needs shall have the same definition as that given in M.G.L. c. 71B (St. 1972, c. 766) and 603 CMR 28.00.

School Committee shall include a school committee, a board of trustees of a charter school, a board of trustees of a vocational-technical school, a board of directors of an educational collaborative and the governing body of an M.G.L. c. 71B (Chapter 766) approved private school.

Student shall mean any person enrolled or formerly enrolled in a public elementary or secondary school or any person age three or older about whom a school committee maintains information. The term as used in 603 CMR 23.00 shall not include a person about whom a school committee maintains information relative only to that person's employment by the school committee.

Student Record shall consist of the Transcript and the Temporary Record, including all information – recording and computer tapes, microfilm, microfiche, or any other materials – regardless of physical form or characteristics concerning a student that is organized on the basis of the student's name or in a way that such student may be individually identified, and that is kept by the public schools of the Commonwealth. The term as used in 603 CMR 23.00 shall mean all such information and materials regardless of where they are located, except for the information and materials specifically exempted by 603 CMR 23.04.

Temporary Record shall consist of all the information in the student record which is not contained in the transcript. This information clearly shall be of importance to the educational process. Such information may include standardized test results, class rank (when applicable), extracurricular activities, and evaluations by teachers, counselors, and other school staff.

Third Party shall mean any person or private or public agency, authority, or organization other than the eligible student, his/her parent, or authorized school personnel.

Transcript shall contain administrative records that constitute the minimum data necessary to reflect the student's educational progress and to operate the educational system. These data shall be limited to the name, address, and phone number of the student; his/her birth date; name, address, and phone number of the parent or guardian; course titles, grades (or the equivalent when grades are not applicable), course credit, highest grade level completed, and the year completed, and highest performance level achieved on all MCAS tests required for the competency determination.

23.03: Collection of Data: Limitations and Requirements

All information and data contained in or added to the student record shall be limited to information relevant to the educational needs of the student. Information and data added to the temporary record shall include the name, signature, and position of the person who is the source of the

information, and the date of entry into the record. Standardized group test results that are added to the temporary record need only include the name of the test and/or publisher, and date of testing.

23.04: Personal Files of School Employees

The term student record does not include notes, memory aids and other similar information that is maintained in the personal files of a school employee and is not accessible or revealed to authorized school personnel or any third party. Such information maybe shared with the student, parent or a temporary substitute of the maker of the record, but if it is released to authorized school personnel it becomes part of the student record subject to all the provisions of 603 CMR 23.00.

23.05: Privacy and Security of Student Records

(1) The school principal or his/her designee shall be responsible for the privacy and security of all student records maintained in the school.

(2) The superintendent of schools or his/her designee shall be responsible for the privacy and security of all student records that are not under the supervision of a school principal, for example, former students' transcripts stored in the school department's central administrative offices or student records of school-age children with special needs who have not been enrolled in a public school.

(3) The principal and superintendent of schools shall insure that student records under their supervision are kept physically secure, that authorized school personnel are informed of the provisions of

603 CMR 23.00 and M.G.L. c. 71, § 34H are educated as to the importance of information privacy and confidentiality; and that any computerized systems employed are electronically secure.

23.06: Destruction of Student Records

(1) The student's transcript shall be maintained by the school department and may only be destroyed 60 years following his/her graduation, transfer, or withdrawal from the school system.

(2) During the time a student is enrolled in a school, the principal or his/her designee shall periodically review and destroy misleading, outdated, or irrelevant information contained in the temporary record provided that the eligible student and his/her parent are notified in writing and are given opportunity to receive the information or a copy of it prior to its destruction. A copy of such notice shall be placed in the temporary record.

(3) The temporary record of any student enrolled on or after the effective date of 603 CMR 23.00 shall be destroyed no later than seven years after the student transfers, graduates, or withdraws from the school system. Written notice to the eligible student and his/her parent of the approximate date of destruction of the record and their right to receive the information in whole or in part, shall be made at the time of such transfer, graduation, or withdrawal. Such notice shall be in addition to the routine information letter required by 603 CMR 23.10.

(4) In accordance with M.G.L. c. 71, § 87, the score of any group intelligence test administered

to a student enrolled in a public school shall be removed from the record of said student at the end of the school year in which such test was so administered.

23.07: Access to Student Records

(1) Log of Access. A log shall be kept as part of each student's record. If parts of the student record are separately located, a separate log shall be kept with each part. The log shall indicate all persons who have obtained access to the student record, stating: the name, position and signature of the person releasing the information; the name, position and, if a third party, the affiliation if any, of the person who is to receive the information; the date of access; the parts of the record to which access was obtained; and the purpose of such access. Unless student record information is to be deleted or released, this log requirement shall not apply to:

(a) authorized school personnel under 603 CMR 23.02(9)(a) who inspect the student record;

(b) administrative office staff and clerical personnel under 603 CMR 23.02(9)(b), who add information to or obtain access to the student record; and

(c) school nurses who inspect the student health record.

(2) Access of Eligible Students and Parents. The eligible student, or the parent, subject to the provisions of 603 CMR 23.07(5), shall have access to the student record. Access shall be provided as

soon as practicable and within ten days after the initial request, except in the case of non-custodial parents as provided in 603 CMR 23.07(5). Upon request for access, the entire student record regardless of the physical location of its parts shall be made available.

