

October 12, 2016

[Superintendent]

Re: Complaint Decision File #16-138C

Dear [Superintendent]:

The Minnesota Department of Education (MDE) has reached a decision regarding the complaint [Complainants] brought on behalf [Student 5] and all other students (Students) who attend Osseo Public School District ISD #0279-01 (District) through the state's enrollment options program and have transportation services in their individualized education programs (IEPs). Subsequently, MDE received a second complaint from the parent of [Student 61], raising the same issue. The information provided by the parent of Student 61 has been included and is covered as part of this complaint investigation as Student 61 attends school within the District through the State's enrollment options program and has transportation services in his IEP.

An independent investigation was conducted, which was limited to allegations that occurred on or after June 24, 2015, one year prior to the date the complaint was received. The complaint investigation was conducted by [complaint investigator]. The independent investigation included:

- An opportunity for the Complainants to submit additional information, either orally or in writing.
- An opportunity for the District to respond to the complaint.
- Discussions with Complainants and District Staff.
- A review of all relevant information.

Based on consideration of the information collected in the investigation, an independent decision was made about whether the District violated special education law. The decision addresses the issue from MDE's letter dated July 15, 2016. The District provided a written response to the complaint on August 12, 2016. The decision includes:

- Findings of fact and conclusions.
- The reasons for the final decision.
- Corrective action (remedies).

The findings of fact and conclusions, and reasons for the final decision, explain how the decision was reached on the issue. The decision section reports on whether there was a violation of special education law. Corrective action is included when appropriate. Corrective action outlines the remedies the school district must complete when a violation is found.

## **Issue**

The Complainants allege the District's unilateral change in busing practices for open enrolled Students with transportation included in their IEPs denies the Students a free appropriate public education (FAPE). Specifically, the Complainants allege the District's practice denies the Students a FAPE by not providing them with transportation to and from their homes and school as indicated in their IEPs.

## **Findings of Fact**

1. The Students have been found eligible for, and in need of, special education and related services under Minnesota law. The Students attended schools within the District, or at the intermediate school district of which the District is a member, during the time period covered by this complaint and had transportation services in their IEPs.
2. Complainants allege the District denied the Students FAPE and failed to follow due process procedures by making a unilateral change in the District busing practice. The Complainants further allege the District failed to provide prior written notice to the Students' parents limiting special transportation services and failed to provide an opportunity for parents to participate in meetings regarding the transportation policy that effects the provision of a FAPE to the Students. Specifically, Complainants reported:

[Students] have specialized transportation listed on their IEPs. The inclusion of specialized transportation meets the definition of a related service under Individuals with Disabilities Education Act (IDEA). . . Related services are those services that are required in order for students to access a [FAPE]. . .

While [District] has acknowledged that [Student 5] needs specialized transportation in [his] IEP and other Students' IEPs, the District is refusing to provide the transportation necessary for the Students to benefit from educational services and receive FAPE—between where the Students live and their school. Without school-provided specialized transportation, [Student 5] cannot access the educational and other services called for in his IEP or receive FAPE.

3. A parent of [Student 61] also reported:

[The District has] discontinued transportation for my son due to him being open enrolled. It is in his IEP that transportation is to be provided. He cannot go to a bus stop in the District due to being in a wheelchair and his health issues. He cannot be in the outdoor elements for long periods of time, not to mention accessibility issues for his chair. He has issues with extreme heat/cold. Independently, he cannot do [public transportation options] due to his inability to advocate for himself due to his developmental delays and vision issues. [The resident district] when contacted hinted that he could get his needs met through their program. However, he was removed from that district due to concerns with care, supervision, and safety. My son has been very happy in the [District] all these years and would be devastated if he had to leave due to this transportation issue. I am begging that his IEP be followed.

4. During the 2014-15 school year, the District reported its transportation practice for open enrolled Students consisted of the following:

Under the District's then-current practice, the families of general education students and the families of students with special needs who did not have transportation on the IEP were responsible to get their child to a bus stop located within the [District's] geographic boundary. The District transported the student from there to school. Families of students with special needs who had transportation on the IEP were treated more favorably. For these families, the District had been sending buses across the District's boundary to the Students' home school districts to collect them and transport them to school.

This practice exceeded legislative requirements and was in excess of the practices of other school districts. Minnesota's Enrollment Options legislation provides "[i]f requested by the parent of a pupil, the nonresident district shall provide transportation within the district." Minn. Stat. § 124D.03, subd. 8. Under the legislation a school district may, but is not required to, transport outside the district. Other school districts were not transporting outside the district boundaries.

Sending buses to retrieve students from other school districts, some not contiguous with [the District], was difficult logistically. The practice sometimes required a bus and driver to be dedicated for a large part of a day to a route across boundary lines to a

distant location to collect only one student. The practice created inefficiencies, and during major events such as road construction, collisions and accidents, or winter weather, these inefficiencies were exacerbated. The farther the District had to go across boundaries to collect students, the greater the inefficiencies became.

