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November 10, 2011

OFFICIAL OPINION 2011-1

Hon. Michael Speedy
State House
200 W. Washington Street
Indianapolis, IN 46204

Hon. Patricia Miller
State House
200 W. Washington Street
Indianapolis, IN 46204

RE: School Bus Rider Fees Via Third Party Provider

Dear Representative Speedy and Senator Miller:

You requested an opinion regarding an arrangement between a school corporation and an Educational Service Center (ESC) whereby the school corporation contracts with the ESC and the ESC charges parents a fee for providing transportation for students to and from the corporation's schools. The specific questions presented are (1) whether the ESC may "contract with parents of students and charge them fees for transportation services;"¹ and (2) whether the school corporation's transportation arrangement "complies with state law."²

Additionally, we have analyzed the related issues of (3) whether parents may be charged fees in any circumstance for bus transportation of their children; (4) whether schools may utilize

¹ Letter from Representative Mike Speedy dated August 29, 2011. ("I write to request an opinion from your office over whether Indiana state law permits the Central Indiana Educational Service Center to contract with parents of students and charge them fees for transportation services. I am contemplating legislation in this area of the law and your office's research and opinion would be helpful in my preparation.")

² Letter from Senator Patricia Miller dated August 29, 2011. ("I would like to request an opinion regarding the Franklin Township Community School Corporation's transportation arrangement, and whether it complies with state law.")

private parties for provision of student transportation services; and (5) whether schools may utilize ESCs for provision of student transportation services.

BRIEF ANSWERS

1) An ESC is the agent of the school corporation and may not charge parents for transporting students to and from school. Such a fee is unconstitutional.

2) Franklin Township Community School Corporation's transportation arrangement does not comply with state law as the school is attempting to do indirectly what it is prohibited from doing directly.

3) The statutory provisions for the Parents' Supplemental Transportation Contract seem to indicate that parents, acting jointly to retain a qualified school bus driver, could be assessed fees for bus transportation of their children under limited circumstances. Whether this is so is a matter of considerable doubt. Notwithstanding, Franklin Township's transportation arrangement does not comply with Indiana law relating to the Parents' Supplemental Transportation Contracts.

4) Schools may utilize private parties for provision of student transportation services, but neither the school nor the private party may charge fees to parents for the provision of such services.

5) Schools may utilize ESCs for provision of student transportation services, but neither the school nor the ESC may charge fees to parents for the provision of such services.

ANALYSIS

This office addressed school bus rider fees in *Official Opinion 2010-2*.³ The question posed then was whether a public school corporation was "authorized to assess and collect a bus rider fee from its students in order for the students to receive transportation to and from their respective schools where they receive a public education." *Ind. Atty. Gen. Op.* 2010-2. The opinion discussed *Nagy, et al. v. Evansville-Vanderburgh School Corporation*, 844 N.E.2d 481 (Ind. 2006), in which the Indiana Supreme Court established a two-part inquiry to determine the constitutionality of a school fee:

1. "Is the program, activity, project, service or curricula mandated by the legislature or permitted by the legislature? If so, then 'the legislature has made a policy decision regarding exactly what qualifies for funding at public expense.'" *Ind. Atty. Gen. Op.*

³ See <http://www.in.gov/attorneygeneral/files/Opinion.SBOA.BusFees.7.12.10.pdf>.

2010-2 (quoting *Nagy v. Evansville-Vanderburgh School Corporation*, 844 N.E.2d at 492).

2. “Although the legislature has the authority to place appropriate conditions or limitations on funding for such programs, ‘absent statutory authority, fees or charges for what are otherwise public education cost items cannot be levied *directly or indirectly* against students or their parents.’” *Id.* (emphasis added).

The school corporation in *Nagy* assessed and collected a mandatory \$20 “student services fee” from each student in grades K-12. The fee was deposited in the school corporation’s general fund and used to offset the costs of a student services coordinator, nurses, media specialists, alternative education, elementary school counselors, a drama program, a music program, speech and debate programs, academic academies, athletic programs, and a police liaison program. 844 N.E.2d at 492. Students were assessed the fee whether they participated or benefited from any of these services. The Supreme Court found the programs and services for which the school corporation was assessing and collecting a fee were already a part of a publicly funded education in Indiana and the assessment of fees was, therefore, unconstitutional.