(a) Upon request, copies of any information contained in the student record shall be furnished to the eligible student or the parent. A reasonable fee, not to exceed the cost of reproduction, may be charged. However, a fee may not be charged if to do so would effectively prevent the parents or eligible student from exercising their right, under federal law, to inspect and review the records.

(b) Any student, regardless of age, shall have the right pursuant to M.G.L. c. 71, § 34A to receive a copy of his/her transcript.

(c) The eligible student or the parent shall have the right upon request to meet with professionally qualified school personnel and to have any of the contents of the student record interpreted.

(d) The eligible student or the parent may have the student record inspected or interpreted by a third party of their choice. Such third party shall present specific written consent of the eligible student or parent, prior to gaining access to the student record.

(3) Access of Authorized School Personnel. Subject to 603 CMR 23.00, authorized school personnel shall have access to the student records of

students to whom they are providing services, when such access is required in the performance of their official duties. The consent of the eligible student or parent shall not be necessary.

(4) Access of Third Parties. Except for the provisions of 603 CMR 23.07(4)(a) through 23.07(4)(h), no third party shall have access to information in or from a student record without the specific, informed written consent of the eligible student or the parent. When granting consent, the eligible student or parent shall have the right to designate which parts of the student record shall be released to the third party. A copy of such consent shall be retained by the eligible student or parent and a duplicate placed in the temporary record. Except for information described in 603 CMR 23.07(4)(a), personally identifiable information from a student record shall only be released to a third party on the condition that he/she will not permit any other third party to have access to such information without the written consent of the eligible student or parent.

(a) A school may release the following directory information: a student's name, address, telephone listing, date and place of birth, major field of study, dates of attendance, weight and height of members of athletic teams, class, participation in officially recognized activities and sports, degrees, honors and awards, and post-high school plans without the consent of the eligible student or parent; provided that the school gives public notice of the types of information it may release under 603 CMR 23.07 and allows eligible students

and parents a reasonable time after such notice to request that this information not be released without the prior consent of the eligible student or parent. Such notice may be included in the routine information letter required under 603 CMR 23.10.

(b) Upon receipt of a court order or lawfully issued subpoena the school shall comply, provided that the school makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance.

(c) A school may release information regarding a student upon receipt of a request from the Department of Social Services, a probation officer, a justice of any court, or the Department of Youth Services under the provisions of M.G.L. c. 119, §§ 51B, 57, 69 and 69A respectively.

(d) Federal, state and local education officials, and their authorized agents shall have access to student records as necessary in connection with the audit, evaluation or enforcement of federal and state education laws, or programs; provided that except when collection of personally identifiable data is specifically authorized by law, any data collected by such officials shall be protected so that parties other than such officials and their authorized agents cannot personally identify such students and their parents; and such personally identifiable data shall be destroyed when no

longer needed for the audit, evaluation or enforcement of federal and state education laws.

(e) A school may disclose information regarding a student to appropriate parties in connection with a health or safety emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. This includes, but is not limited to, disclosures to the local police department and the Department of Social Services under the provisions of M.G.L. c. 71, § 37L and M.G.L. c. 119, § 51A.

(f) Upon notification by law enforcement authorities that a student, or former student, has been reported missing, a mark shall be placed in the student record of such student. The school shall report any request concerning the records of the such child to the appropriate law enforcement authority pursuant to the provisions of M.G.L. c. 22A, § 9.

(g) Authorized school personnel of the school to which a student seeks or intends to transfer may have access to such student's record without the consent of the eligible student or parent, provided that the school the student is leaving, or has left, gives notice that it forwards student records to schools in which the student seeks or intends to enroll. Such notice may be included in the routine information letter required under 603 CMR 23.10.

(h) School health personnel and local and state health department personnel shall have access to student health records, including but

not limited to immunization records, when such access is required in the performance of official duties, without the consent of the eligible student or parent.

(5) Access Procedures for Non-custodial Parents. As required by M. G.L. c. 71, § 34H, a noncustodial parent may have access to the student record in accordance with the following provisions.

(a) A non-custodial parent is eligible to obtain access to the student record unless:

1. the parent has been denied legal custody or has been ordered to supervised visitation, based on a threat to the safety of the student and the threat is specifically noted in the order pertaining to custody or supervised visitation, or

2. the parent has been denied visitation, or

3. the parent's access to the student has been restricted by a temporary or permanent protective order, unless the protective order (or any subsequent order modifying the protective order) specifically allows access to the information contained in the student record, or

4. there is an order of a probate and family court judge which prohibits the distribution of student records to the parent.

(b) The school shall place in the student's record any documents indicating that a

noncustodial parent's access to the student's record is limited or restricted pursuant to 603 CMR 23.07(5)(a).

(c) In order to obtain access, the non-custodial parent must submit a written request for the student record to the school principal.

(d) Upon receipt of the request the school must immediately notify the custodial parent by certified and first class mail, in English and the primary language of the custodial parent, that it will provide the non-custodial parent with access after 21 days, unless the custodial parent provides the principal with documentation that the non-custodial parent is not eligible to obtain access as set forth in 603 CMR 23.07(5)(a).

(e) The school must delete all electronic and postal address and telephone number information relating to either work or home locations of the custodial parent from student records provided to non-custodial parents. In addition, such records must be marked to indicate that they shall not be used to enroll the student in another school.

(f) Upon receipt of a court order that prohibits the distribution of information pursuant to M.G.L. c. 71, § 34H, the school shall notify the non-custodial parent that it shall cease to provide access to the student record to the non-custodial parent.