The practice of sending buses across boundaries to collect students from other districts also resulted in longer bus rides for students on routes overall. District administrators understood that these longer rides were not beneficial for students, and this was an additional consideration in moving to the new protocol.

In studying the issue, the District calculated the annual expenditure to provide this benefit at \$242,950.00. By moving its practice in line with legislation and with what other districts were doing, Osseo Area Schools could reduce the number of buses that left the District to collect students from many other districts, e.g., Minneapolis, Anoka-Hennepin, and Robbinsdale. This would not only reduce the burden on the general fund, but would improve route times and recovery times making for shorter rides for students and a more sustainable bus route structure.

5. In March 2015, the District made the decision to change its practice as follows:

[A]ll open enrolled families would be responsible to get their student to a bus stop within [the District]. This would include general education students, students with special needs who did not have transportation as a related service, and students with special needs who did have transportation as a related service.

6. On July 31, 2015 (July 2015 letter), the District sent a letter to open enrolled families that had a student with a disability and transportation listed in their IEPs. The July 2015 letter provided (emphasis in original):

Dear Parent/Guardian of: [Student]

The purpose of this communication is to notify you of a change in school district busing practices in which [District] will be conforming to the legislative requirements of transporting open enrolled students. [District's] practice of transporting open enrolled students who receive special education services exceeds legislative requirements, so the District is changing practice to conform with the law. Stated below is the practice to which the district will be adhering:

*Special transportation is provided within the student's enrollment area for that school or special program. Special transportation will not be continued when the student moves out of the enrollment area or outside of the district. If the student is accepted through open enrollment, the district will provide special transportation from the district's boundary area (Minn. Stat. § 124D.03, subd. 8).*

Your student currently receives busing from place of residence to school. This will continue through the 2015-16 school year, so no action is required on your part at this time. For the 2016-17 school year, if you choose for your student to ride a bus to school, you will need to submit an open enrollment transportation request. A bus stop will be provided in the boundaries of the school of attendance according to Minn. Stat. § 124D.03, subd. 8. Forms will be mailed out late in the school year to the families who are impacted by the change in the 2016-17 school year.

What you need to know:

- Students who currently receive special education transportation will continue to receive transportation through the 2015-16 school year.
- If you choose to open enroll to a school other than their attendance school, this will be considered a new enrollment, and the student will be required to present themselves to a bus stop within the boundaries of the school of attendance.

7. On March 22, 2016, the District sent another letter to families of open enrolled Students with transportation listed on their IEPs (March 2016 letter). The March 2016 letter provided:

When students are approved to attend a school outside of their assigned attendance area school, transportation is the responsibility of the parent/guardian. However, transportation may be provided from an existing bus stop within our border that serves the approved school under the following conditions:

- 1) The Student registers for bus service each school year and is approved to use an existing bus stop.
- 2) Space is available on existing bus routes.
- 3) Parents accept ultimate responsibility for ensuring that their student can get safely to and from the assigned bus stop and also maintain safety of their student in and around the bus stop.

Note: Existing bus stops are located within each school's attendance area and are not guaranteed to be in a convenient location for your student. From time to time, enrollments change, bus routes change, and available seats on bus routes change.

8. On July 29, 2016, the District mailed the following letter (July 2016 letter), with a corresponding postcard to 30 parents of Students who "were being picked up from outside of District boundaries at the end of the 2015-16 school year and had not indicated their intentions for the 2016-17 school year" (emphasis in original):<sup>1</sup>

Dear Parent/Guardian:

...

Due to this [MDE] complaint, the District will continue transportation for students who currently are receiving this service until the matter is resolved or the IEP team makes a different determination.

If the District prevails on this issue, transportation will be discontinued from that point on. The District will give you as much notice as reasonably possible to make other arrangements, but the notice may be as short as one school week.

Enclosed you will find a postcard in which you can choose to elect or decline transportation under these conditions. Please return by August 15<sup>th</sup>, especially if you are electing to receive transportation services as bus routes will be finalized that week. If we do not receive confirmation regarding your desire to receive transportation, we will NOT schedule transportation for the start of the 2016-17 school year.

9. The District reported it did not send the July 2016 letter and the postcard to the parents of Students who had previously indicated their intentions for the 2016-17 school year. For example, some parents arranged to get their Student to a designated bus stop within the boundaries of the school of attendance,<sup>2</sup> some parents agreed to transport their

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<sup>1</sup> The District reported it mailed the July 2016 letter and postcard to the following Students: [Student 1], [Student 3], [Student 4], [Student 5], [Student 6], [Student 11], [Student 13], [Student 14], [Student 16], [Student 17], [Student 18], [Student 21], [Student 22], [Student 23], [Student 24], [Student 25], [Student 26], [Student 28], [Student 29], [Student 32], [Student 36], [Student 37], [Student 40], [Student 41], [Student 49], [Student 54], [Student 56], [Student 61], [Student 62], and [Student 64].