In *Ind. Atty. Gen. Op.* 2010-2, this office likewise determined that proposed school bus rider fees by a school corporation were unconstitutional under the Indiana Constitution, Article 8 § 1.⁴ The opinion stated, “The legislature has identified transportation of school children as a part of what would constitute a uniform system of public education in Indiana.” *Id.* Additionally, it determined that a school corporation “is required to establish a School Transportation Fund,” and that “[t]he School Transportation Fund was the exclusive means for the payment of costs attributable to transportation.” *Id.* Furthermore, “there is no statutory authority permitting a governing body to assess a school bus rider fee on its own students for transportation to and from school.” *Id.*

A question has arisen concerning whether a school corporation may avoid the prohibition of bus rider fees through a contractual agreement with another entity. The situation giving rise to this opinion concerns a school corporation entering into a contractual relationship with an ESC whereby the school corporation would sell its buses to the ESC with the ESC providing the transportation.⁵ The question raised is whether the ESC could charge the fee the school corporation is otherwise prohibited from assessing.

⁴ Art. 8, § 1 provides: “Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual scientific, and agricultural improvement; and provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.”

⁵ The school corporation is a member of the ESC and its superintendent is a member of the ESC’s Board of Directors. See http://www.ciesc.k12.in.us/index.php?option=com_content&view=article&id=82&Itemid=211 . A member of the school corporation’s governing body who voted for this transportation arrangement is also a member of the Advisory Board for the ESC.

A. Private Providers of Student Transportation

An Indiana school corporation generally has the option of choosing whether to provide transportation to its students.⁶ See Ind. Code § 20-27-5-2.⁷ If the school corporation decides to provide transportation, it must obtain school buses and school bus drivers. Ind. Code § 20-27-5-3. A school corporation may obtain the school buses and drivers in three different ways: (1) by purchasing school buses and hiring drivers (see Ind. Code § 20-27-5-4); (2) through a transportation contract with a driver who will provide driving services and the school bus (see Ind. Code § 20-27-5-5); and (3) through a fleet contract with a fleet contractor (see Ind. Code § 20-27-5-6).

If a school corporation hires a school bus driver or a fleet contractor to provide transportation services for students, the school has not chosen to eliminate transportation for its students. Rather, it is simply providing transportation indirectly through a contractual arrangement. As such, neither the school nor the private entity may charge fees for the private provider's services. To do so would violate *Nagy's* prohibition against directly or indirectly levying fees or charges for public education cost items without statutory authority. See *Nagy*, 844 N.E.2d at 492.

Should a school corporation choose not to provide transportation to its students, parents may jointly contract with bus drivers to provide transportation. Ind. Code § 20-27-6-3(a) (Parents' Supplemental Transportation Contract). The contract is subject to the approval of the governing body of the school corporation, which thereafter places the school bus under the supervision and direction of the governing body. Ind. Code § 20-27-6-3(b). The school corporation and ESC involved in this matter appear to be relying upon Ind. Code § 20-27-6-3 to justify the ESC collecting fees.⁸

Any purported reliance on Ind. Code § 20-27-6 (Parents' Supplemental Transportation Contract) in this instance is misplaced. First, the parents did not jointly contract with a provider and then request approval of the governing body. Pursuant to Ind. Code § 20-27-6-3(a), Parents' Supplemental Transportation Contracts must be agreements between "parents of public school students not provided bus transportation by the school corporation" and a "school bus driver."

⁶ School Corporations are required to transport certain classes of students to and from school under federal or state law. Examples include homeless students (Ind. Code § 20-27-12), students with disabilities (Ind. Code § 20-35; 511 IAC 7-36-8, 511 IAC 7-43-1(u)); students under federal desegregation orders (Ind. Code § 20-26-11-26); and certain children in foster care (Ind. Code § 20-50-3).