23.08: Amending the Student Record

(1) The eligible student or the parent shall have the right to add information, comments, data, or any other relevant written material to the student record.

(2) The eligible student or the parent shall have the right to request in writing deletion or amendment of any information contained in the student record, except for information which was inserted into that record by an Evaluation Team. Such information inserted by an Evaluation Team shall not be subject to such a request until after the acceptance of the Evaluation Team Educational Plan, or, if the Evaluation Team Educational Plan is rejected, after the completion of the special education appeal process. Any deletion or amendment shall be made in accordance with the procedure described below:

(a) If such student or parent is of the opinion that adding information is not sufficient to explain, clarify or correct objectionable material in the student record, either student or parent shall present the objection in writing and/or have the right to have a conference with the principal or his/her designee to make the objections known.

(b) The principal or his/her designee shall within one week after the conference or receipt of the objection, if no conference was requested, render to such student or parent a decision in writing, stating the reason or reasons for the decision. If the decision is in favor of the student or parent, the principal or

his/her designee shall promptly take such steps as may be necessary to put the decision into effect.

23.09: Appeals

(1) In the event that any decision of a principal or his/her designee regarding any of the provisions contained in 603 CMR 23.00 is not satisfactory in whole or in part to the eligible student or parent, they shall have the right of appeal to the superintendent of schools. Request for such appeal shall be in writing to the superintendent of schools.

(2) The superintendent of schools or his/her designee shall within two weeks after being notified of such appeal (longer should the appellant request a delay) review the issues presented and render a written decision to the appellant, stating the reason or reasons for the decision. If the decision is in favor of the appellant, the superintendent of schools or his/her designee shall promptly take such steps as may be necessary to put the decision into effect.

(3) In the event that the decision of the superintendent of schools or his/her designee is not satisfactory to the appellant in whole or in part, the appellant shall have the right of appeal to the school committee. Request for such appeal shall be in writing to the chairperson of the school committee.

(4) The school committee shall within four weeks after being notified of such appeal (longer should the appellant request a delay) conduct a fair

hearing to decide the issues presented by the appellant.

(a) School officials shall have the burden of proof on issues presented by the appellant.

(b) The appellant shall have the right to be represented by an advocate of his/her choosing, to cross-examine witnesses, to present evidence, to make a tape or other recording of the proceedings, and to receive a written decision within two weeks after the hearing.

(c) If the appeal concerns statements by an employee of the school committee, such person(s) shall have the right to be present and to have an advocate of his/her own choosing.

(5) Nothing in 603 CMR 23.00 shall abridge or limit any right of an eligible student or parent to seek enforcement of 603 CMR 23.00 or the statutes regarding student records, in any court or administrative agency of competent jurisdiction.

23.10: Notification

(1) At least once during every school year, the school shall publish and distribute to students and their parents in their primary language a routine information letter informing them of the following:

(a) The standardized testing programs and research studies to be conducted during the year and other routine information to be collected or solicited from the student during the year.

(b) The general provisions of 603 CMR 23.00 regarding parent and student rights, and that copies of 603 CMR 23.00 are available to them from the school.

(2) In those school systems required under M.G.L. c. 71A to conduct a bilingual program, all forms, regulations, or other documents regarding 603 CMR 23.00 that a parent receives or is required to receive shall be in the language spoken in the home of the student, provided that it is a language for which the school system is required to provide a bilingual program.

23.11: Monitoring

The Bureau of Student Services may, pursuant to a request by an eligible student or parent or on its own initiative, conduct reviews to insure compliance with 603 CMR 23.00 The school committee and the specific school(s) involved shall cooperate to the fullest extent with such review.

23.12: Severance Clause

The provisions of 603 CMR 23.00 are severable and should any section be found upon judicial review to exceed the authority of the State Board of Education, the remaining sections shall not be affected.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SCOTT PITTA, Plaintiff, v. DINA MEDEIROS, Individually and in her) Official Capacity as Administrator of Special Education for the Bridgewater Raynham Regional School District, and BRIDGEWATER RAYNHAM REGIONAL SCHOOL DISTRICT. Defendants.	Civ. No _____

COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, AND DAMAGES

(Filed Sep. 28, 2022)

Introduction

1. Plaintiff is the parent of a child with special needs who brings this suit to enforce his well-established First Amendment right to record government officials in the performance of their duties during meetings with public school officials to discuss their child's needs for reasonable accommodations and special education related services required for a free and appropriate public-school education (FAPE). This Court and the First Circuit Court of Appeals have consistently

upheld the public's right to video record government officials in the performance of their duties, from a vantage point where the person conducting the recording is lawfully present, "is a basic, vital, and well-established liberty safeguarded by the First Amendment" that is subject only to a reasonable time, place, and manner restriction. Martin v. Gross, 340 F. Supp. 3d 87, 109 (D. Mass. 2018), quoting Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011). The Glik court further clarified that a peaceful recording of public officials that does not interfere with the performance of their duties is not reasonably subject to limitation. 655 F. 3d at 85.

Plaintiff Scott Pitta believes that, because of the Defendants' prior acts of omitting facts and statements from the official minutes of prior meetings, video recording interactions and meetings with school officials to be the only means to form an accurate record of statements made by those in attendance at said meetings. But he has been unlawfully prevented from engaging in this constitutionally protected activity due the Defendants' actions.