<sup>2</sup> Students getting to a designated bus stop within the boundaries of the school of attendance included the following: [Student 10], [Student 31], [Student 33], [Student 38], [Student 45], [Student 55], and [Student 59].

Student to and from the school themselves,<sup>3</sup> some parents made arrangements for their Student to be picked-up/dropped off at another home or daycare located within the boundaries of the school of attendance,<sup>4</sup> some parents had their Student transfer school districts,<sup>5</sup> and some parents utilized other options.<sup>6</sup>

10. The District reported:

The change [in transportation practice] began with the start of the 2015-2016 school year. The District grandfathered in for a year those students who had been receiving transportation outside the boundaries to give the families time to get a plan in place.

11. The District identified and provided portions of the education records for 64 Students who were open enrolled in the District and received transportation services during the 2015-16 school year.<sup>7</sup>

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<sup>3</sup> Students being transported by their parents to and/or from the school included the following: [Student 2], [Student 12], [Student 30], [Student 48], and [Student 51].

<sup>4</sup> Students being picked-up/dropped off at another home or day care located within the boundaries of the school of attendance included the following: [Student 27], [Student 34], [Student 35], [Student 51], and [Student 53].

<sup>5</sup> Students who were no longer enrolled in the District included the following: [Student 19] (subsequently sent a post card), [Student 20], [Student 41], and [Student 42].

<sup>6</sup> Student [Student 15] continued receiving transportation services through the McKinney Vento Act. Student [Student 57's] transportation status was unclear and the District subsequently notified the parents of the options outlined in the post card.

<sup>7</sup> The District identified and provided portions of the education records of the following Students: [Student 1], [Student 2], [Student 3], [Student 4], [Student 5], [Student 6], [Student 7], [Student 8], [Student 9], [Student 10], [Student 11], [Student 12], [Student 13], [Student 14], [Student 15], [Student 16], [Student 17], [Student 18], [Student 19], [Student 20], [Student 21], [Student 22], [Student 23], [Student 24], [Student 25], [Student 26], [Student 27], [Student 28], [Student 29], [Student 30], [Student 31], [Student 32], [Student 33], [Student 34], [Student 35], [Student 36], [Student 37], [Student 38], [Student 39], [Student 40], [Student 41], [Student 42], [Student 43], [Student 44], [Student 45], [Student 46], [Student 47], [Student 48], [Student 49], [Student 50], [Student 51], [Student 52], [Student 53], [Student 54], [Student 55], [Student 56], [Student 57], [Student 58], [Student 59], [Student 60], [Student 61], [Student 62], [Student 63], and [Student 64].

12. MDE's review of the 64 Student IEPs provided by the District indicated that 51 Students had IEPs which specifically included transportation services.<sup>8</sup> For example, [Student 61's] IEP stated:

[Student 61's] transportation to and from school is provided by the [District]. Currently, [Student] is open enrolled in the [District]. He lives within the boundaries of the [resident district]. Special education busing will be provided to and from school with curb to curb service. The bus must have a wheelchair lift. [Student 61] will need to be supervised by Staff to safely transition between his bus and the school building. The bus needs to have regulated heat and air conditioning due to [Student 61's] significant health concerns. [Student 61's] family or home caregivers will be responsible to assist him on the driveway going to and from his house and the bus.

13. Individual Student IEPs also detailed specific needs and the supports necessary to address those needs when providing transportation services. For example:

[Student 61] uses his personal power wheelchair to meet his mobility and positioning needs. He requires adult assistance and supervision to manage his wheelchair for safety. He needs regular verbal and physical cues to attend to where he is going when he travels especially around stairs and curbs.

...

[Student 61] is extremely sensitive to very cold weather. [Student 61's] poor circulation prevents his body from warming up appropriately when he gets cold.

[Student 61] needs to be closely monitored for overheating and sunburn during very hot weather. [Student 61's] emerging advocacy skills for communicating his wants and needs regarding extreme weather make it necessary Staff keep him safe.

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<sup>8</sup> The IEPs of the following Students specifically included transportation services: [Student 1], [Student 3], [Student 4], [Student 5], [Student 6], [Student 7], [Student 10], [Student 11], [Student 12], [Student 13], [Student 14], [Student 15], [Student 16], [Student 17], [Student 18], [Student 19], [Student 20], [Student 21], [Student 22], [Student 23], [Student 24], [Student 25], [Student 26], [Student 27], [Student 31], [Student 33], [Student 34], [Student 35], [Student 36], [Student 37], [Student 38], [Student 40], [Student 41], [Student 42], [Student 43], [Student 44], [Student 45], [Student 46], [Student 48], [Student 49], [Student 51], [Student 53], [Student 54], [Student 55], [Student 56], [Student 57], [Student 58], [Student 59], [Student 61], [Student 63], and [Student 64].

