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The Wheels on the Bus: Transportation Issues in Special Education

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I. Introduction

A. Definition of Transportation

1. The related service of transportation includes transportation to and from school between schools, as well as travel in and around school buildings. It also includes specialized equipment, such as special or adapted buses, lifts, and ramps, if required to provide special transportation. 34 C.F.R. 300.34(c)(16).

B. Minnesota Rule:

1. School districts must provide free transportation services to any child with a disability who requires special transportation services because of the

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child's disabling conditions or special program needs. Minn. R. 7470.1600, subp. 1.

2. The length of transport time must be appropriate to the physical, mental, and emotional well-being of the child. In general, a child with a disability should not spend more time in transit than a child without a disability except as may be required because of the unique location of the child's educational program. Minnesota Rule 7470.1600 subp. 3.
3. The school district shall determine the type of vehicle used to transport based on the disabling condition of the students. Specially adapted seats, support, or protective devices must be provided for students who require it for safety. A school bus used to transport students in wheelchairs must be equipped with fastening devices. Minn. R. 7470.1600, subps. 4-7.

II. Eligibility for Transportation

- A. The IEP team must decide whether a student requires transportation as a related service. The decision must be based upon the individualized needs of each student. If the team determines that supports or modifications are needed in order for the child to be transported so that the child can receive FAPE, the child must receive the necessary transportation and supports at no cost to the parent. 71 Fed. Reg. 46,576 (2006); 34 C.F.R. § 300.320.
 1. If a child with a disability has no need for special arrangements or accommodations in connection with transportation, transportation is not a related service. See Appendix A to 34 Part 300, Question 33 (1999 regulations).
 2. Pursuant to *Letter to Smith*, 23 IDELR 344 (OSEP) 1995, “[s]chool districts must provide transportation to students with disabilities if they provide transportation to the general student population. In the event that a public agency does not supply transportation to its general population, then the issue of transportation for students with disabilities must be decided on a case-by-case basis.”
 3. *In re Student with a Disability*, 59 IDELR 180 (SEA NY 2012). In this case, a student who had communication issues and impulsive behaviors lived within a ten-minute walk to school. The school district denied transportation services because the student did not have ambulatory impairments. The SRO found that although the student had no physical

disabilities, the student was unable to walk to school independently because of his problems with focus, self-control, and impulsiveness. The SRO stated, “Determining whether a student is eligible for transportation services isn’t as simple as checking to see if his disability includes some ambulatory impairment. Rather, districts should consider several facts, including the child’s mobility, behavior, communication skills, physical needs, age, and ability to follow directions.

4. *San Bruno Park Unif. Sch. Dist.*, 116 LRP 17626 (SEA CA 2016). This case involved a student with autism who was not offered transportation by the school district. The school district did not provide transportation to non-disabled students as well. In finding for the school district, the ALJ wrote “[w]hile Student has autism and expressive and receptive language delays, there was no evidence presented that his adaptive skills or physical condition are deficient requiring bus transportation for Student to access his education. . . . Student’s impairments do not limit his ability to travers to and from school to a greater degree that typically developing kindergarteners.”

B. Open Enrollment

1. *OSSEO AREA SCHOOLS v. M.N.B.*, 970 F.3D 917 (8th Cir. 2020).

- a. Factual Background

M.N.B. resided in Big Lake, Minnesota, and required special education. Big Lake Schools referred M.N.B. to Karner Blue Education Center, which she attended for two years. The student’s IEP provided that M.N.B. should be “transported individually to and from school.” Accordingly, Big Lake Schools reimbursed M.N.B.’s mother based on mileage driven to and from Karner Blue Education Center.

The mother applied under Minnesota’s open enrollment program for M.N.B. to enroll in Osseo Area Schools for her fifth-grade year. Upon approval, M.N.B. was enrolled in Osseo Area Schools and began attending the North Education Center. This school was located five miles from Osseo and thirty-four miles from M.N.B.’s residence in Big Lake.

The mother sought reimbursement for mileage costs between M.N.B.'s residence and the North Education Center. Osseo maintained that it was only required to reimburse the mother for mileage costs from the border of the Osseo School District to the school. Osseo declined to reimburse the mother for mileage costs between M.N.B.'s residence and the Osseo School District border.

