



# Wiretapping Laws and Audio Surveillance

Recent events have heightened the discussion regarding school safety and steps that districts can take to maximize a safe educational environment. One such step is to use surveillance cameras in school buildings, around school property, and on school buses. Surveillance cameras can capture both video images and audio, which can provide useful real-time or recorded information regarding an incident. However, the use of audio surveillance brings into play state and federal wiretapping laws. This Legal Comment will provide an overview of the implications of state and federal wiretapping laws on district audio surveillance and discuss the legal and logistical challenges districts face if they consider utilizing audio surveillance.<sup>1</sup>

## State and Federal Wiretapping Law

It is a violation of Title III of the federal Omnibus Crime Control and Safe Streets Act (OCCSSA) and the Wisconsin Electronic Surveillance Control Law (WESCL) for anyone to intercept or attempt to intercept any “oral communication.”<sup>2</sup> “Interception” includes both monitoring and recording oral communication. A surveillance system, including a camera, that records or monitors audio likely intercepts oral communication, thus potentially violating wiretapping laws.

However, in order for speech to be “oral communication” covered by OCCSSA and WESCL, the speaker must have a reasonable expectation of privacy in the speech being intercepted.<sup>3</sup> Additionally, OCCSSA and WESCL do not prohibit the interception of oral communication, such as audio surveillance, if one of the parties to that communication has given prior consent to the interception.<sup>4</sup>

Districts have three options when deciding whether to utilize audio surveillance. The most conservative course of action is for districts to avoid OCCSSA and WESCL by using only video surveillance. However, if a district is committed to using audio surveillance, the district can take steps to try to establish that those engaged in any speech subject to audio surveillance do not have a reasonable expectation of privacy in that speech. Additionally, the district can try to obtain written consent for audio surveillance from everyone whose speech might be intercepted. The last two options carry significant practical hurdles.

## Reasonable Expectation of Privacy

In order to have a reasonable expectation of privacy, a speaker must have both (1) an actual subjective expectation of privacy in the speech, and (2) a subjective expectation that society is willing to recognize as

reasonable. This test reflects the right individuals have under the state and federal constitutions to be free from unreasonable searches and seizures.

In determining whether a person has a reasonable expectation of privacy, courts will conduct an individualized “totality of the circumstances” analysis, including the following non-exclusive factors: (1) the volume of the statements; (2) the proximity of other individuals to the speaker, or the potential for others to overhear the speaker; (3) the potential for the communication to be reported; (4) the actions taken by the speaker to ensure his or her privacy; (5) the need to employ technological enhancements for one to hear the speaker’s statements; and (6) the place or location where the statements are made.<sup>5</sup>

Because this test is individualized to each person whose communication is intercepted and to what that person is saying, districts will have difficulty determining whether every person subject to audio surveillance on school property has a subjective, reasonable expectation of privacy in his or her speech. For example, students likely have a limited expectation of privacy in a crowded hallway, but when two students talk alone their expectation of privacy is likely greater. The reasonableness of a speaker’s expectation of privacy also depends, in part, on what the speaker is saying. For example, a speaker likely has a diminished

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expectation of privacy if he or she is making threats to another person.

A federal district court held that teachers have no expectation of privacy in their classrooms and thus, could be subject to audio surveillance in their classrooms.<sup>6</sup> However, this case did not discuss whether students and other non-employees have an expectation of privacy in classrooms, nor is it certain that a Wisconsin court would follow the reasoning of this court in light of Wisconsin case law requiring an individual inquiry into the reasonableness of someone's expectation of privacy.

A district can strengthen its position that those subject to audio surveillance have no reasonable expectation of privacy by providing individual or public notice that the district is engaging in audio surveillance. However, because of the individualized nature of the inquiry, the district might not be able to establish that each person who is subject to audio surveillance is without a reasonable expectation of privacy simply through such notice. For example, districts might provide notice by conspicuously displaying cameras with signs stating that audio surveillance, including recording, is in use. However, these signs might not be effective for those who did not or are not able to read or see the signs.