14. Individual Student IEPs which detailed specific needs and the supports necessary to address such needs also included: vulnerability concerns;<sup>9</sup> mobility concerns;<sup>10</sup> temperature sensitivity;<sup>11</sup> the need for a bus aide or paraprofessional;<sup>12</sup> directions for bus personnel in case of a Student seizure;<sup>13</sup> safety devices or adaptations for the bus;<sup>14</sup> and other directions for picking up and dropping off Students.<sup>15</sup>
15. A review of the Student IEPs provided by the District informed that 42 IEPs included boilerplate transportation language.<sup>16</sup> The District reported that this language was included into Student IEPs during the 2015-16 school year as the Students' annual IEPs came due. Specifically, the boilerplate language provided:

Special transportation is provided within the student's enrollment area for that school or special program. Special transportation will not be continued when the student moves out of the enrollment area or outside of the district. If the student is accepted through open-enrollment, the district will provide special transportation from the district's boundary (Minn. Stat. 124C.03, subd. 8).

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<sup>9</sup> See the following Student IEPs addressing vulnerability concerns: [Student 3], [Student 4], [Student 6], [Student 10], [Student 17], [Student 21], [Student 27], [Student 35], [Student 37], [Student 38], [Student 41], and [Student 58].

<sup>10</sup> See the following Student IEPs addressing mobility concerns: [Student 3], [Student 13], [Student 30], [Student 36], [Student 61], and [Student 64].

<sup>11</sup> See the following Student IEPs addressing temperature sensitivity: [Student 40] and [Student 61].

<sup>12</sup> See the following Student IEPs addressing the need for a bus aide or paraprofessional: [Student 4], [Student 6], [Student 35], [Student 40], [Student 42], and [Student 57].

<sup>13</sup> See the following Student IEPs addressing seizure management needs: [Student 6] and [Student 35].

<sup>14</sup> See the following Student IEPs addressing safety devices or adaptations for the bus: [Student 4], [Student 33], [Student 40], [Student 54], and [Student 57].

<sup>15</sup> See the following Student IEPs addressing hand to hand transfer provisions: [Student 4], [Student 11], [Student 33], [Student 34], [Student 35], [Student 51], and [Student 53]. See the following Student IEPs addressing eye to eye transfer provisions: [Student 14], [Student 21], [Student 26], and [Student 37]. See the following Student IEPs addressing curb to curb transfer provisions: [Student 27] and [Student 61]. See the following Student IEP addressing door to door transfer provisions: [Student 10].

<sup>16</sup> The following 42 Students had boilerplate transportation language in their IEPs: [Student 2], [Student 3], [Student 7], [Student 8], [Student 9], [Student 10], [Student 13], [Student 14], [Student 16], [Student 17], [Student 19], [Student 21], [Student 25], [Student 26], [Student 27], [Student 28], [Student 29], [Student 30], [Student 31], [Student 32], [Student 33], [Student 34], [Student 35], [Student 37], [Student 39], [Student 40], [Student 41], [Student 43], [Student 44], [Student 45], [Student 46], [Student 47], [Student 49], [Student 52], [Student 53], [Student 55], [Student 57], [Student 58], [Student 59], [Student 62], [Student 63], and [Student 64].

16. In a response to a request during the complaint investigation for “prior written notices, including parent signature pages, for the most recently adopted IEPs of all Students,” the District provided IEP team meeting notes and/or prior written notices of 18 Students<sup>17</sup> showing that transportation was discussed and at issue at ten IEP team meetings during the 2015-16 school year.<sup>18</sup>
17. The IEP team meeting notes confirm that the change in transportation services was discussed at IEP team meetings during the 2015-16 school year. The notes also indicate that the discussion included informing the Students’ parents of the change in practice but not how the practice would impact the Student’s individual needs. For example:
- [Student 4’s] April 26, 2016 IEP team meeting notes state: “[Staff] said that state statute says they cannot transport outside of their District area.”
  - [Student 6’s] April 18, 2016 IEP team meeting notes state: “Program secretary shared that [District] will no longer transport [Student] here in the fall. [Case manager] asked if [parents] were going to have [resident district] transport. [Parent] said that they will transport [Student]. [District] will transport through ESY.”
  - [Student 61’s] May 2, 2016 IEP team meeting notes state: “[District] is changing process. [District] will no longer be transporting. Either mom and dad will need to transport or will have to go to [resident district] . . . [District’s] policy is changing.”
18. The documentation provided by the District included four prior written notices with the proposed change in transportation services consistent with District practice<sup>19</sup> and the remaining did not include the proposed change in transportation services by prior written notice.<sup>20</sup> Further, the parents of [Student 5] report that they did not receive a prior written notice attempting to change his transportation services and the District did not submit a prior written notice for [Student 5] regarding the change in transportation services.