The mother filed a complaint with the Minnesota Department of Education alleging that the Osseo School District violated the IDEA by declining to reimburse the full amount of transportation costs. An administrative law judge ruled in the mother's favor. The Osseo School District brought an action in district court to challenge the administrative decision. The district court granted summary judgment in favor of the mother, finding that the Osseo School District is responsible for providing M.N.B. with a FAPE, and thus it is necessarily responsible for providing her with transportation. The Osseo School District appealed to the United States Court of Appeals for the Eighth Circuit.

b. Issue

The issue presented to the Eighth Circuit was "whether the IDEA requires a school district that enrolls a nonresident student like M.N.B. to provide transportation between the student's home and the school district where her parent has chosen to enroll her." *Osseo Area Schools, Ind. Sch. Dist. No. 279 v. M.N.B. by and through J.B.*, 970 F.3d 917, 920 (8th Cir. 2020).

When a student is open enrolled in another district, the nonresident district must provide transportation only within the boundaries of the district. Minn. Stat. § 124D.03, subd. 8. Additionally, pursuant to Minn. Stat. § 123B.88, subd. 6, "[i]f requested, a nonresident district shall transport a nonresident pupil within its borders and may transport a nonresident pupil within the pupil's resident district."

Here, M.N.B.'s IEP provided individual transportation to and from school. However, the IEP also placed the student at Karner Blue Education Center. The Eighth Circuit was ultimately faced with determining whether the Osseo School District provided a FAPE.

c. Holding

First, the Eighth Circuit determined that the State met its obligation to provide a FAPE by enrolling M.N.B. at Karner Blue Education Center pursuant to her IEP and by providing transportation reimbursement while the student was enrolled at Karner Blue. The Court further found that the mother unilaterally chose to open enroll M.N.B. in the Osseo School District, which was not the placement agreed upon by the parents and school officials in the IEP.

The Court determined that there was nothing in the IDEA that provided clear notice to a school district that it must cover transportation costs when a student's travel is the result of a parent's choice under an open enrollment program.

The Court stated, "[t]he IDEA requires the State to provide the student with a FAPE, and M.N.B.'s individualized education program calls for individual transportation to and from school. But the Big Lake District is required by state law to provide a FAPE for all residents of the district, *see* Minn. Stat. § 125A.03, and the State satisfied the obligation to provide a FAPE when the Big Lake District reimbursed the cost of transporting M.N.B. to and from the school that was agreed upon in her IEP. That was sufficient to meet the federal statutory conditions, and the IDEA does not unambiguously require the State to do more because M.N.B.'s parent unilaterally chose to enroll the student elsewhere. *Osseo Area Schools*, 970 F.3d at 923.

Ultimately, the Osseo School District was not obligated to reimburse the mother for the cost of transportation between M.N.B.'s residence and the border of the Osseo School District.

2. Though a district is not required to provide transportation outside its borders, under the 8th Circuit's interpretation of the U.S. Constitution, IDEA, and Minnesota state law and rule, it is permissible for a school district to provide special education transportation to an open enrolled student with a disability outside its borders if a student's IEP team determines on a case-by-case basis that special transportation across district borders is necessary to assist that student to benefit from special education. Then the school district may provide this special transportation and may seek reimbursement. *Letter to Smith, IDELR*, 344 (1995); Minn.

Stat. § 123B.88, subd. 6 and subd. 1(b)(4); Minn. Stat, § 127A.47, subd. 7; 71 Fed. Reg. 46576 *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (Question A-4) (2009).

C. Minnesota Care and Treatment Placements

1. The resident district must provide necessary transportation to and from the day treatment program for the student when the student is temporarily placed for care and treatment in a day treatment program located in another district and continues to live within the resident district. The resident district can claim those expenditures for special education aid. The district does not need to provide transportation to a day treatment program that does not provide an educational program. Minn. Stat. §§ 125A.15 and 125A.51; *see also* Minnesota Office of Administrative Hearings case number 8-1300-32841 (finding the resident district legally obligated to provide or underwrite the costs of transportation services between student’s day treatment program outside of the resident district and student’s regular education program within the boundaries of the resident school district).
2. Transportation shall only be provided by the resident district during the regular operating hours of the resident district. Therefore, the resident district is not responsible for transportation when its schools are not in session. However, if the resident district elects to provide transportation during these times, it can claim those expenditures for state special education aid. Extended school year (“ESY”) services must be considered for special education students placed for care and treatment, pursuant to federal law. If ESY services are provided to a special education student placed for care and treatment, “Transportation costs must be paid by the district responsible for providing transportation pursuant to section 125A.15 and transportation aid must be paid to that district.” Minn. Stat. § 125A.14; *see also* Minn. Stat. §§ 125A.15 and 125A.51; Minn. R. 3525.0755; 34 C.F.R. § 300.106.

