

# LEGAL ROUTES™

Your roadmap to pupil transportation law and compliance™

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## WELCOME BACK: MEETING CHALLENGES

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It's spreading across the country, and it's not the flu. Nationally, school districts are cutting stops and consolidating routes, and parents are expressing concern. While you're forced to respond to budget cuts with sometimes harsh measures, I want to caution you to do everything in your power to ensure that the "hurt" that accompanies these cuts affects only convenience and not safety or student achievement. Think about ways you can minimize the possibility that student welfare and school attendance will suffer. Monitor closely the effects of the changes you've been forced to make. As I sit in the "ivory tower" populated by consultants, I know that it's easy to urge caution from my comfortable distance. But the headlines and cases I read bring me close to the reasons why you need to weigh and minimize the risks attentively. Without caution, tragedy, litigation, and diversion from your mission can negate any savings you achieve.

I recently read a book titled *Leadership in the Era of Economic Uncertainty* by Ram Charan that offers six essential leadership traits for hard times. I'm passing them on in the hope that they will help you focus in a positive way on the challenges you face:

1. **Honesty and credibility:** "Your authority derives not from omniscience but from your ability to facilitate understanding and solutions. Level with people: tell them how you see the world, acknowledge the limits of your understanding, and ask them for their own views." Transparency is important when dealing with staff members, parents, and your own supervisors.
2. **The ability to inspire:** "Inspire your team to focus on the new priorities by doing so yourself, fearlessly." Student safety, I know, continues to be your priority – there's nothing new there. But transporting students to school safely and ready to learn may create heady challenges when the mandated priority is increasing cost-effectiveness. Take the high road, and model your insistence that you can continue to accomplish your goals by exploring, regularly, new ways to achieve them.
3. **Real-time connection with reality:** "In this volatile and uncertain environment, reality is a moving target. You have to keep updating your picture of it, continuously monitoring change and impending change through ground-level intelligence." Gather your people regularly, learn from those in the field, and "allow the picture to change as you gather new information." This is time well spent.
4. **Realism tempered with optimism:** "Focus your people on a vision of what is possible, and energize them to search for the actions that will realize the vision." Ask your team members what they would like

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## FACING THE CHALLENGES

This is the fourth year that school has started without me. As most of you know, for 20 years, I was employed by a large Colorado school district, first as an English teacher, then as in-house legal counsel. I still miss the excitement of a new school year beginning, even while I recognize the struggles that so many of you face in these difficult economic times.

The challenges before you in this school year are immense, and in the article that begins on the front page of this issue (at left), I hope you will find some sound advice on meeting them. After reading "Welcome Back: Meeting Challenges," you will see that my bottom-line counsel is the following:

- Don't cut corners on training your workforce.
- The children that need your expertise and care aren't going anywhere, even if today's children aren't tomorrow's faces on the bus.
- Equip your operations with the essentials for success both today and tomorrow.

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## Welcome Back, continued from page 1 -----

to do differently that will help them play an active role in furthering department goals. Ask everyone – encourage each and every one of your team members to be a specific part of solutions.

- 5. Managing with intensity:** “Your hands-on participation is essential in these times. ...You have to be interactive – listening as well as explaining, answering questions, taking the conversation to the next level, and then doing it again and again.” Does this take time? Yes, but being actively present will pay dividends.
- 6. Boldness in building for the future:** “Facing the necessity of conserving cash and surviving in the short run, you may feel pressured to shortchange the future. Resist this pressure.” Many of you have told me about turning buses in, implementing crippling hiring freezes, cutting activity runs, consolidating routes. But “don’t stop thinking ‘bout tomorrow,” and planning for the long term. If you get stuck in the present you may be less ready for a future that might arrive with even less notice than the warnings that preceded the economic surprises of the present. Don’t lose your focus on training tomorrow’s workforce, transporting children that will be in your system for a while to come, and equipping your operations with the essentials for success. 🚌

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## COMPANY AND MONITOR MAY BE RESPONSIBLE FOR DRIVER’S ASSAULT ON STUDENT

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Sometimes, school districts, bus companies, and their employees are protected from liability simply because of legal technicalities. In such cases, harm to a student because of action or inaction in connection with school transportation has no remedy. It’s often frustrating to read such cases, even as an attorney and consultant who works solely with management,

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## Company Responsible, continued from page 2 -----

as opposed to students and their parents, because the absence of liability cannot cloud the fact that training and other necessary steps might well have prevented the harm in the first place. In *Doe v. Talabi*, 2009 WL 2784854 (Conn.Super.), August 7, 2009, even legal structures could not protect a transportation broker or monitor from liability when a school bus driver sexually assaulted a special education student.