⁷ Also see Ind. Code § 20-26-5-4(10) (empowering the governing body "[t]o transport children to and from school, when in the opinion of the governing body the transportation is necessary, including considerations for the safety of the children and without regard to the distance the children live from the school. The transportation must be otherwise in accordance with applicable law").

⁸ See Transportation Operating Agreement, Preliminary Statement B, and Article II § 2.3, A., between Franklin Township Community School Corporation and Central Indiana Education Service Center.

The arrangement that prompted your opinion requests, on the other hand, involved a governing body contracting with its agent, the ESC, and then imposing the arrangement upon the parents.

Furthermore, the threshold requirement permitting the development of Parents' Supplemental Transportation Contracts has not been met. Such contracts are only permitted where bus transportation is not being provided by the school corporation. As explained below, the school in question is still providing transportation for students; it is doing so through its agent, the ESC.

It should be noted that attempts to utilize the Parents' Supplemental Transportation Contract option would necessarily involve the approval by the school corporation's governing body of the contract's terms under Ind. Code § 20-27-6-3(b), and such approval depends on whether the school is willing to accept supervision and direction responsibilities for the contract, as well as the school's acceptance of the contract's terms relating to access to school grounds, scheduling and timing considerations, safety and inspection requirements, liability and insurance provisions, and related factors.⁹ The structure created for formation and execution of such contracts may explain why they are seldom used. Regardless, the school corporation at issue did not follow the requirements found in Ind. Code § 20-27-6 and may not rely upon the statute to justify the fees imposed on parents.¹⁰

B. Educational Service Centers Acting as Agents of School Corporations

Similarly, a school corporation may not justify a busing fee by contracting directly with an ESC to provide transportation for students. An ESC is, by definition, "an extended agency of school corporations[.]" Ind. Code § 20-20-1-2(a). It is not a private entity or a third party filling in a gap left by the school corporation's decision to cease providing transportation.¹¹ An ESC

⁹ Furthermore, the statutory provisions in Ind. Code § 20-27-6 are somewhat unclear as to the impact of approval and the subsequent supervision and direction of the contracts. The Supplemental Transportation Contract arises where a school corporation does not provide transportation for its students. A parent could always provide transportation for the parent's child without recourse to these statutory provisions. A reasonable interpretation of the statutory framework for supplemental contracts could conclude that parents, acting jointly (the statute does not speak to a parent acting alone), who enter into such a contract that meets the requirements of Ind. Code § 20-27-6 to provide transportation for their children, are providing a service the school corporation should provide. Once the governing body approves the contract and assumes the responsibility for its supervision and direction, Ind. Code § 20-27-6-3(b), a reasonable interpretation may find that the governing body also becomes responsible for the contract itself (that is, the cost), although fees are not directly addressed in the chapter. While these provisions are inapplicable to this situation because the governing body did not follow this process, the legislature could clarify its intent and remove any ambiguity.

¹⁰ Ind. Code § 20-27-6-4 requires specific items to be included in Parents' Supplemental Transportation Contracts, including the type of bus equipment to be furnished; incorporation of state safety, training, and inspections requirements; and the amount of liability and property damage insurance provided. It does not appear that any of these items are included in the ESC's individual agreements with parents.

¹¹ See *Baker v. Tremco, Inc.*, 917 N.E.2d 650, 655-56 (Ind. 2009) (An ESC is an extended agency of its member school corporations, and operates pursuant to statutory authority and the rules of the Indiana State Board of Education. The ESC provides "a mechanism through which schools may undertake collective programs and

“allows school corporations to voluntarily cooperate and share programs and services that the school corporations cannot individually provide but collectively may implement,” but it is required to operate under rules established by the State Board of Education and to serve a defined geographical area. Ind. Code § 20-20-1-2(a)(1)-(3). The statute contemplates that certain “[p]rograms and services [will be] collectively implemented through an educational service center,” with a non-exhaustive list provided for guidance. Ind. Code § 20-20-1-2(b).