On the morning of September 20th, 2022, the parties had a scheduled "Google Meet" meeting to discuss the Individualized Education Plan (IEP) of the Plaintiff's child. Citing the Defendants' failure to produce accurate minutes of prior meetings and refusal to correct those errors despite obligations to maintain accurate records under 603 CMR 23.03, the Plaintiff requested the Defendants' video record the meeting using the Google Meet record function. The Defendants' refused

the Plaintiffs request and stated that the only recording they would permit would be an external audio recording operated and controlled by the Defendants'. The Defendants' stated that the reason for their decision was that a video recording was "invasive" and their policy would not permit such a recording. The Plaintiff informed the meeting chair, Dina Medeiros, that since school policy prevented her from making a video recording of the meeting, the Plaintiff would then make his own recording. At the commencement of the meeting, the Defendants announced that they were audio recording the meeting and the Plaintiff announced that they were video recording the meeting. The meeting chair stated that if the Plaintiff did not terminate their video recording, she would end the meeting. The Plaintiff refused to stop the video recording, and the chair terminated the meeting on the Google Meet platform.

Plaintiff therefore challenge the constitutionality of the Defendants' actions and Bridgewater Raynham Regional School District's policy of only permitting the Defendants to record (audio only) and prohibiting parents from making their own independent video recording of their meetings with school officials performing their duties, and seek declaratory judgment, injunctive relief, and monetary damages under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution.

2. The First Amendment protects the right of the people to record government officials' performance of their jobs. This constitutional safeguard preserves two core

free speech interests: promoting an informed discussion of government affairs and uncovering government misconduct, such as falsifying official records.

3. Consistent with the profound impact that recordings of public officials interactions with the people can have on the public, the First Circuit has held that the right to record government officials performing their duties in public "is a basic, vital, and well-established liberty safeguarded by the First Amendment." Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011). The First Circuit and this Court has *not* limited this holding to open recording in traditional public forums, but rather, this court declined to define the term "public space" and "public official" to prevent narrowing the scope beyond constitutional limits and preventing the public from holding government officials accountable. Project Veritas Action v. Rachael Rollins, No. 16-10462-PBS, (D. Mass. filed May 22, 2019). Thus, this constitutional protection extends to all interactions between members of the public and government officials where, as in this case, the citizen is lawfully present while recording public officials performing their duties in public.

4. The Defendants' policy and actions have directly violated Plaintiffs' exercise of this First Amendment right by preventing the recording of public officials in the performance of their duties.

5. Plaintiff therefore seeks a declaration, under 42 U.S.C. § 1983 and 28 U.S.C. § 2201, that the Defendants' actions are unconstitutional as applied to the video recording of public-school employees performing

their duties while meeting with members of the public. Plaintiff also seek a permanent injunction in the form of an order enjoining the defendants from applying or enforcing any policy prohibiting such conduct.

JURISDICTION AND VENUE

6. This action is brought under 42 U.S.C. §§ 1983 and 1988, and the First and Fourteenth Amendments to the United States Constitution. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343 and 2201 *et seq*. Venue in the District of Massachusetts is proper under 28 U.S.C. § 1391(b).

PARTIES

7. Plaintiffs Scott Pitta is a citizen of the United States and a resident of Bridgewater, MA.

8. Defendant Dina Medeiros is the Administrator of Special Education for the Bridgewater Raynham Regional School District. She is being sued individually and in her official capacity as Administrator of Special Education. Her usual place of employment is located at 166 Mt. Prospect St. Bridgewater, MA 02324.

9. Defendant Bridgewater Raynham Regional School District is a Massachusetts school district formed and operated under the authority of MGL c. 71 sec. 14B. Its usual place of business and central office is located at 166 Mt. Prospect St. Bridgewater, MA 02324.

ALLEGATIONS.

I. The Constitutional Right to Record the Public Officials Performing Their Duties Encompasses Interactions and Meetings Between Public School Officials and Parents of School Children.

10. The right to record public officials is essential to promoting the free discussion of governmental affairs, protecting the democratic process, and uncovering governmental misconduct.

11. The First Circuit has held that the First Amendment "unambiguously" protects the right to record government employees carrying out their duties. Glik, 655 F.3d at 82. The court explained that this right "fits comfortably" within basic First Amendment principles both because "gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs," and because it aids in the uncovering of official abuses. *Id.* at 82-83.

12. This right and its underlying principles fully extend to parents of school children recording public school officials performing their duties while conducting official meetings with the parents.

13. Recording is necessary to create an accurate record of all statements made during an IEP team meeting and to identify the statements declarant because the official records of these meetings may be admitted as evidence in subsequent administrative and legal

appeals. In the instant case, the Defendants' prior history of omitting, falsifying, and / or altering meeting minutes demonstrate a clear need for a more robust and accurate record of the meetings.

II. Plaintiffs Desire for an Accurate Record of Statements is Reasonable Given the Defendants' Prior Acts of Omitting, Falsifying, or Altering Meeting Minutes.

14. Plaintiff's concerns are reasonable because the Defendants' have previously produced meeting minutes that glaringly omitted statements made by the Defendants' employees that were harmful to the Defendants' position.

15. On February 15th 2022 and March 8th 2022, the parties conducted virtual IEP team meetings to in order to discuss and develop a new IEP for the Plaintiff's child.

16. During these meetings, several school district employees made statements of facts that were harmful to the Defendants' argument to remove the Plaintiff's child from IEP based special education services. These statements included, but are not limited to, an admission that the Defendants had no data upon which to base their opinion, an admission that teachers who performed evaluations on the child that resulted in findings contrary to the Defendants position were later asked by the Defendants to "double check" their evaluation, but teachers whose evaluation results supported

the Defendants' position were not asked to do the same.