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<sup>17</sup> In the request the District was asked to prioritize sending MDE the prior written notices of 18 specific Students. The District provided documentation for the 18 Students MDE asked to prioritize and did not submit any additional prior written notices for other Students. The District provided IEP team meeting notes and/or prior written notices for the following Students: [Student 3], [Student 4], [Student 6], [Student 7], [Student 10], [Student 11], [Student 16], [Student 17], [Student 25], [Student 37], [Student 43], [Student 44], [Student 46], [Student 54], [Student 56], [Student 58], [Student 61], and [Student 63].

<sup>18</sup> The District provided IEP team meeting notes and/or prior written notices for the following ten Students that mentioned transportation: [Student 4], [Student 3], [Student 6], [Student 7], [Student 10], [Student 16], [Student 37], [Student 58], [Student 61], and [Student 63].

<sup>19</sup> See the prior written notices provided by the District including a change in transportation for Students: [Student 3], [Student 4], [Student 16], [Student 58].

<sup>20</sup> See the prior written notices provided by the District not including a change in transportation for Students: [Student 6], [Student 10], [Student 11], [Student 17], [Student 25], [Student 43], [Student 44], [Student 46], [Student 54], [Student 56], and [Student 63].

19. Consistent with the IEP team meeting notes, the submitted prior written notices which provided for a change in transportation indicated that the change was made in accordance with the District's new practice, not how the practice would impact the Student's individual needs. For example, the parent of [Student 4] rejected the District's first proposed IEP based on the transportation practice and no agreement was reached through conciliation. The District subsequently sent another prior written notice stating:

Following district transportation practice, the District is proposing transportation for [Student] to and from school within district boundaries and denying the parent's request for transportation to and from [resident district]. The District considered special exceptions, however none applied. . . The District considered continuing to provide special education transportation for [Student 4] from [resident district], however rejected that option as it is the District's transportation practice not to cross into other district's boundaries.

20. The District reported that the change in busing practice was based on a facially neutral transportation policy, and that to provide transportation for the Students with disabilities beyond the District geographical boundary would be based on the Students' parental preference or convenience, instead of based on the Students' educational needs.

## Conclusions

1. Under federal regulations at 34 C.F.R. §§ 300.151 to 300.153, MDE is required to establish and implement complaint procedures and has the authority to review state complaints that include matters concerning the identification, evaluation, educational placement, or the provision of a [FAPE] to a child. More specifically, at 71 Fed. Reg. 46601, the U. S. Department of Education's comments to 34 C.F.R. § 300.151, provide:

The complaint procedures provide parents, organizations, and other individuals with an important means of ensuring that the educational needs of children with disabilities are met and provide [state educational agencies] with a powerful tool to identify and correct noncompliance with Part B of [IDEA] or of [IDEA regulations].

2. The Complainants allege the District's new transportation policy denies the Students FAPE and violates Part B of the IDEA and its implementing regulations. The Complainant's allegations implicate 34 C.F.R. § 300.34(a) and (c)(16); Minn. R. 3525.0800, subp. 8; Minn. Stat. § 127A.47; Minn. Stat. § 123B.92; 20 U.S.C. § 1414(d)(3) and 34 C.F.R. § 300.324(a); Minn. Stat. § 125A.08(b)(1); 34 C.F.R. § 300.501; Minn. Stat. § 124D.03; Minn. Stat. § 123B.88; Minn. Stat. § 124D.08; and 34 C.F.R. § 300.503.

3. MDE has the requisite legal authority to investigate the Complainants' allegations and review the District's policy as it relates to the provision of special education services and the District's noncompliance with Part B of the IDEA and IDEA regulations. *See, Indep. Sch. Dist. No. 281 v. Minnesota Dep't of Educ.*, 743 N.W.2d 315 (Minn. Ct. App. 2008) ("When the MDE receives a written complaint regarding the dispute over the provision of special education services, it has the general authority and responsibility to investigate the complaint, assess the local school district's policies raised therein, and, if necessary, order corrective action to address the provision of appropriate services to children with disabilities in the future.).
4. The Complainants raise an actual and existing legal controversy, as the District's July 2016 letter clearly informs that but for this pending complaint, none of the Students would receive special transportation services across the District's boundaries to the Students' homes.
5. This complaint only examines allegations of special education violations that occurred not more than one year prior to the date that the complaint was received, June 24, 2016, pursuant to 34 C.F.R. § 300.153(c). Although this complaint includes some factual information about the events that occurred prior to June 24, 2015, such facts are for contextual purposes only.
6. School districts must make available to each eligible student a FAPE, consisting of special education and related services that are provided in conformity with the Student's IEP, pursuant to 34 C.F.R. §§ 300.17 and 300.101.
7. Minnesota Rules at 3525.0800, subp. 8 provide:

When a pupil is placed outside of the district of residence by the parent or pupil for the purpose of education and in accordance with a statutory education choice enrollment act, the resident district shall be responsible for assuming the cost of the education program when notified in accordance with Minnesota Statutes, section 127A.47, subdivision 5. The providing district shall be responsible for assuring that an appropriate program is available for the pupil including the notice and hearing provisions. Responsibility for transportation costs between the pupil's home and the providing school district shall be determined in accordance with Minnesota Statutes.
8. Minnesota Rules at 3525.0210, subp. 35 defines "providing district" as "a district with the responsibility of providing special education services to a pupil according to part 3525.0800."
9. Under 34 C.F.R. § 300.34(a), "related services" includes transportation.