### THE FACTS

The City of Hartford, Connecticut had contracted with Laidlaw Transit, Inc. to provide transportation services to special needs students attending Hartford Public High School. A separate company, LogistiCare Solutions, LLC, provided monitoring services under contract with the City. According to their website, LogistiCare is a transportation broker with, now, “a national network of more than 1,100 transportation companies that provide more than 17 million trips to customers annually.”

Yemi Talabi was a school bus driver employed by Laidlaw; Clarence Hendricks was a bus monitor employed by LogistiCare. Jane Doe was a special education student enrolled in the twelfth grade at Hartford High School. On April 28, 2005, Jane Doe boarded a Laidlaw school bus driven by Talabi and monitored by Hendricks. Prior to dropping off Jane Doe at her destination, Talabi drove the bus, with Hendricks present, off of its designated route and to his own home in Hartford. Talabi had Jane Doe exit the bus and enter his home. Once inside, Talabi sexually assaulted her. After this incident, Jane Doe re-boarded the school bus, and Talabi drove the bus to Jane Doe’s destination where he dropped her off.

Jane Doe sued Talabi and Laidlaw (*Lemieux v. Talabi*, 2008 WL 2313636) and Hendricks and LogistiCare. I do not know what happened regarding the civil claims for recklessness and negligence against Talabi, but I feel sure of the driver’s personal liability (and I’m guessing that the district attorney filed criminal charges as well). In a 2008 decision, the court held that Laidlaw was not responsible for Talabi’s actions, since the company’s “alleged culpability resulted from Talabi acting to the scope of this employment,” and the driver “was engaging in criminal conduct that had no connection to the defendant’s business of providing transportation to special education students.” Laidlaw was dismissed from the suit.

However, the August 7, 2009 decision on LogistiCare’s motion for summary judgment seeking its own dismissal from the lawsuit, went in a very different direction.

### THE ISSUES

I’m going to take some editorial license from the get-go and tell you that I believe that sometimes the simplest lessons can come from the most complicated issues. In the *Talabi* case, better training of its monitors together with provision of suitable communications equipment – and the know-how to use it – might have been enough to allow the company to drive through the morass of complex considerations that compose the issue of legal duty. More about that later.

The concept of “duty” is, indeed, complex, and it takes

even more than just duty for a party to be liable for harm to another. Liability depends upon the existence of:

- A legal duty
- A breach of that duty
- A very direct link from the breach to the harm to the injured party, and
- Actual, measurable, harm

That may seem simple enough, but duty – or lack of a duty – may depend upon the relationship between the parties, the knowledge of the parties, the relative abilities of the parties to prevent harm, the existence of a statute, ownership of land or goods, whether or not a party is under another’s care and dependent on that party for protection, the existence of a contract – I could go on and on.

And, even when the relationship between the parties is such that a legal duty might be imposed, if the defendant had no reason to foresee that harm would befall the other individual in the absence of action on the part of the defendant, or even if the defendant just had no opportunity to take any meaningful action, the law won’t hold the defendant accountable for harm to the plaintiff.

Although Jane Doe alleged ten distinct but sometimes overlapping bases on which LogistiCare and/or Hendricks should be held liable for her sexual assault by Laidlaw’s driver, the company’s potential liability rests, in part, on the question of the existence of a duty and the extent to which it took rea-

### WOULD MONITOR OR EMPLOYER HAVE A DUTY HERE?

You be the judge. Check off the elements:

- Was Ms. Doe particularly vulnerable to harm?
- What did LogistiCare know about the likelihood of harm to Doe if it did not take reasonable steps to prevent that harm?
- Could and should LogistiCare have taken these reasonable steps?
- Did Hendricks’ job duties, as the monitor, include responsibility to protect Doe?
- Was there anything about driver Talabi’s actions that would have warned Hendricks that he intended to harm Doe?
- Were there any meaningful and reasonable actions Hendricks could have taken to prevent the harm?
- Did Hendricks have time and means to take such actions?
- Did LogistiCare provide Hendricks with the necessary training and equipment to enable him to intervene?
- Had LogistiCare made any representations of its role to protect and/or care for Doe?