D. Extracurricular Activities

1. Under the IDEA, transportation for extracurricular activities may qualify as either a related service or a “nonacademic and extracurricular service

and activity.” 71 Fed. Reg. 46,583 (2006). *See also* 34 C.F.R. 300.34; 34 C.F.R. 300.107.

2. A District must provide transportation as a “related service” when the student with a disability requires that service in order to benefit from special education. 34 C.F.R. 300.34.
 - a. Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available. 34 C.F.R. 300.107.
3. A district is not required to provide transportation to extracurricular activities if the student does not need to participate in those activities to receive FAPE under IDEA. *Ipswich Pub. Schc.*, 119 LRP 43070 (SEA MA 10/20/19).

E. Door to Door Service

1. Administrative Authorities have differed on the issue of whether the district’s duty to provide transportation as a related service begins at the door of the student’s home or at the curb. In the 2006 IDEA Part B regulations, the U.S. Education Department rejected requests to clearly define transportation as door-to-door services, observing that decisions about services are left up to the IEP teams. 71 Fed. Reg. 46,576 (2006).
2. A District, however, may need to provide door-to-door transportation if requiring the student to travel to a bus stop would jeopardize their safety. *Missouri Schools for the Severely Disabled*, 67 IDELR 221 (SEA MO 2016).

F. Transportation Provided by Parents

1. A Parent who transports a child with a disability is entitled to reimbursement if transportation is a related service that a student with a disability needs to receive FAPE and the student’s IEP provides for the

transportation arrangement. However, parents are not entitled to reimbursement if the school district has offered to provide appropriate transportation and the parent insists on providing their own. *See, e.g., Maynard Sch. Dist.*, 20 IDELR 394 (SEA AR 1993).

III. How to Draft IEP to Accurately Reflect Transportation as a Relative Service

- A. Districts should conduct assessment reports, consider relevant information, educate team members and parents about transportation options, and keep up with any changes to placement or disability.
- B. In determining whether a child needs transportation as a related service, it would be appropriate to include a person with expertise in this area at the IEP meeting. The IEP team must consider how the child's disability affects the child's need for transportation, including determining whether the disability prevents the child from using the same transportation provided to non-disabled children or from getting to school in the same manner as non-disabled children. Appendix A to 34 Part 300, Question 33 (1999 regulations).
- C. The services must be based on the needs caused by the student's disability, not the parent's situation.
- D. According to OSERS, "[t]he IEP Team is responsible for determining if transportation is required to assist a child with a disability to benefit from special education and related services, and how the transportation services should be implemented. The IEP should describe the transportation services to be provided, including transportation to enable a child with disabilities to participate in nonacademic and extracurricular activities in the manner necessary to afford the child an equal opportunity for participation in those services and activities to the maximum extent appropriate to the needs of that child." *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (2009); *see also* 34 C.F.R. §§ 300.107, 300.117.
- E. Special education transportation is a related service, and the IEP must specify the responsibilities of the transportation provider to implement that transportation provision outlined in the student's IEP if the student requires special transportation to receive a free appropriate public education. For example, the IEP should specify whether the student will receive special transportation from the school district's border to/from the school, or the student will receive special education transportation from the student's home to/from the school. Further, the

IEP must continue to address any of the student's anticipated transportation needs in order to ensure the student receives a FAPE. For example, the student's IEP should address any disability-related behavioral needs the student may require to transfer at the school district's border to the school district's bus. 34 C.F.R. §§ 300.17; 300.101; 300.34(a) and (c)(16); 300.323(d); 300.324(b).

F. The district must ensure that the document clearly explains what services the student needs and how to implement those services. Ambiguity in the provisions of the IEP may lead to inadvertent implementation failures that negatively affect the student's progress or jeopardize safety.

1. *Minnesota Transitions Charter 4017-07, 119 LRP 36029 (SEA MN 2019)*. In this case, the IEP indicated that the student needed transportation services, the charter school failed to clarify in the IEP when, how, and where to transport the student. Because neither the school nor the IEP informed staff members of their specific responsibilities regarding the student's transportation, staffers transported the student to school in their personal vehicles on four occasions. This denied the student access to the services and equipment he needed during transportation and jeopardized his safety.

G. The IDEA specifies that IEPs must be reviewed periodically but at a minimum of at least once a year. As a component of the IEP, the same is true for transportation provisions. This means that districts must consider transportation at the annual IEP meeting as well as other times during the year when necessary. 34 C.F.R. 300.324(b)(1)(i).