10. Federal regulations at 34 C.F.R. § 300.34(c)(16) provide:

“Transportation includes—(i) Travel to and from school and between schools; (ii) Travel in and around school buildings; and (iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.”

11. The comments to the Federal Register at 71 Fed. Reg. 46576, discussing 34 C.F.R. § 300.34(c)(16), provide in relevant part:

A child’s IEP Team is responsible for determining whether transportation between school and other locations is necessary in order for the child to receive FAPE. Likewise, if a child’s IEP 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 parents.

12. Similarly, in *Letter to Smith*, 23 IDELR 344 (1995), the U.S. Department of Education, Office of Special Education Programs (OSEP) stated (emphasis added):

[I]f a public agency does not provide transportation to the general student population, the issue of transportation for students with disabilities must be decided on a *case-by-case basis*. If a public agency determines that a disabled student needs transportation to benefit from special education, it must be provided as a related service at no cost to the student and his or her parents.

...

In all instances, each student's need for transportation as a related service and the type of transportation to be provided are issues to be discussed and decided during the evaluation process and [IEP] meeting, and the transportation arrangements agreed upon should be included in the disabled student's IEP. If the IEP team determines that transportation is a related service, including it in the IEP for a particular student because it is required to assist that student to benefit from special education, the public agency must provide transportation to the student at public expense.

13. In *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (2009), the U.S. Office of Special Education and Rehabilitative Services (OSERS) informed:

A child's [IEP] Team is responsible for determining both 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.

Question A-4: Do the transportation provisions in 34 C.F.R. 300.34(c)(16) mean that an LEA [local educational agency] is responsible for transporting children with disabilities to and from the locations where the students receive special education and related services, even if the LEA has to redirect the transportation routes or provide an aide for safety?

Answer: Yes. If an IEP Team determines that a child with a disability requires special transportation arrangements or accommodations, including an aide for safety, the LEA must provide these services.

14. In *Letter to Lutjeharms*, 16 IDELR [Individuals with Disabilities Education Law Report] 554 (1990), OSEP reviewed Nebraska's open enrollment legislation which provided that open enrolled students were to be treated as resident district students of the open enrolled school and neither the resident district nor the open enrolled district was directly responsible for providing transportation. Specifically, OSEP responded to the following inquiry:

"If a [student with a disability] chooses to [open enroll] into another district, is it permissible for that district to deny transportation even though the child would qualify for transportation as a related service?"

15. OSEP provided the following general guidance:

It is the Department's position that, under interdistrict choice programs, States must ensure that the rights guaranteed to children with [disabilities] and their parents by [IDEA] and Section 504 are not diminished by virtue of a child's participation in the program. However, Federal law does not prohibit States from requiring that responsibility for providing a [FAPE] to children with [disabilities] be transferred from the school district of the child's residence (resident district) to the non-resident school district of parental choice [open enrolled district], as Nebraska's program currently does. The effect of this allocation of responsibility may not operate to deny any of the substantive rights and procedural

safeguards guaranteed by [IDEA] and Section 504 to children with [disabilities] and their parents.

16. OSEP then responded to the inquiry by stating:

[I]f a child is entitled to transportation as a related service, the school district responsible for FAPE, which, [here], is the [open enrolled] district, must provide, or ensure the provision of, transportation. However, if transportation is not required as a related service, such transportation need not be provided to the [student with a disability], if [students without disabilities] do not receive this service.

17. Minnesota Statutes § 124D.03, subd. 8, provide:

If requested by the parent of a pupil, the nonresident district shall provide transportation within the district.

The resident district is not required to provide or pay for transportation between the pupil's residence and the border of the nonresident district. A parent may be reimbursed by the nonresident district for the costs of transportation from the pupil's residence to the border of the nonresident district if the pupil is from a family whose income is at or below the poverty level, as determined by the federal government. The reimbursement may not exceed the pupil's actual cost of transportation or 15 cents per mile traveled, whichever is less. Reimbursement may not be paid for more than 250 miles per week.

At the time a nonresident district notifies a parent or guardian that an application has been accepted under subdivision 4 or 5, the nonresident district must provide the parent or guardian with the following information regarding the transportation of nonresident pupils under section 123B.88, subdivision 6.

18. Minnesota Statutes § 123B.88, subd. 6, provide:

For the purposes of this subdivision, a "nonresident pupil" is a pupil who resides in one district, defined as the "resident district" and attends school in another district, defined as the "nonresident district."