Continued on page 4

sonable steps in furtherance of that duty. As you'll see, the court had lots of information to consider.

## THE EVIDENCE

The *Talabi* court cut through the various legal standards and examples from other cases to conclude that "Ms. Doe was not only a child, but a special education child... Ms. Doe was under the supervision of Mr. Hendricks, an adult employee of LogistiCare whose own job description, as supplied by LogistiCare, contemplated that he was on board the bus to insure the children's safety. ...LogistiCare and Mr. Hendricks had stepped into the roles of parental proxies for Ms. Doe and other special education students on the bus when they were being transported back and forth from school."

But that's not all. The court concluded that the evidence raised at least a reasonable inference that the company and the monitor could have and should have foreseen that harm would befall the student if they breached their duty to exercise due care. Here are key considerations.

**What the monitor knew.** Here are the facts on which the court focused:

- Before Jane Doe reached her final destination, the driver drove the bus off its usual route to his own private residence.
- Hendricks himself testified that before the driver removed Doe from the bus, he told the monitor that he wanted to show her a room in his house.
- Hendricks' own job description expressly prohibited monitors from entering a student's home or leaving the bus to escort students into buildings without consent of the school's Board of Education. According to the court, that should have suggested the "inappropriateness of the situation developing in his presence."
- Hendricks did not question either Doe or the driver at this point, nor did he try to convince Doe not to enter the driver's home.
- Hendricks noted on a bus incident report, and testified at deposition, that before the incident took place, he had witnessed the driver talking to Doe on a cell phone, a private interaction, the court noted, which should have warned the monitor about, at the least, unusual conduct.

**LogistiCare's failure to train.** Although, school districts and companies have often succeeded in winning "failure to train" cases through the years, recent indications are that courts will subject the matter of training to more scrutiny where the transportation of students with special needs are concerned. Here's what the *Talabi* court noted:

- The contract between the City of Hartford and LogistiCare expressly required that "all transportation monitors be specially trained in the management of special education students."
- The court concluded that this contract provision was related, at least in part, to an understanding of the special vulnerability of special needs students to "predatory behavior," and the fact that they "are prone to become

victims of third party abuse and overreaching."

- The monitor testified at deposition that he had received no training, and didn't even know that all of the students he monitored were special needs students.
- LogistiCare's project manager testified that the only record of in-service training that she had for Hendricks was a single session conducted by American Red Cross four years prior to the incident at hand.
- The only tracking of monitors' performance done by LogistiCare was through day-to-day casual conversation with them.

**LogistiCare's reckless disregard for safety.** The attorneys representing Jane Doe's case were very thorough and comprehensive in their allegations. In support of the allegation that LogistiCare's conduct was allegedly reckless and wanton, the lawsuit claims that LogistiCare failed to provide monitors with either radios or cell phones to report emergencies on the bus. The lack of training was germane to the claim as well. The company's own documents "spoke" to the court as valuable evidence of the possible success of the assertion that its conduct demonstrated its reckless disregard for the safety of others:

- Though it failed to provide adequate communication equipment, the company issued an "employee warning notice" to Hendricks noting his failure to call in the incident while the student was in the driver's home.
- Its commitment to training in the contract with the City showed its awareness that such training was necessary to avoid harm.

## THE DECISION

The court denied LogistiCare and Hendrick's motion for summary judgment on all counts, allowing the claims against them to move forward for further fact-finding and ultimate verdict by a jury. It is up to that jury to decide if the relationship between Hendricks and LogistiCare, and their relationship to Jane Doe, was of the kind to impose a legal duty of care. Even if that is, indeed, the case, the jury will have to decide whether the monitor should have reasonably foreseen that harm like the sexual abuse by the driver would have resulted from his failure to take action to protect her. In fact, the jury will also have to decide if the monitor's failure to act actually created the risk to which Doe was exposed. Finally, the jury will be called upon to decide whether LogistiCare should be held legally responsible for its failure to train, properly equip, and supervise Hendricks.