17. Despite lengthy discussions regarding the statements mention in paragraph 17 above, these discussions were not included in the Defendants' official meeting minutes that were emailed to the Plaintiffs on March 10th, 2022. After having time to review the meeting minutes, the Plaintiffs alerted the Defendants to the omissions and inaccuracies and objected to the Defendants' minutes as an official record of the meetings and requested that the minutes be amended to include the omitted portions of the meeting.

18. Despite their duty to maintain accurate records, the Defendants refused to amend the meeting minutes as requested by the Plaintiffs.

19. The Plaintiff has suffered ongoing irreparable injury due to the Defendants refusal to conduct IEP team meetings while the Plaintiff exercises his well-established, constitutionally protected right to record government officials in the performance of their duties directly interferes with the Plaintiffs rights as a parent to participate in the IEP process for their child.

20. The Plaintiff has suffered ongoing irreparable injury because the Plaintiff has been forced to take extra time off from his job in order to attend additional IEP team meetings due to the Defendants' refusal to continue meetings while the Plaintiff exercised his right to record the meeting.

Claim for Relief:
Violation of the First and Fourteenth Amendments
(42 U.S.C. § 1983)

21. Plaintiff repeats and incorporate by reference the foregoing paragraphs of this Complaint as if fully set forth herein.

22. The First Amendment to the United States Constitution, as applicable to the states through the Fourteenth Amendment, prohibits the making of any law that "abridg[es] the freedom of speech." The Fourteenth Amendment also guarantees due process and prohibits states from denying to any person "the equal protection of the laws."

23. Under the First Amendment, Plaintiff has a right to gather information about the conduct of public officials, and is secure in this right against interference by the government of the Commonwealth.

24. The Defendants' stated policy to prohibit parents from making an independent video recording of an IEP team meeting violates the First Amendment by causing Plaintiffs to refrain from constitutionally protected information gathering.

25. By acting and threatening to act under the color of state law to deprive Plaintiffs of rights guaranteed by the First Amendment and the Fourteenth Amendment, Defendants have violated and continue to violate Plaintiff's First and Fourteenth Amendment rights, actionable under 42 U.S.C. § 1983.

26. Plaintiff has no adequate remedy available at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff seeks an order and judgment:

1. declaring that the Defendant's prohibition on parents' video recording IEP team meetings is unconstitutional because it violates the First Amendment to the United States Constitution;

2. permanently enjoining Defendants from preventing or interfering with Plaintiffs or others who are lawfully present, from video recording government officials engaged in their official duties;

3. awarding to Plaintiff costs and attorneys' fees under 42 U.S.C. §§ 1983 and 1988; and

4. providing such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Plaintiff, SCOTT D. PITTA

/s/ Scott D. Pita

Scott D. Pitta, BBO #707615
118 Pine St.
Raynham, MA 02767
508-468-6180
Scott.Pitta@ScottPittaLaw.com

Dated: September 28, 2022

11:01 AM (3 hours ago)

Mary Ellen Sowyrda

to Dina, me

Dear Dina and Paul,

You have requested my assistance in addressing the legal implications of the emails from a parent of a special education student served by your district, which appear below.

In summary, the parent is demanding that his child's team meeting be video-taped, not just audio-taped; that he be made a co-host of the meeting, to be held virtually, and that if the district does not yield to his demands (and today is the 10th school day from the date when he provided the team with an independent evaluation for the team to review, and that team meeting was scheduled for today), he will initiate "a civil lawsuit" against " . . . the school district and individual team members . . . ", see email from Scott Pitta, below.

You have advised me that faculty team members are now feeling threatened and intimidated by these legal threats being levied against them by this parent who is also a lawyer.

The case law regarding the recording of team meetings and the informal guidance from the Massachusetts Department of Elementary and Secondary Education (DESE) makes clear that the audio recording of team meetings, requested by parents when they indicate that they have an impairment which requires this

audio recording as an accommodation, is a reasonable accommodation. Additionally, if the parent simply indicates that they wish to have an audio recording for their own personal usage, and/or as a reference to share with an advocate or counsel, or as a student record to supplement the team meting, I have consistently advised that such request is reasonable, given the provisions of the federal special education law. In short, the IDEA supports full parental access to the process, and thus audio recording is a reasonable way to create this record for the types of reasons. See 603 CMR 23.00 et seq., Massachusetts Student Record regulations.

However, if a parent indicates that the recording will be used against the team or team members – to share with third parties such as the media, school committee members and/or the like, or to file a civil right lawsuit – to expose the team or team members to liability, this would be facially impermissible and would run counter to the notion that the taping is being made as an accommodation to the parent.

This case presents concerns that the parent's motives here – in seeking any recording, whether audio or visual, are improper. The parent has advised the district that this demand to record is not about the creation of a student record to supplement what is discussed at the team, but that will be used against the district and the team. The parent claims that the team lacks veracity and that the recording will somehow expose them in their dishonesty.

The parent is also demanding that the meeting be videotaped, not audio-taped, and that the parent co-host the

meeting. The parent provides no basis for his "video-taping" demand, and the rationale he provides for the need to tape in any manner would support the concerns expressed by the faculty, that the parent is seeking to pursue litigation against them on grounds of alleged civil rights violations.

I recognize that the parent claims civil rights violations related to his demand to co-host the team meeting and audio-tape the meeting; however, it appears that his threats of perceived procedural violations are intertwined with his other threats against the district, the team and team members. Hence, his demand to video-tape seems to be part of a larger theme of filing litigation in this matter.