If requested, a nonresident district shall transport a nonresident pupil within its borders and may transport a nonresident pupil within the pupil's resident district. If a nonresident district decides to transport a nonresident pupil within the pupil's resident district,

the nonresident district must notify the pupil's resident district of its decision, in writing, prior to providing transportation.

19. MDE has consistently interpreted Minn. Stat. §§ 124D.03 and 123B.88 in a manner to ensure that the rights guaranteed to students with disabilities and their parents under IDEA are not diminished by virtue of a student's participation in the state's open enrollment options program. *See also, Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1160 (5th Cir. 1986)(transportation required as a related service under the [IDEA] is not arbitrarily limited by the geographic boundaries of the school district so long as it is required for the special circumstances of the [student receiving special education services] and is reasonable when all of the facts are considered).
20. In 2010, MDE anticipated that providing districts under Minnesota's Enrollment Choice Program would "transport[] to and from home and school if a student requires special education transportation." *See, A Providers Guide to Transporting Students with Disabilities and Special Transportation of Selected Students in Minnesota* (2010), pp. 33-34, situation 2B-10.
21. In a 2012 MDE document entitled *Minnesota Department of Education, Transportation of Public School Enrollment Options Students* (2012), p. 2, MDE provided the following guidance:

In addition, even though [Minn. Stat. 123B.88, subd. 6] provides that a district "may" transport a pupil within the pupil's resident district, there may be instances when a district would be "required" to transport an enrollment options pupil within the pupil's resident district. If the enrollment options pupil has a disability and the pupil requires special transportation to get to and from school, then the enrolling district would be required to transport the pupil from the pupil's home to the education site.
22. Under the allocation of responsibility in Minnesota's open enrollment law, the open enrolled district, the "providing district," and "nonresident district" is the school district responsible for providing FAPE to all eligible students participating in the choice program. Therefore, Osseo Public School District may not operate to deny any of the substantive rights and procedural safeguards guaranteed under the IDEA to the Students and their parents and is responsible for ensuring each eligible student receives a FAPE consisting of special education and related services at no cost to the parents.
23. Under Minnesota special education funding statutes, providing districts, under the Minnesota Enrollment Options Program Statute, may seek state reimbursement for transportation expenses. *See* Minn. Stat. § 124D.03, Minn. Stat. § 123B.92, Minn. Stat. § 125A.76 and Minn. Stat. § 127A.47. *See also, Letter to Lutjeharms*, 16 IDELR 554 (1990)(Federal law does not require the school district responsible for providing FAPE actually to pay for the necessary transportation it must provide.)

24. Given that Minnesota law provides reimbursement for transportation expenses, the cost of transportation is not an undue burden on the District which makes it factually different from *Timothy H. v. Cedar Cmty. Sch. Dist.*, 178 F.3d 968 (8<sup>th</sup> Cir. 1999) (finding the cost of the transportation for a particular student to another school within the district, constituted an undue burden under Section 504 of the Rehabilitation Act).

25. Federal regulations at 34 C.F.R. § 300.501(b) provide in relevant part:

“Parent participation in meetings. (1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—

- (i) The identification, evaluation, and educational placement of the child; and
- (ii) The provision of FAPE to the child.”

26. Federal regulations at 34 C.F.R. § 300.324(a) provide:

Development of IEP – (1) General. In developing each child’s IEP, the IEP Team must consider –

- (1) The strengths of the child;
- (2) The concerns of the parents for enhancing the education of their child;
- (3) The results of the initial or most recent evaluation of the child; and
- (4) The academic, developmental and functional needs of the child.

27. Minnesota Statutes § 125A.08(b) provide, in relevant part, that every district must ensure the following:

- (1) all students with disabilities are provided the special instruction and services which are appropriate to their needs. Where the individualized education program team has determined appropriate goals and objectives based on the student's needs, including the extent to which the student can be included in the least restrictive environment, and where there are essentially equivalent and effective instruction, related services, or assistive technology devices available to meet the student's needs, cost to the district may be among the factors considered by the team in choosing how to provide the appropriate services, instruction, or devices that are to be made part of the student's individualized education program . . . The student's needs and the special education instruction

and services to be provided must be agreed upon through the development of an individualized education program.

28. IEP team meeting notes, prior written notices, the District's response, and Student IEPs evidence that Staff presented the transportation change as a change in practice and did not consider whether transporting between the Student's home and school was needed to meet Students' individual needs.

29. The District did not provide the Students' parents an opportunity to meaningfully participate in IEP team meetings with respect to the provision of FAPE to their Students. Instead, the July 2015 letter, the March 2016 letter, the July 2016 letter, and the IEP team meeting notes, prior written notices, and IEPs submitted by the District, support a conclusion that the District unilaterally changed its transportation practice and informed the Students' parents that the District would no longer provide transportation outside of the District's boundaries regardless of whether such transportation was necessary to provide their Student a FAPE. The District's transportation practice interferes with the District's responsibility to decide, on a case-by-case basis, the individual Student's need for transportation as a related service in violation of 34 C.F.R. §§ 300.501(b) and 300.324(a) and Minn. Stat. § 125A.08(b)(1).