## THE LESSONS

Let's go back to my earlier statement that the simplest lessons can come from the most complicated issues. What can *Legal Routes* readers learn to avoid being at the center of student harm and legal claims? Some of the lessons derive directly from the contractual relationship between the transportation broker and the City, and are especially significant for school transportation companies that provide services under contract to school districts and educational agencies. Others are pertinent to train-

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ing staff members whether the employer is a school district, company, or transportation broker. Think about your answers to the following questions, and take note of the pointers that I offer.

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*What is the responsibility of a monitor or bus attendant for a driver if the driver engages in egregious acts?*

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The question of responsibility is tricky, isn't it? Typically, the bus driver is the "captain" of the bus. Can we really expect a monitor or paraprofessional, whatever their title or exact role, to take assertive action to stop outrageous conduct from occurring?

The answer comes down to that old "saw," "reasonableness," and reasonable action may vary under the circumstances. The *Talabi* case incorporated the additional awkwardness of the driver and monitor being employed by two different entities. The telling point is that Hendricks did not even question either Doe or the driver as they exited the bus, nor did he try to convince Doe not to enter the driver's home. Let your monitors know that they must – at the least – speak up and question potentially aberrant behavior. That's true even though they may not have the ability to actually stop the behavior from occurring, and, typically, won't be expected to do so.

Of course, monitors, like drivers, should have the means (and use those means) to report to dispatch and/or the authorities the nature of their concern. Don't forget: When the driver left the bus with the student, the monitor was the sole adult on the bus. If a driver becomes incapacitated, wouldn't you expect the monitor to take whatever action is available to him or her? This is an important subject for discussion with your monitors and your drivers. Both should hear the same story. And, if your monitors don't know how to use any communication device on a vehicle to which they're assigned, this may be a good reminder that they need to be trained to do so.

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*What information should staff members – including monitors – have about the students on the vehicle?*

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In short, staff members with any responsibility for the safety of children, must know simply everything they have to know within the scope of their authority to keep children safe. A lesson of *Talabi* and other cases is the recognition that students with special needs are especially vulnerable to abuse, harassment, negative influence from peers and others, and any number of other situations. In addition, further specific training and information about a particular student and his or her disability should be provided as necessary whenever that training will improve the staff member's ability to keep the student safe in a transportation context.

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*Do you expect more from monitors than passive silence?*

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You should expect more than passive silence from monitors, but I'm worried that you don't. And, even if you assume

that monitors will exhibit an active presence on the vehicle, have you adequately communicated that fact? The message of the *Talabi* case is not unlike the implications of a recent Florida situation headlined in news reports.

In the Florida case, an attendant who stood by while a preschooler was raped by a teenager on her bus was convicted of child neglect in May, 2009. The attendant saw the boy kneeling on the floor and kissing a 3 ½ year old's neck. She asked the boy what he was doing; the boy said "Nothing," and the monitor told him to go to another seat. When the boy refused, the monitor walked away but "kept an eye on" him. The student was not questioned further, and was simply allowed to get off the bus. The surveillance video confirmed that an assault had occurred. The attendant said she "just panicked."

Review such possible scenarios with your monitors in advance of tragedy to avoid panic-driver paralysis that permits injury to children and career-ending mistakes.

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*What have you said?*

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On a motion for summary judgment, a court will review all relevant documents submitted to it by the parties. The documents you and your employees have created – job descriptions; bus incident reports for the incident at hand and other like incidents, if any; the employee's discipline file and related communications; the employment manual; promotional materials; contracts – give judges insight into the promises the company has made, the beliefs it holds, and the expectations it has for itself, its customers, and its staff members. They can, and will, be used to assess the scope of your legal duties.

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*Who rides your vehicles?*

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Depending upon your state, different standards may be used to determine the existence of a "special relationship" between drivers and attendants, and students. The level of "custody" exercised can be very important in determining the responsibilities of a company and its staff members. Your duty can be heightened in the case of very young children, non-communicative children, children who must ride in child safety restraints, and children with a limited ability to appreciate danger. Your direction to and training of staff members who work with such children must take into account the need to be especially vigilant. 