Consequently, at this point, the audio-taping vs. video-taping demands are falling secondary to the threats and intimidation concerns. Again, the parent has not provided a basis to explain why he needs to have the meeting video-taped as an accommodation.

I would strongly suggest, at this juncture, that you immediately notify your contact person at the Problem Resolution System Office (PRS) within DESE, to advise them of all of the above, and include the emails from this parent. I would ask them for their immediate guidance in moving forward.

Clearly, the student and parent have a right to the team's timely review of the private evaluation, and the parent has a right to the reconvening of the team to review his bases for rejection of the proposed IEP. However, the team members have a right to know that their

participation in the meeting will not be used against them for improper purposes. They also have a right to expect that their team chair will be the only chair and host of the meeting, and that, without more from the parent on this topic, the meeting will be audio-recorded, not video-recorded.

I would suggest that, if the parent can agree to comport himself within the DESE guidelines for team members' participation and then allow the district to audio-record the meeting as an accommodation to the parent, not, ab initio as evidence of tortious civil rights wrongdoing, then the meeting can occur, with the team chair hosting the meeting.

If the parent refuses to cooperate on any of these prerequisites, the intervention of the state will be needed. Unfortunately, that impasse appears to have now arrived. The parent may place his team participation in jeopardy; however, I defer to PRS at this juncture. The intervention and guidance of PRS is needed now, given the untenable posture of this parent on these matters.

I hope this is helpful.

Very truly yours,

Mary Ellen

Mary Ellen Sowyrda, Esq.
Murphy Hesse Toomey & Lehane LLP
300 Crown Colony Drive
Quincy MA 02169
msowyrda@mhtl.com
(617) 479-5000

10:23 AM (4 hours ago)

Scott Pitta <scottpitta@yahoo.com>

to Dina, me, Susan, Abiann, David, Ellen, Katelyn, Lauren, Megan, Roxanne, Sarah, kara

Dina,

Now that you have stated that you are working with legal counsel, I am barred by the ethical rules for attorneys from speaking with you directly unless your attorney agrees. If your attorney would like to discuss the matter, they may call me at 508-468-6180.

-Scott

10:03 AM (4 hours ago)

Dina Medeiros

to Scott, Susan, Abiann, David, Ellen, Katelyn, Lauren, Megan, Roxanne, Sarah, kara,

me

Good morning Scott,

We are consulting with the district's counsel for further guidance. Our counsel is respectfully asking me to

ask you to provide us with why you need to have the Team meeting video taped rather than audio taped?

Best regards,

Dina

Begin forwarded message:

From: Dina Medeiros <dmedeiros@bridge-rayn.org>

Date: September 20, 2022 at 9:29:34 AM EDT

To: Mary Ellen Sowyrda <msowyrda@mhtl.com>, Paul Tzovolos <ptzovolos@bridge-rayn.org>

Subject: Fwd: confirming the Sept 20th 8:45 meeting

*** **WARNING**: EXTERNAL***

Please below

---------Forwarded message---------

From: **Scott Pitta** <scottpitta@yahoo.com>

Date: Tue, Sep 20, 2022 at 8:29 AM

Subject: Re: confirming the Sept 20th 8:45 meeting

To: Dina Medeiros <dmedeiros@bridge-rayn.org>

Cc: Susan Kaszanek <skaszanek@bridge-rayn.org>, Abiann Tucker <atucker@bridge-rayn.org>, David Dilley <ddilley@horizonconsultinggroup.org>, Ellen Bennett <ebennett@bridge-rayn.org>, Katelyn Carreau <kcarreau@bridge-rayn.org>, Lauren Suarez <Isuarez@bridge-rayn.org>, Megan Welch

<mmcmasters@bridge-rayn.org>, Roxanne pitta <roxannepitta@hotmail.com>, Sarah dePontbriand <sdepontbriand@bridge-rayn.org>, kara Kuntupis <kkuntupis@bridge-rayn.org>

Just to be clear, I will be recording the meeting video on our end since the school administration refuses to do so. Given the glaring omissions in previous draft meeting minutes of your staff's own comments that were harmful to the school system's position and the unwillingness to correct those omissions, we do not trust the administration to be the sole custodian of any records of our meetings going forward.

The constitution, statutes, and case law are clear that we have a right to record this meeting and I will do so. Any attempt to prevent this recording or refusal to conduct the meeting will simply add to the school district's and individual team members' liability in a civil lawsuit. Any privacy rights belong to us, not the school system. The school system and its employees have no legal basis to object to a recording.

On Monday, September 19, 2022 at 10:29:33 PM EDT, Dina Medeiros <dmedeiros@bridge-rayn.org> wrote:

Good evening Scott,

Just replying to your two emails that you sent at 5.06pm and 5.16pm this evening.

I believe my email affirmed that we would indeed be honoring your request to have the Team meeting for JJ recorded. My email simply clarified that the recording would be audio only and not a video recording. We do

understand and support your right to have the meeting recorded.

Our procedure and guidance has been that audio recording serves as an appropriate accommodation to create a record of a meeting and video recording is unnecessary and overly invasive.

Ms. Kaszanek has been provided with the district's device to audio record the meeting. We should be all set for tomorrow.

Have a good night.