Another way to address this issue is for a school board to pass a policy providing that all school property will be subject to audio surveillance and recording, and that no one on school property has an expectation of privacy in their conduct or speech. However, this policy, by itself, is likely insufficient to eliminate any expectation of privacy that someone might have in their speech although the policy could diminish the reasonableness of that expectation. The wider the dissemination of the policy to those who could be on school property, the less reasonable any such expectation would be. This policy could be included in student and employee handbooks, included in sign-up forms for volunteering, and posted in the front office. Districts

could have students, employees, and volunteers sign a form acknowledging receipt and understanding of the policy. These forms would provide evidence that the signatory was on notice of the district's audio surveillance policy and could limit the reasonableness of the signatory's expectation of privacy.

### ■ Consent

Assuming that the speaker has a reasonable expectation of privacy in his or her speech, OCCSSA and WESCL only require one-party consent to legally "intercept" an oral communication. Either party in a conversation can provide consent for the conversation, even if the second party is unaware that the conversation is being recorded.<sup>7</sup> However, obtaining consent from one party to every conversation that might be intercepted by audio surveillance will be difficult given that such audio surveillance could involve employees, students, volunteers, and visitors. Districts can obtain consent from employees by requiring them to sign consent forms as a condition of employment. However, districts need to be prepared to either take disciplinary action against an employee that refuses to sign a consent form or not use audio surveillance in areas that might capture that employee's speech.

Districts will also have to obtain consent from all school volunteers and visitors. For volunteers, this consent can be obtained along with any other documents, such as background check forms, that districts require to be completed prior to permitting someone to volunteer. Again, if a volunteer refuses to sign the consent form, the district will either have to refuse to allow that volunteer to serve or not use audio surveillance in areas that might capture that volunteer's speech. For school visitors, a district can obtain consent when they enter the building. This could be logistically prohibitive, particularly for large public events like athletic events, fine arts performances, and parent-teacher conferences; however, districts could also disable audio surveillance during these events.

Districts will also have to obtain consent from members of every outside organization using school facilities whose oral communication might be intercepted by their audio surveillance. For districts that allow outside organizations to use their facilities, obtaining consent from everyone attending all outside organizations' events is probably unrealistic.

Obtaining consent from students to legally intercept their oral communication not only creates logistical problems, but also additional legal issues. Whether a student is legally capable of consenting to audio surveillance is determined based on the student's individual circumstances, such as the student's knowledge, intelligence, and maturity. Additionally, consent must be a free and unconstrained choice. Courts will consider a minor student's state of mind at the time consent is obtained, and the methods which were used to secure consent.<sup>8</sup> Given that consent must be obtained voluntarily, districts likely cannot require consent from students as a condition of attending school in light of Wisconsin's compulsory attendance law.

Districts might be able to obtain vicarious consent for audio surveillance from students' parents or legal guardians. However, vicarious consent is not always valid. Some courts have held that parents need to demonstrate a good faith, objectively reasonable basis for believing that granting consent on behalf of their children is necessary.<sup>9</sup> For example, parents might be able to meet the standard for vicarious liability if they can demonstrate that they are giving consent to audio surveillance in order to enhance their children's safety. However, a court could still conclude that requiring parental consent for audio surveillance in order for a student to attend school renders the consent involuntary.

Courts also recognize, in some circumstances, the doctrine of "implied consent." Under this doctrine, the person who is subject to audio surveillance is deemed to have consented to the surveillance if the person has actual notice of an audio

surveillance policy and nevertheless talks within range of a known camera. This doctrine is evaluated under the totality of the circumstances. The Seventh Circuit Court of Appeals (with jurisdiction over Wisconsin's federal courts) takes the position that merely having knowledge of an audio surveillance policy and having oral communication intercepted is not equivalent to providing consent to audio surveillance.<sup>10</sup> In addition, "implied consent" is particularly difficult to prove when the party being recorded has no reasonable alternative to being recorded (*e.g.*, when riding a bus with audio surveillance is the only way the student can get to school).