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**MORE SEXUAL ABUSE ON THE BUS: STUDENT-TO-STUDENT CASE SHEDS ADDITIONAL LIGHT ON DUTIES**

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*Lopez v. Metropolitan Government of Nashville and Davidson County* (U.S. Dist Court, TN, July 7, 2009) is another reminder about how important it is to act on knowledge. While some of the facts in this case may have developed, in part, as a result of factors like a large district, an out-of-district placement, and

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involvement by several entities, any school district can fall prey to these events if information isn't shared, and appropriate steps taken in light of what you know about the students who ride your vehicles.

## THE FACTS

After Gilberto, a 9-year old special needs student, was repeatedly harassed by other students on the regular bus, his parent requested that a monitor be assigned, or that the boy be moved to a smaller bus. When the harassment became threatening, his mother renewed her requests for assignment of a monitor. These requests were ignored, but, ultimately, the boy was transferred to a bus with only four other students.

One of these students was Kolby Harris, a 19 year-old with an extensive record of previous sexual behavior toward other students on the bus. Kolby's history was so extensive, in fact, that his own mother sought increased supervision at all times at school. In addition, Ms. Harris recognized that a school bus driver could not provide adequate supervision, and requested that Kolby be placed on a bus with only a few students, and that the students not be smaller children. She was told that a monitor would be assigned, but that never occurred.

On May 7, 2007, a sub-driver with absolutely no information about her passengers, drove Kolby and Gilberto's bus. At the end of the afternoon shift, the driver reported to the transportation department a concern that "something" may have happened between the two boys that was inappropriate, noting that "she had noticed that Gilberto's head was below the seat and she observed Kolby 'raise up like he was. . .zip-ping his pants or whatever.'" When the driver supervisor pulled the surveillance video, the tape, though not definitive, strongly indicated a sexual assault by Kolby.

## THE EVIDENCE

The district's ("Metro's") special education bus route coordinator had assigned Gilberto to the smaller bus. She had a list of students on the bus, but no information about Kolby, who had, in fact, previously been under a bus safety plan for a prior assault; the plan was intended to insure that he be isolated from other children. She testified that "had she known of that history, she would have been concerned about some risk to the students who rode with Kolby."

As a matter of fact, prior to the alleged assault in the *Lopez* case, several district officials had expressed general concerns about the safety of children riding on special needs school buses. Discussions with parents about fighting, students throwing items on the bus and out the bus windows, use of profane language, stealing, and inappropriate sexual activity caused a number of officials to discuss the topic of monitors on the school bus. A variety of obstacles to the placement of monitors were raised at various times, and monitors were not assigned to routes servicing the private, non-profit learning center that Gilberto attended.

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*Ms. DePriest, a special education coordinator admitted that "the combination of a lack of monitor, the absence of screening during the bus assignment process, and insufficient training of bus drivers was a concern because that combination could lead to harm to children with disabilities."*

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## THE DECISION

The legal theories raised in *Lopez* differed in some respects from the issues in *Talabi*. The court has sent on for full trial the question of whether Metro's affirmative acts increased the risk of harm to Gilberto. The court found that Ms. Lopez's failed request for a monitor, Ms. Harris' failed requests that her son Kolby not be placed on a school bus with young children, together with his history, could add up to the district's deliberate indifference to Gilberto's safety.

The district did succeed in ending Ms. Lopez' claim of "failure to train," however, because "Plaintiff offers no definitive proof of how the bus driver's alleged lack of training either caused or contributed to the incident that is the subject of this lawsuit, or how any additional training could have prevented it."

## THE LESSONS

A school district simply cannot afford to ignore what it knows about students' histories and vulnerabilities. If a parent's concern about her child's safety is well in line with real dangers of which key district personnel are aware, the failure to act on that concern can spell a good chance for liability. The lessons of *Talabi* are the lessons of *Lopez*, but with the addition of substantial forewarning in the *Lopez* case they could spell defeat of the school district on the claim of deliberate indifference. Are there individual student situations your school district should review – before something happens? 