30. Federal regulations at 34 C.F.R. § 300.503 provide:

(a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) Content of notice. The notice required under paragraph (a) of this section must include—

(1) A description of the action proposed or refused by the agency;

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
- (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
- (7) A description of other factors that are relevant to the agency's proposal or refusal.

31. Minnesota Statutes § 125A.091, subd. 3a, provide:

In addition to federal law requirements, a prior written notice shall:

- (1) inform the parent that except for the initial placement of a child in special education, the school district will proceed with its proposal for the child's placement or for providing special education services unless the child's parent notifies the district of an objection within 14 days of when the district sends the prior written notice to the parent; and
- (2) state that a parent who objects to a proposal or refusal in the prior written notice may request a conciliation conference under subdivision 7 or another alternative dispute resolution procedure under subdivision 8 or 9.

32. The District's decision to change the provision of FAPE to the Students by changing transportation services required prior written notice as outlined in 34 C.F.R. § 300.503(a) and Minn. Stat. § 125A.091, subd. 3a.

33. The District's July 2015 letter, the March 2016 letter, and the July 2016 letter sent to parents, did not serve as prior written notice since they did not contain the required elements under 34 C.F.R. § 300.503(b) and Minn. Stat. § 125A.091, subd. 3a. For example, the letters failed to provide: a description of other options that the IEP team considered, and the reasons why those options were rejected; a statement to inform the parents that the District will proceed with its proposal unless the parent notifies the District of an objection within 14 days; and a statement that a parent who objects to the proposal may request a conciliation conference, in violation of 34 C.F.R. § 300.503 and Minn. Stat. § 125A.091, subd. 3a. *See also, Indep. Sch. Dist. No. 281 v. Minn. Dep't of Educ.*, No. A06-1617, 2007 WL 2774337 (Minn. Ct. App. Sep. 25, 2007) (letters sent out to parents unilaterally denying students adaptive swimming were not individualized for

each student and did not include the required elements as provided by state and federal law).

34. Based on the record, and the IEP team meeting notes and prior written notices submitted by the District, not all Students' parents received prior written notice regarding the change in the provision of transportation services in violation of 34 C.F.R. § 300.503(a) and (b) and Minn. Stat. § 125A.091, subd. 3a.
35. The District failed to follow the proper procedural requirements of the IDEA when it unilaterally changed the provision of FAPE to all open enrolled Students with disabilities. Specifically, the District limited the transportation necessary for Students to access their education and failed to consider the Students' individualized needs on a case-by-case basis in violation of 34 C.F.R. §§ 300.17 and 300.101.

### **Decision**

1. The District violated 34 C.F.R. § 300.324(a), 34 C.F.R. § 300.501(b) and Minn. Stat. § 125A.08(b)(1), when it failed to determine on a case-by-case basis the individual transportation needs of each Student.
2. The District violated 34 C.F.R. § 300.503 (a) and (b) and Minn. Stat. § 125A.091, subd. 3a, when it failed to provide all Students' parents with proper prior written notice prior to changing the provision of FAPE to the Students.
3. The District violated 34 C.F.R. §§ 300.17 and 300.101 when it failed to follow the procedural safeguards outlined in IDEA and instead unilaterally changed transportation services to all open enrolled Students with disabilities.

### **Corrective Action**

1. Within 30 calendar days of the date of this decision, the District will submit in writing to MDE, attention [corrective action specialist], the District's revised transportation practice consistent with this decision regarding transporting open enrolled students with related service transportation needs.
2. Within 21 calendar days of the date of this decision, the District will remove the boilerplate language regarding transportation from its special education IEP templates and will submit to MDE, attention [corrective action specialist], a copy of the template to confirm.
3. Within 14 calendar days of the date of this decision, the District will provide confirmation that the District made reasonable attempts to send the attached letter to Students who were identified by the District as having transportation services in their IEPs during the 2015-16 school year, including Students who are no longer enrolled in the District. The letter discusses this complaint decision and offers the Students' parents the opportunity to participate in an IEP team meeting regarding whether transporting the Student

between the Student's home and school is necessary to provide a FAPE for the Student.

4. Within five calendar days of the date of the IEP team meeting held as outlined in the attached letter, the District will submit to MDE, attention [corrective action specialist], copies of the team meeting notes and prior written notices.

The authority to review complaints is given in the federal regulations to the IDEA, 34 C.F.R. §§ 300.151-153. Questions about this decision should be directed to the [complaint investigator]. Questions about the corrective action should be directed to the [corrective action specialist].

Sincerely,

Marikay Canaga Litzau, J.D.  
Director of Compliance and Assistance  
Minnesota Department of Education