



Massachusetts Department of Elementary and Secondary Education

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September 18, 2009

Daniel M. Funk
City Solicitor
City of Newton
1000 Commonwealth Avenue
Newton Centre, MA 02459

SEP 21 2009

Re: Transportation of Private School Students

Dear Mr. Funk:

Your letter to Rhoda Schneider requesting an advisory opinion regarding the provision of transportation to private school students was referred to me for response. In your letter you pose several questions regarding a school district's obligation to transport private school students in any year in which the district does not accept the provisions of Chapter 663 of the Acts of 1983 ("Chapter 663"). This response reviews the statutory history of G.L. c. 76, § 1, and summarizes judicial decisions interpreting this statute; reviews the enactment of Chapter 663 and the decision of the Massachusetts Supreme Judicial Court addressing Chapter 663; and addresses your queries.

Chapter 76, § 1

A school committee's duty to provide transportation to students attending private school is governed by G.L. c. 76, § 1. Prior to the enactment of Chapter 663, G.L. c. 76, § 1, provided in pertinent part as follows:

Pupils who, in the fulfillment of the compulsory attendance requirements of this section, attend private schools of elementary and high school grades so approved shall be entitled to the same rights and privileges as to transportation to and from school as are provided by law for pupils of public schools and shall not be denied such transportation because their attendance is in a school which is conducted under religious auspices or includes religious instruction in its curriculum, nor because pupils of the public schools in a particular city or town are not actually receiving such transportation.

Courts have consistently recognized the intent of G.L. c. 76, § 1, to ensure that private school students are transported "to the same extent" as public school students. See Quinn v. School Comm. of Plymouth, 332 Mass. 410, 412 (1955) (obligation to transport students attending

private school is dependent upon what is provided students attending public school). In a 1976 opinion letter to the Commissioner of Education, the Attorney General, based upon his review of the applicable cases, concluded that

G.L. c. 76, § 1, requires a municipality to provide transportation to nonpublic school students when the circumstances are such that the municipality would provide transportation to similarly situated public school students, either because it is required by law, or by its own regulations or practices to do so, or because in the exercise of its sound discretion, considering among other things the health and safety of the children, it would chose to do so.

In 1982, in Attorney General v. School Committee of Essex, the Supreme Judicial Court upheld the constitutionality of the guarantee contained in G.L. c. 76, § 1, that students "attending private schools in the fulfillment of the compulsory attendance requirements shall be entitled to transportation to the same extent as public school students." Although the Court in Essex affirmed that students attending private schools should be afforded the same transportation as that afforded to public school students, it limited the scope of that entitlement. Based on the plain language of the law, the Court limited the entitlement to transportation to students who are of compulsory school age, ages 6 through 15. Thus students attending private schools are entitled to be transported to the same extent as public school students, except where such entitlement is specifically limited by the plain language of G.L. c. 76, § 1.

The Court in Essex further limited the scope of the entitlement by reading G.L. c. 76, § 1, in conjunction with G.L. c. 71, § 68. Section 68 of G.L. c. 71 at that time required school districts to provide transportation for all students who live more than two miles from the school they are entitled to attend.¹ The Court ruled that school districts are required to provide transportation to private school students who are of compulsory school age who live more than two miles from the public school they are entitled to attend and whose private school is more than two miles from home and the same distance from or closer to home than the public school. This meant that students attending private schools were entitled to receive publicly-funded transportation between home and school only if the students were of compulsory school age, ages 6 through 15; they lived more than two miles, or whatever limit the school committee set for public school transportation, from the public school they were entitled to attend; and the private school was more than two miles from home and the same distance from or closer to home than the public school.

¹ In 2000, G.L. c. 71, § 68, was amended to require school districts to provide transportation for all students in grades K through six who live more than two miles from the school they are entitled to attend.

Chapter 663

In 1983, in response to the Essex decision, G.L. c. 76, § 1, was amended by Chapter 663. As amended by Chapter 663, G.L. c. 76, § 1, provides as follows.

Except as herein provided, pupils who attend approved private schools of elementary and high school grades shall be entitled to the same rights and privileges as to transportation to and from school as are provided by law for pupils of public schools and shall not be denied such transportation because their attendance is in a school which is conducted under religious auspices or includes religious instruction in its curriculum. Each school committee shall provide transportation for any pupil attending such an approved private school within the boundaries of the school district, provided, however, that the distance between said pupil's residence and the private school exceeds two miles or such other minimum distance as may be established by the school committee for transportation of public school students.