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## A POLICY AND ITS PROBLEMS: ONE SIZE CAN'T FIT ALL STUDENTS WITH DISABILITIES

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A geographically large district in North Carolina implemented a hub system of transportation. Under the system, all students are bused to a central location, unloaded, and loaded onto other buses that take them to their school. While the system results in a longer bus ride for students, the district determined this was the most effective way to transport its resident students. The Office for Civil Rights' (OCR) analysis in the matter of *Henderson County (NC) Public Schools* (April 30, 2009) is a good reminder that parents may win out over policy where special needs transportation is concerned. And, the lessons of the case with regard to parental reimbursement for transporting their own students with special needs provide an excellent review of some important points.

## THE FACTS

The parent of a second grade student who is medically

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fragile, uses a wheelchair, and has a seizure disorder, requested transportation for her daughter when the student enrolled in the district in January 2008 for the her second grade year. Rather than convene an IEP meeting, the district informed the parent that transportation would be provided in accordance with its policy. That meant the girl would be picked up two hours before school started, and returned home two hours after the school day ended. Because the child's mother believed this was too long for the student to spend on the bus, she agreed to transport the student. This wasn't an easy decision, according to OCR's Letter of Findings, because she has other children at home, including little ones.

When the child's mother requested transportation reimbursement, the district offered a contract under which the parent would be reimbursed for one round trip per day, although she was making two trips each day. For that reason, the mother complained to the OCR.

But that initial complaint didn't end the controversy. That fall, there was an IEP meeting, and the district proposed transportation that would, again, involve lengthy rides both in the morning and afternoon, and the student's parent, once again, "felt pressured to agree to transport the Student."

Within days of the IEP meeting, the district's attorney discussed the district's policy for transporting students with disabilities with OCR, with the result that the policy was revised to require case-by-case consideration of the needs of each special education student in determining the appropriate method of transportation, as well as all other decisions. Soon thereafter, the parent and the district resolved the question of the length of ride. The time on the bus was reduced to about 40 minutes each way, and the district began transporting the student. The question of reimbursement remained subject to OCR investigation.

## THE EVIDENCE

The district's Superintendent admitted to OCR that "the history of parent transportation contracts needed 'rethinking'." Generally, IEP teams first, properly, determined whether or not the student needed transportation as a related service. But once that initial decision was made, the district claimed that the actual mode of transportation, including parental contracts to transport their own children, subject to receipt of reimbursement, was based on parental preference. OCR interviews with parents told a different story, however.

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*In each case, the parents questioned felt pressured into driving their students when they were offered a long bus ride that simply conformed to the district's hub transportation policy but did not take into consideration the unique needs of each child stemming from that student's disability.*

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Even when the IEP teams were involved in the transportation offer, the evidence was in conflict as to whether the team

considered information from a variety of sources when making the decision as to the type of transportation required by the student. In fact, the student's parent had submitted a doctor's recommendation that transportation for the student not exceed an hour each way because of the student's difficulty with noise, the bumpy ride, and the possibility of serious injury to this medically fragile student even if the trauma to the student was minor. Nevertheless, there was no evidence that the district took that information into consideration.

Finally, the evidence demonstrated that the district refused to reimburse the parent for transportation except when the student was actually in the car.

## THE DECISION

The district agreed to implement a Commitment to Resolve (CTR). The CTR obligated the district to convene an IEP meeting to consider the student's individual needs with regard to transportation, and to provide her mother with full reimbursement for past transportation. And, as to its overall approach to special needs transportation, the district committed to ensure that the IEP and Section 504 teams will make an individualized determination of each child's needs, and that the minutes of their meetings will reflect the basis for the determination. To correct past mistakes, the district agreed to review all transportation arrangements for students with transportation contracts for the 2008-2009 school year, and offer appropriate transportation. In addition, in those limited cases in which transportation contracts would be implemented, the district agreed to offer full reimbursement. OCR will monitor implementation of the agreement.

## THE LESSONS

Many districts are making sweeping changes in transportation approaches as a way to address necessary budget cuts and increase cost efficiencies. Having a policy that is your standard approach to providing school transportation is fine, but there the *Henderson County* case offers lessons in addressing the needs of students with disabilities.