### ■ Audio Surveillance on School Buses

The difficulties in complying with OCCSSA and WESCL with respect to districtwide audio surveillance are more manageable with respect to audio surveillance on school buses. To limit the reasonableness of a bus rider's expectation of privacy in his or her speech, the district can place conspicuous signs on each bus that audio surveillance, including recording, is in progress. Additionally, the Wisconsin Supreme Court has held that the public nature of transporting schoolchildren weighed against finding a reasonable expectation of privacy in a bus driver's speech.<sup>11</sup> However, in that case, the bus driver was making threats against the only student riding the bus, a factor that usually will not be present when a district uses audio surveillance on a bus.

If a district is concerned about whether it has effectively limited the reasonableness of a bus rider's expectation of privacy in his or her speech, it can take the additional step of obtaining consent forms from everyone who regularly rides district buses (including bus drivers and other employees) at the start of each school year. Field trip chaperones and other volunteers who ride buses on limited occasions can sign consent

forms when they sign-up to volunteer for events that use bus transportation. Parents and students can sign consent forms when they sign up for bus service during school registration.

However, a district likely cannot require students and parents to sign consent forms as a condition of riding the bus when the district uses the bus transportation to fulfill a statutory duty to transport students. If a district has a duty to transport a student and the student or parent refuses to consent to audio surveillance, the district would have to turn off the audio surveillance for that bus or provide alternate transportation to that student. By not requiring students and parents to sign the consent form as a condition of riding the bus, a court might hold that such consent is voluntary. Districts have to weigh the possibility that a student or parent will refuse consent against the logistical burden of obtaining consent from every student, parent, employee, and volunteer.

An appropriate consent form for audio surveillance on buses would incorporate a school board policy on audio surveillance, disclaim any expectation of privacy that riders, including bus drivers and other employees, have in their speech while riding the bus, and provide that the signatory consents to audio and video surveillance, including recording, while riding the bus. For students, a parent or guardian should also sign the form.

If a district successfully negates any expectation of privacy that bus riders have in their speech on a bus or if all bus riders are bound by a consent form, a court is likely to find that audio surveillance is legally permissible. Taking both actions is the most conservative approach if audio surveillance is used on buses.

### ■ Conclusion

In assessing whether to utilize audio surveillance, boards need to evaluate the legal and logistical hurdles placed on that use by OCCSSA and WESCL

and the potential benefit secured by engaging in such surveillance. If a school board is committed to establishing or continuing an audio surveillance program, that board must take such steps to limit the expectation of privacy in the communication of those subject to the interception, and/or obtain the appropriate consent of those subject to the interception. Unfortunately, these steps are often impractical if the surveillance takes place on a wide scale. They are more manageable, however, in limited usage of audio surveillance, for example, on buses. Therefore, boards which are considering using audio surveillance should assess precisely the areas in which surveillance would provide the most benefit in order to better navigate the boundaries of OCCSSA and WESCL. ■

### ■ End Notes

1. For additional information on this topic, see WASB *School News*, "Video Recordings and Pupil Records Laws" (January 2018) and "Video Surveillance" (June 2003); WASB *Legal Note*, "Internet Streaming of High School Athletic Events for Commercial Purposes" (Winter 2007).
2. 18 U.S.C. s. 2511; Wis. Stat. s. 968.31. These statutes establish both criminal and civil penalties.
3. *State v. Duchow*, 2008 WI 57, ¶ 19, 310 Wis. 2d 1, 749 N.W.2d 913.
4. 18 U.S.C. s. 2511(2)(c); Wis. Stat. s. 968.31(2)(b).
5. *Duchow*, 2008 WI 57, ¶ 22.
6. *Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145*, 545 F. Supp. 2d 755, 758 (N.D. Ill. 2007).
7. 18 U.S.C. s. 2511(2)(c); Wis. Stat. s. 968.31(2)(b).
8. *State v. Turner*, 2014 WI App 93, ¶¶ 29–30, 356 Wis. 2d 759, 854 N.W.2d 865.
9. See *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998).
10. See *United States v. Daniels*, 902 F.2d 1238, 1245 (7th Cir. 1990).
11. *Duchow*, 2008 WI 57, ¶ 40.

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