



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

February 9, 2012

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:

I am writing in response to your August 15, 2011 letter to U.S. Department of Education Secretary Arne Duncan. Your letter was forwarded to the Office of Special Education and Rehabilitative Services for a response. I am happy to respond to your letter regarding the October 4, 2010 response that you received from the Office of Special Education Programs (OSEP) concerning a parent's right to a due process hearing under section 615 of the Individuals with Disabilities Education Act (IDEA).

In your June 29, 2010 letter to Dr. Perry Williams in OSEP and in your August 15th letter to Secretary Duncan, you expressed concern that students and families in Minnesota have had their right to a due process hearing under section 615 of the IDEA limited due to a decision in the Eighth Circuit Court of Appeals. Minnesota State law requires that the due process hearings conducted by the State be held in the local educational agency (LEA) responsible for the provision of a free appropriate public education (FAPE) to the child at the time the hearing is conducted. See Minn. Stat. §125A.091. 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. Bd. of Special Sch. Dist. No 1*, 144 F.3d 574, 579 (8th Cir. 1998).

The *Thompson* case has been affirmed several times by the Eighth Circuit as recently as 2010 in *C.N. v. Willmar Public Schools*, 591 F. 3d 624 (8th Cir. 2010). You reported that in May 2010, Minnesota amended its Notice of Procedural Safeguards (Notice) to reflect the court's decision in *Thompson*. As clarified by the State in its August 25, 2011 letter to Secretary Duncan, the Notice cites the *Thompson* case and states "due to an interpretation of state law by the 8th Circuit Court of Appeals, if your child changes school districts and you do not request a due process hearing before your child enrolls in a new district, you may lose the right to have a due process hearing about any special education issues that arose in the previous district."

In its October 4, 2010 response, OSEP stated:

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.

You are asking OSEP to take further action, including withholding IDEA funds, to ensure that Minnesota's due process system complies with the requirements of section 615 of the IDEA. As stated in OSEP's October 4, 2010 response, decisions in the Eight Circuit Court of Appeals are binding in the State of Minnesota and, to the extent that those decisions allow Minnesota to limit IDEA protections in this way, and absent additional legal authority, OSEP cannot require the State to take an action that is contrary to those decisions. OSEP does not believe the State is necessarily endorsing the position of the court by including the information quoted above in the Notice of Procedural Safeguards regarding the Thompson case. Rather, the State is providing parents a full explanation of the procedural safeguards available in Minnesota related to the opportunity to present and resolve complaints through the due process complaint procedures. See 34 CFR §300.504(c).

You state that your Office is "working within the administrative and judicial systems" and continues "to argue against application of *Thompson* in many cases." I appreciate all of your efforts on behalf of children with disabilities in Minnesota.

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.

Sincerely,

A handwritten signature in black ink that reads "Alexa Posny". The signature is written in a cursive style with a large, looped initial 'A'.

Alexa Posny, Ph.D.

cc: State Director of Special Education