H. Documentation for Parent Who Voluntarily Transport Their Child

1. If a student with a disability is found eligible for specialized transportation and the parents voluntarily decide to make their own arrangements for transportation, it is advisable for the district to document this fact in the IEP. Specifically, the IEP should note:

a. That the child is entitled to transportation;

b. that the parents have been informed of their special education rights;

- c. that the parents prefer to provide their own transportation without the school;
 - d. an explanation on how reimbursement will be calculated.
2. It should also be documented in writing if the parents waive their right to reimbursement for the transportation. As well as a statement that the district has offered to compensate the parent and offered transportation services without any financial costs to the parents.

IV. Transportation for Qualified Students Under Section 504

- A. Section 504 requires schools to provide a free appropriate public education to each qualified individual with a disability. An “appropriate education” is defined by section 504 as the provision of regular or special education and related aids and services that are designed to meet educational needs of an individual with a disability as adequately as the need of the individuals without disabilities are met. 34 C.F.R. 104.33(a); 34 C.F.R. 104.33(b)(1).
- B. Section 504 requires that the child receive transportation to the same extent provided to nondisabled children, regardless of the child’s need for this service. *Notice of Interpretation*, Appendix A to Part 300, Question 33 (1999 regulations).
- C. In addition, if the student needs special transportation in order to access the curriculum on an equal basis as other students, the district must provide the transportation.
- D. Districts have a further duty to provide transportation if they refer the student for aid, benefits, or services not operated or provided by the district as a means of providing a FAPE. 34 C.F.R. § 104.33(c)(2). The district shall ensure that adequate transportation to and from the aid, benefits, or services is provided at no greater cost than would be incurred by the person or the person’s parent or guardian if the person were placed in the aid, benefits, or services operated by the district. *Id.*
- E. In *North Allegheny School District*, 62 IDELR 306 (SEA PA 2013), a district placed a student at a private school in order for him to receive a FAPE. The district provided the transportation to the private school at no cost to the parent. Before and after school, the student attended a private daycare facility located

about ten miles outside the district's attendance boundaries. The private daycare was not part of the student's IEP. The district generally provided its students transportation to and from private daycares, but only to facilities within the school district's boundaries. A hearing officer held that the district did not deny the student a benefit based upon his disability, but rather applied a facially neutral transportation policy. The federal district court affirmed that decision. *S.K. v. North Allegheny Sch. Dist.*, 2015 WL 1285794 (W.D. Penn. 2015). The court, however, subsequently granted the parent leave to assert a claim for associational discrimination.

- F. Section 504 also requires a district to provide extracurricular activities in such a manner as is necessary to afford students with disabilities an opportunity to participate equal to that afforded to students without disabilities. This includes the provision of transportation services. 34 C.F.R 104.37.

V. **Staffing and Equipment Considerations**

- A. The district shall determine the type of vehicle used to transport based on the disabling condition of the students. Specially adapted seats, support, or protective devices must be provided for students who require it for safety. A school bus used to transport students in wheelchairs must be equipped with fastening devices. Minn. R. 7470.1600, subps. 4-7.
- B. **School Bus Requirements.** A school bus is a “motor vehicle used to transport pupils to or from school . . . or to or from school-related activities, by the school or a school district, or by someone under an agreement with the school or a school district.” Minn. Stat. § 169.011, subd. 71. However, the vehicles must be types A through D, a multifunction school activity bus, or type III, with weight and design limitations on each of those types.
- C. Vehicles used to transport pupils with a disability must be equipped with a two-way communications system or have a responsible aide, or both, to provide necessary assistance and supervision that cannot safely be provided by the driver. To determine the need of an aide, the school district should consider the following factors:
 - 1. disabilities of students transported;
 - 2. distance travelled;

3. density of population, terrain;
 4. any other factors that may affect the safety of the student passengers.
Minn. R. 7470.1600, subp. 5.
- D. Drivers should be carefully selected to assure he or she can perform the requirements of the job. Drivers must be assigned to a route on a regular basis whenever possible. Minn. R. 7470.1700, subp. 1.
- E. Each driver and aide should have the following information in hard copy or immediately accessible through a two-way communication system:
1. the student's name and address;
 2. the nature of the student's disabilities;
 3. emergency health care information;
 4. the names and telephone numbers of the student's physician, parents, guardians, or custodians, and some person other than the student's parents or custodians who can be contacted in case of an emergency. Minn. R. 7470.1700, subp. 2.
- F. Each driver and aide must:
1. be instructed in basic first aid and procedure for the students under their care;
 2. within one month after the effective date of assignment, participate in a program of in-service training on the proper methods for dealing with the specific needs and problems of students with disabilities;
 3. assist students with disabilities on and off the bus when necessary for safety;
 4. ensure that safety devices on the vehicle are in use and fastened properly.
Minn. R. 7470.1700, subp. 3.