Dina

On Mon, Sep 19, 2022 at 5:16 PM Scott Pitta <scottpitta@yahoo.com> wrote:

> Please have me appointed as a co-host in the meeting to resolve this matter. I will make the recording on our end as the recording is constitutionally protected by the first amendment under Pollack v. Region 1 School Unit, US Dist. Ct., ME, 2017.
>
> On Monday, September 19, 2022 at 05:06:36 PM EDT, Scott Pitta <scottpitta@yahoo.com> wrote:
>
> Hi Dina,
>
> Can you please clarify? Is that a school policy to not record video?
>
> On Monday, September 19, 2022 at 04:25:04 PM EDT, Susan Kaszanek <skaszanek@bridge-rayn.org> wrote:
>
> I am able to audiotape tomorrows meeting.

I look forward to seeing everyone tomorrow.

On Mon, Sep 19, 2022 at 1:21 PM Scott Pitta <scottpitta@yahoo.com> wrote:

I know that zoom has the ability to record. That may be a better platform.

On Monday, September 19, 2022 at 01:15:44 PM EDT, Susan Kaszanek <skaszanek@bridge-rayn.org> wrote:

I will have to get back to you regarding if I am able to gather a recording device on our end on such short notice.

I will be back in touch as soon as I am able to confirm.

Thank you,

Susan Kaszanek

On Mon, Sep 19, 2022 at 1:05 PM Scott Pitta <scottpitta@yahoo.com> wrote:

> We would like the meeting to be recorded in order to preserve the record more accurately.
>
> -Scott Pitta
>
> On Monday, September 19, 2022 at 10:33:02 AM EDT, Susan Kaszanek <skaszanek@bridge-rayn.org> wrote:
>
> Good morning,
>
> This email is to confirm our meeting which is scheduled for Tuesday, September 20th at 8:45 AM.

> The meeting will be held virtually. The special education secretary has sent the invitation and Google meet link.
>
> The purpose of the meeting is to review the outside evaluations you submitted to the school for review.
>
> I look forward to seeing you tomorrow at our virtual meeting.
>
> --
>
> Thank you,
>
> Susan Kaszanek M.Ed, CAGS (she/her)
>
> School Psychologist
>
> Bridgewater-Raynham Regional High School
>
> (508) 697-6902 x 35316

--

Thank you,

Susan Kaszanek M.Ed, CAGS (she/her)

School Psychologist

Bridgewater-Raynham Regional High School

(508) 697-6902 x 35316

--

Thank you,

Susan Kaszanek M.Ed, CAGS (she/her)

School Psychologist

Bridgewater-Raynham Regional High School

(508) 697-6902 x 35316

[SEAL] **UNITED STATES DEPARTMENT OF EDUCATION**

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

JUN - 4 2003

[redacted]

This letter is in response to your telephone call requesting a copy of the April 15, 1988 Office of Special Education Programs (OSEP) Memorandum 88-17 regarding the use of tape recorders at IEP meetings. As a member of my staff, Mr. Dale King, explained in your telephone conversation of May 2, 2003, the position expressed in Memorandum 8817 does not reflect OSEP's current position regarding the use of audio or video tape recorders at IEP team meetings. The Department issued OSEP Memorandum 91-24 on July 18, 1991 clarifying and amending OSEP's position as expressed in Memorandum 88-17. I am enclosing a copy of Memorandum 91-24.

Moreover, Appendix A to the final regulations Om 34 CFR Part 300) implementing the Individuals with Disabilities Education Act (IDEA) states the Department's current position regarding the audio or video tape recording of IEP meetings. OSEP, in its response to question 21 under "Other Questions Regarding Implementation of IDEA" states the following:

Part B does not address the use of audio or video recording devices at IEP meetings, and no other Federal statute either authorizes or prohibits the recording of an IEP meeting by either a parent or a school official. Therefore, an SEA or public agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings.

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. An SEA or school district that adopts a rule regulating the tape recording of IEP meetings also should ensure that it is uniformly applied.

Any recording of an IEP meeting that is maintained by the public agency is an "education record," within the meaning of the Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. 1232g), and would, therefore, be subject to the confidentiality requirements of the regulations under both FERPA (34 CFR Part 99) and Part B (§§300.560-300.575).

Parents wishing to use audio or video recording devices at IEP meetings should consult State or local policies for further guidance.

Should you have further questions regarding this issue, please do not hesitate to contact Dale King at (202) 260-1156.

Sincerely,

/s/ Patricia J. [Illegible] for
Stephanie S. Lee
Director,
Office of Special
Education Programs

Enclosure

cc: Dr. Jana L. Jones
State Director
Idaho State Department of Education

[SEAL] **UNITED STATES DEPARTMENT OF EDUCATION**

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

July 18, 1991

Contact Person
Name: Robert LaGarde **Telephone: (202) 732-1053**

OSEP – 91-24

OSEP MEMORANDUM

TO : State Directors of Special Education

FROM : Judy A. Schrag, Ed. D. [/s/ JAS]
Director
Office of Special Education Programs

SUBJECT : Amendment' of "OSEP 88-17" Regarding the Use of Tape Recorders at IEP Meetings

The purpose of this Memorandum is to clarify the position of the Office of Special Education Programs (OSEP), issued in OSEP Memorandum 88-17, dated April 15, 1988, on the tape recording of meetings conducted to develop, review, and revise individualized education programs (IEPs) for children with disabilities. Because OSEP has received a number of inquiries regarding our policy on the tape recording of IEP meetings, we would like to reiterate the position stated in the previous Memorandum, which reflects our current position. This Memorandum is not intended to alter our conclusion, as stated in the April 15, 1988 Memorandum, that a decision regarding whether parents may tape record IEP meetings should be left to the discretion of local school districts, based upon local considerations. Instead, the purpose of this Memorandum is merely to provide clarification of the statements made in OSEP Memorandum 88-17 regarding Federal privacy law.