- An IEP or Section 504 team must be involved when transportation of a student with special needs is contemplated. If the student requires "specially designed instruction" and fits within the Individuals with Disabilities Education Act's (IDEA) disability categories, I'd expect IEP team involvement. If the student does not require special education, and/or has an impairment that significantly impacts one or more major life activity, but does not fall within an IDEA disability category, I'd expect Section 504 team involvement. Typically, a student will not have both an IEP and a Section 504 plan.
- Determination of the necessity for transportation, and the mode of transportation must involve consideration of information from a variety of sources. If a parent submits a recommendation from a medical professional, you can certainly ask for permission to speak with the medical professional about that recommendation. When the

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need for transportation, or the recommended type is not obvious, I encourage you to ask the medical professional to help you understand the basis for the recommendation. Once you know that, you can discuss other methods that might adequately meet the student's needs at a lower cost to the district.

- Notes or minutes of the IEP or Section 504 team discussion provide important proof that the team considered available information and made its decision based on the mandate to meet the student's disability-related needs.
- You can suggest that a parent transport his or her own child in return for reimbursement of transportation expenses, but the parent's agreement to do so must be truly voluntary. It cannot occur, as in the *Henderson County* case, because the parent concludes there's no other option. And, you must pay for all trips the parent makes in connection with drop-off and pick-up activities that the school district would otherwise be obligated to do.
- When OCR comes knocking, the best result is usually a Commitment to Resolve, representing an agreement between the school district and OCR. Be ready to be flexible. And it's a good idea – if you haven't done so previously – to do an internal investigation to determine the strength of your position. If that position is weak, save the district and staff members the time and tension connected with a full-scale OCR investigation and on-going monitoring, and offer to make change early on. 

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## SINCE YOU ASKED: LEGAL DIMENSIONS OF H1N1 FLU FOR TRANSPORTATION DEPARTMENTS

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**It's a question on everyone's mind as we move into the flu season. So, even if you didn't email me to ask the question, I'm offering the following thoughts on the issues you may encounter, or want to plan for.**

School transportation departments certainly won't be impacted in isolation if H1N1 ("swine") flu reaches expected levels. In fact, two-thirds of respondents to a recent survey conducted by the Society for Human Resource Management said they'll have "severe" problems keeping their business open if an H1N1 epidemic hits.

As you contemplate greater absenteeism among staff members, give some thought to these issues. Without planning, each can create unintended legal consequences.

- Do whatever you can to increase the number of potential qualified relief drivers.
- If you will need to move staff members from other positions into a back-up driver role because more drivers are absent, determine how you will cover the usual functions not being performed by individuals pressed to drive.

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## USDOE PROPOSES TO COLLECT DATA ON RESTRAINT USE, SECLUSION, DISCIPLINE

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On September 11, 2009, the U. S. Department of Education published in the *Federal Register* a request for changes for the annual mandatory collection of data for elementary and secondary data for *EDFacts*. There are a number of significant changes from previous data collection efforts. For example, the proposed data collection would require submission of data on disciplinary actions against students with and without disabilities and on restraints and seclusion.

In addition, the proposed request includes the following definition which could have implications for school transportation:

*Restraints—any manual method, physical or mechanical device, material, or equipment that immobilizes the ability of an individual to move his or her arms, legs, body, or head freely.*

This definition could lead to unintended consequences and increased litigation. NSBA Council of School Attorneys has brought the matter to its membership, and many of us will be commenting and monitoring the issue.

We need to be vigilant to be sure that IEP teams are not hindered in their ability to include on the IEP the need for child safety restraint systems on school buses when necessary for student safety. Please let us know (by writing to [ecginc@qwestoffice.net](mailto:ecginc@qwestoffice.net) or [myroadmap@legalroutes.com](mailto:myroadmap@legalroutes.com)) any experiences you have had involving objections to the use of child safety restraint systems. 

- Plan for effective communication of route information to substitute drivers. Be sure there's clarity as to exactly where each bus stop is.
- Review the use of seating charts and student identification techniques across the board so that relief drivers can quickly ensure that the right students are on the right buses.
- Review your attendance and notification policies, and stress with employees the need to anticipate absences whenever possible. Employees should not report for work unless they are able to perform their normal job duties. And each must determine if their continued presence would pose a health risk. Employees are being urged by the Center for Disease Control and other entities to stay home when they have flu-like symptoms. And, of course, parents on your staff may well have to be absent to care for ill children.
- Covering the transportation of students with special needs will require additional thought. The burden, however, of supporting the education of students with IEP's when schools are closed or services cannot be provided should fall first on the special education department rather than on the transportation department. 