(Emphasis added). The statute as amended by Chapter 663 requires transportation for students attending private schools within the boundaries of the school district, irrespective of the student's age, and clarifies that entitlement to transportation is based upon the distance between the student's home and the private school, irrespective of the distance between the student's home and the public school the student is entitled to attend.

In Lexington v. Commissioner of Education, 393 Mass. 693 (1985), the Massachusetts Supreme Judicial Court held that the Chapter 663 amendment is a "local mandate" within the scope of G.L. c. 29, §27C(a), popularly known as Proposition 2½. The Court determined that Chapter 663 was ineffective because the Legislature did not provide a specific appropriation to cover the costs of its implementation.

Subsequently the Legislature added language to the transportation reimbursement line item in each General Appropriation Act (the state budget) for several years, conditioning reimbursement for the costs of providing public school transportation on local acceptance of Chapter 663. The state budget, however, no longer includes a line item for transportation reimbursement. As a result of the elimination of the line item for transportation reimbursement, Chapter 663 is once again a "local mandate." This means that a school committee in a city or town that has not accepted Chapter 663 is not required to provide private school students with transportation services beyond those required by G.L. c. 76, § 1, prior to the enactment of Chapter 663.

Transportation If Chapter 663 Not Accepted

The answers to your specific questions are as follows.

1. What is the school district's obligation to provide transportation for students attending private schools?

A school committee in a city or town that does not accept Chapter 663 is required to provide transportation for students attending an approved private school only if all of the criteria that follow are met.² The students:

- are of compulsory school age, ages 6 through 15;
- are in grades K-6, K-12 for a regional school district, or in whatever grades the district transports regular education students attending public schools;
- live more than two miles, or whatever limit the school committee sets for transportation, from the public school they were entitled to attend; and
- the private school is more than two miles, or whatever limit the school committee sets for transportation, from home and is the same distance from or closer to home than the public school that they are entitled to attend.

2. If a school district provides transportation for public school students who live less than 2 miles from their public school, does this trigger any obligation to provide the same transportation for students attending private schools?

Yes. A school committee in a city or town that that does not accept Chapter 663 and provides transportation for public school students who live less than two miles from their public school, for example one-and-one-half miles, would be required to provide transportation to private school students of compulsory school age who live one-and-one-half miles or more from the public school they are entitled to attend and whose private school is at least one-and-a-half miles from home and the same distance from or closer to home than the public school that they are entitled to attend.

3. If a school district provides transportation for some public school students who live less than 2 miles from their public school because of particularly dangerous street crossings, does this trigger any obligation to provide the same transportation for students attending private schools?

² Under G.L. c. 29, § 27C, Chapter 663 "shall be effective in any city or town only if [it] is accepted by a vote or by the appropriation of money for such purposes, in the case of a city by the city council in accordance with its charter, and in the case of a town by a town meeting."

Yes. Private school students who are of compulsory school age have the same rights to transportation as public school students in the school district.

4. If a school district provides transportation for public school students K-12, does this trigger any obligation to provide transportation for private school students K-12?

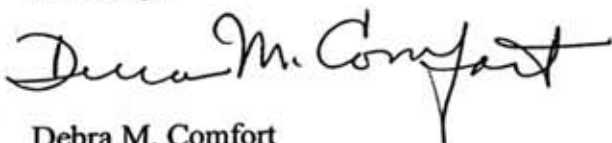
Yes. A school district that provides transportation for public school students in grades K-12 is required to provide transportation to private school students in grades K-12 if (1) they are of compulsory school age; (2) the distance that they live from the public school they are entitled to attend qualifies them for transportation under the policy established by the school committee; and (3) the private school was at least the distance required under the school committee's transportation policy and the same distance from or closer to home than the public school they are entitled to attend.

5. If a school district voluntarily provides more transportation services to private school students than required under the response to Question 1, can the school district charge a fee to the private school students for the expanded level of transportation provided?

Yes, provided the school district does so for students attending public schools. If a school district wishes to charge a fee for student transportation, it may do so only for students who are not by law entitled to receive free transportation. Specifically, in a non-regional school district, the school committee may charge a fee only for students in grades 7-12 and for students in grades K-6 who live two miles or less from school. In regional school districts, the transportation entitlement extends to students in grades K-12. For the students who are entitled to mandatory transportation – that is, students in grades K-6 who live more than two miles from school (K-12 in regional school districts), and any students who are entitled to free transportation under the special education law or other laws – the school district may not charge a fee. Even when fees are permissible, the Department strongly recommends that the school district establish a waiver provision for families based on income eligibility.

I trust that this information will be helpful to you in advising your client. Please feel free to contact me should you require any additional information.

Sincerely,



Debra M. Comfort
Associate General Counsel