The State Board of Education has authority to promulgate rules regarding ESCs. See Ind. Code §§ 20-20-1-3, 20-20-1-4, and 20-20-1-5. These rules appear at 511 Ind. Admin. Code 4-4. The State Board has further refined the “purpose” of an ESC. The “primary purpose...shall be to perform educational planning on a cooperative basis and to assist in meeting specific educational needs in participating school districts which could be better provided by an educational service center than by the districts themselves.” 511 IAC 4-4-1(a). While transportation is not specifically mentioned as a “program or service” an ESC would provide, there is nothing that necessarily prevents this from occurring, assuming compliance with the procedures at 511 IAC 4-4-5 and 511 IAC 4-4-6.¹² At any rate, even if the school utilizes an ESC for purposes of providing transportation for students, the ESC is acting as the agent of the school in such a scenario, and the ESC cannot charge a fee the school corporation is otherwise prohibited from assessing.

CONCLUSIONS

The transportation arrangement that generated your opinion requests does not comply with state law as the school is attempting to do indirectly what it is prohibited from doing directly. While nothing prohibits an ESC from providing transportation for a member school corporation, the ESC is not permitted to charge transportation fees that the school corporation itself cannot charge. Thus an ESC may not contract with parents of students and charge them fees for transportation services.

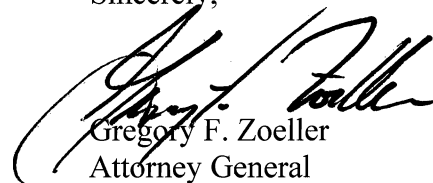
services, one of which is joint purchases and financial management.”) Also see *Ind. Atty. Gen. Op.* 2008-05 at <http://www.in.gov/attorneygeneral/files/OfficialOpinion2008-5.pdf> (“[I.C. §] 20-20-1 permits the creation of educational service centers to allow school corporations to cooperate and share programs and services they cannot individually provide. An educational service center is an extended agency of the school corporation. Ind. Code § 20-20-1-2(a)”).

¹² The relationship between school corporations and their ESCs is prominently addressed under Ind. Code § 20-42.5, which has as a principal purpose the reduction of “noninstructional expenditures” through collaborative efforts, either with other school corporations or through the educational service centers. See, e.g., Ind. Code § 20-42.5-2-1. Transportation and transportation-related endeavors are specifically addressed. See, e.g., Ind. Code § 20-42.5-2-1(3)(A) (school buses and other vehicles and vehicle fleets); Ind. Code § 20-42.5-2-1(3)(B) (fuel, maintenance, or other services for vehicles or vehicle fleets); Ind. Code § 20-42.5-2-1(3)(E) (transportation management services); I.C. § 20-42.5-2-2(1) (“the use of shared administrative services overseeing transportation, ... facilities, or other operations”); and Ind. Code § 20-42.5-2-4 (requiring educational service centers to “support and facilitate actions by school corporations under this article” in reducing costs). There is no evidence that the school corporation in this situation ever explored any alternatives contemplated by Ind. Code § 20-42.5 or any other law available for cooperative ventures and shared costs.

The same conclusion would apply if the school corporation entered into a third-party agreement with a private provider: It would still be electing to provide an essential program or service to its constituents and could not assess a fee for such programs or services, absent specific statutory authority to do so. It would be attempting to do indirectly what it is prohibited from doing directly.

Parents can only enter into a Parents' Supplemental Transportation Contract with a third party under Ind. Code § 20-27-6-3 when the school corporation has elected not to provide transportation. That is not the case in this situation that prompted your opinion requests. The school corporation is still electing to provide bus transportation to its students, albeit through its ESC, which is an extension of the school corporation itself. As such, it would still be prohibited from assessing a bus rider fee for transportation to and from its schools in order for its students to receive the public education contemplated by Art. 8, § 1. ESCs, as agents of school corporations, are prohibited by Indiana's Constitution and statutes from charging fees for student transportation.

Sincerely,



Gregory F. Zoeller
Attorney General

Kevin McDowell
Deputy Attorney General