Since Part B of the Individuals with Disabilities Education Act (Part B), formerly cited as the Education of the Handicapped Act, does not address the issue of

tape recording IEP meetings, and because there are no Federal statutes that authorize or prohibit the tape recording of an IEP meeting by either a parent or a school official, a State educational agency (SEA) or school district has the option to require, prohibit, limit, or otherwise regulate the use of tape recorders at IEP meetings. This remains OSEP's position.

With regard to Federal privacy law, the April 15, 1988 Memorandum also stated that:

> A review of case law under the subject of right to privacy indicated that the rights of a child with a handicap and the child's parents could be violated if school officials recorded an IEP meeting without their permission. However, the privacy rights of school officials would not be violated by tape recording an IEP meeting because they are public officials serving in an official capacity. As stated earlier, [Part B] does not address these issues, but this is the trend in court cases.

Based on subsequent advice from the Department's Office of the General Counsel, the following clarification is needed to reflect current Federal privacy law. First, Federal privacy law does not directly address the issue of whether a parent or school official may tape record IEP meetings. Second, Federal privacy law does not suggest that the rights of children with disabilities or their parents would be violated by an uncontested tape recording of an IEP meeting by a school official, or that the school officials' status as public officials would permit tape recording by others. Instead,

Federal privacy law does not make it unlawful for any participant to a communication for meeting) to tape record the proceedings without the consent of the other parties. See Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2520 et. seq., as amended. The fact that it is not unlawful under Federal law for a participant or party to tape record a conversation, however, does not give that party the absolute right to do so. It merely means that the non-consenting parties to the conversation would not be entitled to sue the tape recording party under Federal statutory law.

It would not be inconsistent with Federal privacy law for a school district to have a rule prohibiting the tape recording of IEP meetings if the policy provided for exceptions when 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. However, a school district that is considering the adoption of such a rule should be aware of the following: First, our discussion of privacy law only addresses the absence of governing Federal law. An individual State may have its own statutory or constitutional provisions that will govern this issue. Second, this action may involve complex issues of Federal constitutional law. We cannot assure that a rule regulating the taping of IEP meetings would not be subject to challenge under the U.S. Constitution. Third, an SEA or school district that adopts a rule regulating the tape recording of IEP meetings may wish to ensure that it is uniformly applied.

Interested SEAs or school districts should consult their own attorneys on these questions. Further, SEAs or school districts which permit tape recording of IEP meetings should be aware that those tape recordings would be subject to the Federal Educational Rights and Privacy Act (FERPA). Thus, with respect to such taped records, parents would have the right to: (1) inspect and review the tape recordings; (2) request that the tape recordings be amended if the parent believes that, they contain information that is inaccurate, misleading, or in violation of that student's rights of privacy or other rights; and (3) challenge, in a hearing, Information that the parent believes is inaccurate, misleading, or in violation of the student's rights of privacy or other rights. See 34 CFR §§99.10-99.22.

We emphasize that each school district has a responsibility to take the steps necessary to ensure parent participation at IEP meetings, including taking steps to ensure that the parent understands the proceedings at the IEP meeting. Under 34 CFR §300.345(e), the [school district] must take whatever action is necessary to ensure that the parent understands the proceedings at an IEP meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English. A district court has held that a parent, whose native language was Danish, and had difficulty understanding the English language, and thus, difficulty understanding her child's IEP meeting, has a right to tape record her child's IEP meeting. 735 F. Supp. 53 (D.Conn. 1990). The same district court also held that a parent with a disabling

injury to her hand, making notetaking at her child's IEP meeting, and thus, her ability to understand the IEP meeting, difficult, has a right to tape record her child's IEP meeting. 131 F.R.D. 654 (D.Conn. 1990). Thus, any policy limiting or prohibiting a parent's right to tape record the proceedings at an IEP meeting must provide for exceptions if they are necessary to ensure that the parent is able to understand the proceedings at the IEP meeting or to implement other parental rights under Part B.

It also should be noted that under certain circumstances, an SEA or local district policy limiting a parent's right to tape record an IEP meeting could also constitute a violation of Section 504 of the Rehabilitation Act of 1973, the Federal law that prohibits discrimination, in Federally-assisted programs, on the basis of disability. A potential violation of Section 504 could arise where the parent involved is a person who is a deaf or hearing impaired, and thus, is unable to understand the proceedings at the IEP meeting without a tape recorder or an interpreter. Further, if the parent involved has a native language other than English, the SEA or school district policy could constitute a violation of Title VI of the Civil Rights Act of 1964, the Federal law that prohibits discrimination on the basis of race and national origin in Federally-assisted programs. The Department's Office for Civil Rights (OCR) is the branch that is responsible for enforcing these statutes. For further clarification of OCR's interpretation of these statutory requirements, you may wish to contact:

Ms. Jean J. Peelen
Acting Director
Policy and Enforcement Service
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Switzer Building, Room 5036
Washington, DC 20202-1174

We regret any confusion that may have resulted from the April 1988 Memorandum. If you have any questions regarding OSEP's position on this issue, please write or telephone the contact person whose name appears at the top of this Memorandum.

cc: Part B Coordinators