UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

October 4, 2010

Amy Goetz and Atlee Reilly
Attorneys at Law
School Law Center, LLC.
452 Selby Avenue, Second Floor East
Saint Paul, Minnesota 55102

Dear Ms. Goetz and Mr. Reilly:

This is in response to your June 29, 2010 letter to Dr. Perry Williams in the Office of Special Education Programs (OSEP) at the U.S. Department of Education (Department). Your letter poses the following question and asks for an interpretation from the Department:

> Does a requirement based solely on an interpretation of state law, that a child with a disability must request a due process hearing before enrolling in a new school district or forever lose the right to a hearing for special education violations that may have occurred in that district, conflict with 20 U.S.C. §1415(b)(6) and related provisions of the Individuals with Disabilities Education Act [IDEA]?

You cite Minnesota law, which provides in relevant part:

> A parent or a district is entitled to an impartial due process hearing conducted by the state when a dispute arises over the identification, evaluation, educational placement, manifestation determination, interim alternative educational placement, or the provision of a free appropriate public education to a child with a disability. The hearing must be held in the district responsible for ensuring that a free appropriate public education [FAPE] is provided according to state and federal law.

Minn. Stat. §125A.091. This statute requires that the hearings conducted by the State be held in the local educational agency (LEA) responsible for the provision of FAPE to the child at the time the hearing is conducted. (OSEP understands that Minnesota is a "one tier" State with regard to due process hearings, meaning that hearings are conducted by the State, not by the child's LEA with an appeal process to the State.) You explain that the Eighth Circuit Court of Appeals has concluded that due to this State statute, if "a student changes school districts and does not request a due process hearing, his or her right to challenge prior educational services is not preserved." *Thompson v. Board of Special Sch. Dist. No 1,* 144 F.3d 574, 579 (8th Cir. 1998). You also point out that the case has been affirmed several times by the Eighth Circuit as recently as 2010. Indeed, in *C.N. v. Willmar Public Schools*, 591 F. 3d 624 (8th Cir. 2010), the Court found that changes to Minn. Stat. §125A.091 were irrelevant and reaffirmed its opinion in *Thompson*. You

also noted that the Minnesota Department of Education recently amended its Notice of Procedural Safeguards to include the following:

> **Loss of Right to a Due Process Hearing** NOTE: If your child changes school districts and you do not request a due process hearing before your child enrolls in a new district you lose the right to have a due process hearing about any special education issues that arose in the previous district. See *Thomson v. Bd. of the Special Sch. Dist. No. 1*, 144 F.3d.574 (8th Cir. 1998) [sic]. You do still have a right to request a due process hearing about special educational issues that may arise in the new district where your child is attending.

Under 34 CFR §300.507(a), which mirrors 20 U.S.C. 1415(b)(6) of the Individuals with Disabilities Education Act (IDEA), a parent or a public agency may file a due process complaint on any of the matters relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child. The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in 34 CFR §300.511(f) apply to the timeline in this section. Under 34 CFR §300.511(f), the two-year timeline does not apply to a parent if the parent was prevented from filing a due process complaint due to: (1) specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or (2) the LEA's withholding of information from the parent that was required under Part 300 of the regulations to be provided to the parent.

Nothing in the IDEA limits a parent's right to file a due process complaint against an LEA that the child previously attended, provided the violation occurred within two years of the time the parent filed the due process complaint even though, in most cases, a parent will request a due process hearing to raise issues involving the LEA where the child is currently attending. In fact, the IDEA contemplates that some parents may remove their child from one LEA and place the child in another LEA or in a private school if they believe the child's current LEA is not providing FAPE to their child. See 34 CFR §300.148, "Children with Disabilities Enrolled by Their Parents in Private Schools When FAPE Is at Issue" and under which provisions a parent may seek reimbursement from the previous LEA, subject to conditions delineated at 34 CFR §300.148(c) and (d).

OSEP believes that the Minnesota statute -- as interpreted by the Eighth Circuit Court of Appeals to deny parents the right to file a due process complaint against an LEA that their child previously attended, provided that the violation occurred within two years of the date when the parents file the complaint -- limits the parents' rights under the IDEA and is inconsistent with the provisions of 34 CFR §§300.507-300.518. OSEP also believes that the section of the State Department of Education's Notice of Procedural Safeguards quoted above is not consistent with the IDEA. However, decisions by the Eighth Circuit Court of Appeals are controlling on this point in the State of Minnesota. Accordingly, since this section of the State's Notice of Procedural Safeguards appears to be consistent with the Eighth Circuit precedent, this office

cannot require the State Department of Education to amend its Notice of Procedural Safeguards or otherwise require the State to amend its statute.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have further questions about this issue, please feel free to contact Deborah Morrow at 202-245-7456 or by email at Deborah.Morrow@ed.gov.

Sincerely,

Melody Musgrove, Ed.D.

Director
Office of Special Education Programs

cc: State Director of Special Education