VI. Discipline

- A. Bus suspension

1. Transportation by school bus is a privilege not a right for an eligible student unless special transportation is required for the student to receive a FAPE. A student's eligibility to ride a school bus may be revoked for a violation of school bus safety or conduct policies, or for violation of any other law governing student conduct on a school bus, pursuant to a written district discipline policy. Revocation of a student's bus riding privilege is not an exclusion, expulsion, or suspension under the Pupil Fair Dismissal Act. Revocation procedures for a student who is an individual with a disability are governed by these provisions with the following conditions:
 - a. If transportation is listed as a related service on a student's IEP the district must provide alternative transportation if school bus privileges are revoked. A related service may not be taken away without due process.
 - b. If a student's IEP team determines the student's behavior is a manifestation of a disability, it could be unfairly discriminatory to revoke all transportation options, if it meant the student could not attend school for more than 10 consecutive school days.
 - c. Disciplinary action by the bus driver or a bus assistant must comply with all provisions on student's IEP, if there are any such provisions. Except for an emergency situation, the bus driver or assistant may not improvise their own disciplinary procedures, which would conflict with an IEP.
2. If a student is suspended from the bus and bus transportation is part of the student's IEP, each day of suspension from the bus counts as a day of suspension for purposes of IDEA, unless the school district arranges for alternative transportation. If bus transportation is not a part of the student's IEP, a bus suspension would not count as a suspension for purposes of IDEA.

VII. Least Restrictive Environment

- A. 34 C.F.R. 300.114(a)(2)(i) instructs that children with disabilities are educated with children who are not disabled to the maximum extent possible.
- B. The least restrictive environment ("LRE") requirement of the IDEA applies equally to student transportation services. 71 Fed. Reg. 46, 576 (2006) (emphasis added); *see also* Questions and Answers on Serving Children with Disabilities Eligible for Transportation, 53 IDELR 268 (OSERS 2009).

- C. A district's decision to provide separate transportation for students with disabilities must be made on an individual basis and must take into consideration each student's disability-related needs, the evaluation must determine whether the separate transportation would provide participation with other students to the maximum extent possible. *Kenai Peninsula (AK) Borough Sch. Dist.*, 20 IDELR 288 (OCR 1993)
- D. District's must consider whether regular transportation can be implemented with supplemental services and aids. They must also consider whether the advantages to the student riding in the typical transportation outweigh the benefit of a more restrictive transportation and whether there are any negative benefits experienced by others if the student takes the typical transportation. *See East Windsor Bd. Of Educ.*, 20 IDELR 1478 (SEA CT 1994).
- E. The LRE requirement may come into play when a student has a history of behavior problems associated with transportation. For example, one federal court determined that a district failed to comply with the LRE requirement by not allowing a seven-year-old student with Down Syndrome to be transported on the regular bus with a "bus buddy" during second grade, despite evidence of a history of behavioral problems on the special education bus. *B.B. v. Catahoula Parish Sch. Dist.*, 62 IDELR 50 (W.D. La. 2013).

VIII. Discrimination in Special Education Transportation

- A. A district's failure to provide transportation as a related service may in some cases result in disability discrimination claims. However, a district generally will not be found liable unless the absence of transportation services denied the student access to his education program or the opportunity to benefit from the district's programs or activities. *S.K. v. North Allegheny Sch. Distr.*, 65 IDELR 65 (W.D. Pa. 2015) (holding that because a student only needed to attend a day care program to accommodate his parent's work schedule, the district's alleged failure to provide transportation to the day care was not enough to raise a claim under Section 504 or Title II).
- B. Requiring students with disabilities to ride in segregated special education buses violates the IDEA, section 504, and the ADA, unless there is a legitimate nondiscriminatory reason for it, or such separation is necessary due to a student's disability. This may occur in situations where the students are being transported to a special education program outside of their local area. *See, e.g., Fairbanks (AK) North Star Brough Sch. Dist.*, 21 IDELR 856 (OCR).

- C. A school day for a child with a disability should not be longer or shorter than a school day for general education students. However, if a child's IEP Team determines a child needs a shorter or extended school day in order to receive FAPE, then appropriate modifications should be incorporated into the IEP. However, these modifications must be based on the unique needs of the child, as determined by the IEP team, and not solely based on the child's transportation time.