



National School Transportation Association

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VIA FIRST CLASS MAIL AND E-MAIL
NOTICE.COMMENTS@IRSCOUNSEL.TREAS.GOV

CC:PA:LPD:PR (Notice 2015-87)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: The National School Transportation Association's Comments on Treasury and the IRS's Further Guidance on the Application of the Group Health Plan Market Reform Provisions of the Affordable Care Act to Employer-Provided Health Coverage and on Certain Other Affordable Care Act Provisions (IRS Notice 2015-87)

To Whom It May Concern:

The National School Transportation Association ("NSTA") submits these comments in response to Q&A-15 of IRS Notice 2015-87, which provides certain guidance that the U.S. Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") intend to incorporate into proposed amendments to regulations under § 4980H to address the application of the special rehire and look-back rules under §§ 54.490H3(c)(4)(ii) and 54.4980H-3(d)(6)(ii) to employees who primarily perform services for one or more educational organizations (collectively, the "proposals"). For the reasons set forth below, Treasury and the IRS should rescind these proposals and they should be excluded from proposed or final regulations.

Treasury and the IRS have promulgated extraordinarily ambiguous proposals to extend the application of the special rehire and look-back rules beyond the narrow scope of the educational organizations the rules were initially intended to cover. NSTA is concerned that the vague language included within the proposal makes it entirely unclear whether they would encompass full-service, turn-key school transportation companies. If, in fact, the agencies intended to do so, such an arbitrary enlargement of the rules would reveal that Treasury and the IRS failed to adequately examine the business model school transportation contractors follow. Instead, it would demonstrate that, without the benefit of a thorough analysis, the agencies have erroneously defined the model as a reaction to the ACA's § 4980H regulations, whereas these practices predated the ACA by over half a century. Moreover, the adoption of the educational exception to the rehire and look-back rules was not intended to modify the longstanding industry norms that have been in place for decades – long before the passage of the statute in question.

Private student transportation companies safely transport millions of students to and from school each day in a reliable and cost-effective manner. These companies provide more than drivers and buses to the school districts they serve. Rather, school districts contracting with private companies garner the benefits of comprehensive structures that provide routing services, bus storage and location, dispatchers, screening and hiring, and thorough safety training. If, in fact, Treasury and IRS did intend to extend the special rehire and look-back rules to employers in the private school transportation industry, they fail to appreciate the long-standing and comprehensive nature of the industry as a whole. This fundamental failure renders the proposal fatally flawed and mandates its rejection.

Furthermore, NSTA is concerned that the stakeholders who this proposal could potentially impact have not received adequate notice of what could require an enormous change to the school transportation industry. The lack of specificity in the proposal, embedded within a 31-page document issued in a Question and Answer format, and the conjecture upon which it is based deprive the public of a meaningful opportunity to assess and respond to the proposal.

The proposal will undoubtedly result in dramatic increases to private school transportation companies' operating costs, jeopardizing their ability to continue to employ thousands of employees across the country. NSTA therefore implores Treasury and IRS to withdraw the proposal in its entirety. Pending further examination of the issues involved and the proposal's potential impact, the agencies should not even consider such a proposal.

The NSTA

The National School Transportation Association (NSTA) was founded in 1964 and is the membership organization for school bus companies engaged primarily in transporting students to and from school and school-related activities under contract to public school districts. Our members offer an array of services to our school district partners, from full turn-key service to management operations and specialized transportation. NSTA members range from small family businesses serving one district to large corporations operating thousands of buses across many states, all committed to the safe, efficient, and economical transportation of America's children.

Notice 2015-87

The ACA requires employers with at least 50 full-time employees (including full-time equivalent employees) to offer health coverage to "full-time" employees and their dependents or pay a penalty. The IRS final employer responsibility rule, issued in 2014¹, allows employers to use a "look-back" method to average an employee's hours over a 12-month period to

¹ 79 Fed. Reg. 8544 (Feb. 12, 2014).

determine if the employee averaged at least 30 hours per week over the course of the look-back period. §54.4980H-3(d)(6)(ii)(B) of the final rule set forth a special rule providing an averaging method for employment break periods that would be applicable to educational organizations that use the look-back measurement method.

In determining the number of hours that an employee has worked over the course of the look-back period, a period of at least four consecutive weeks (disregarding special paid leave) would constitute an employment break during which an employee would not be credited with hours of service. An educational organization employer determines the employee's average hours of service for a measurement period by computing the average after excluding any special unpaid leave and any employment break period during that measurement period and by using that average as the average for the entire measurement period. Alternatively, for purposes of determining the employee's average hours of service for the measurement period, the employer may choose to treat the employee as credited with hours of service for any periods of special unpaid leave and any employment break period during that measurement period at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not part of a period of special unpaid leave or an employment break period.

The final rule also contained another special rule applicable only to educational organizations with respect to treatment as a new employee after a period of absence for employees of employers that are educational organizations. This special rehire rule, set forth in §54.4980H-3(d)(6)(ii)(B) provides that an employee of an educational organization who resumes providing service to an employer after a break in service of at least 26 weeks could be treated as having terminated employment and, therefore, as a new employee upon the resumption of services. The final regulations altered the proposed rule by reducing the length of the break in service required before a returning employee may be treated as a new employee from 26 weeks to 13 weeks for employers who are not educational organizations, but maintained the 26-week break in service rule for educational organizations.

When proposing the regulations that were ultimately enacted in 2014, Treasury and the IRS requested comments on whether the employment break period rules should be applied to all employers, including employers that were not educational organizations. After receiving these comments, in the Preamble to the Final Rules and Regulations, Treasury and the IRS noted that commenters had requested clarification on whether the employment break period rules apply to employers that are *not* educational organizations, but that provide services to such organizations, "such as school bus operators."² Treasury and the IRS responded, unequivocally, that "[t]he commenters did not identify a compelling reason to extend the employment break period rule to employers that are not educational organizations. The

² 79 Fed. Reg. at 8561.

employment break period rule continues to apply only to educational organizations, and the break-in-service period for employees of educational organizations continues to be 26 weeks.”³

Less than two years later, the Treasury and the IRS have reversed their decision. Embedded in Notice 2015-87 is Question and Answer 15 (“Q&A 15”), which proposes to extend the employer break period rules to employees of employers who are not, in fact, educational organizations, but “primarily perform services” for educational organizations. This change could potentially reclassify an employee of such a service provider as full-time for purposes of §4980H, and thus, eligible for health coverage to avoid an employer penalty.

In the guidance, Treasury and the IRS vaguely allude to their awareness “that some educational organizations are attempting to avoid application of these rules” by using third party staffing agencies for certain individuals providing services to the organizations.” Under these proposed amendments, the special look-back and rehire rules would apply to “any employee providing services primarily to one or more educational organizations for whom a meaningful opportunity to provide services during an entire year is not made available.” Specifically, Q&A 15 expressly states that the anticipated amendments “would apply to an employer with respect to a bus driver who is primarily placed to provide bus driving services” at one or more educational organizations and “who is not provided a meaningful opportunity to provide services during one or more months of the year.”

It is unclear if Treasury and IRS intended to include private school transportation companies within the scope of the proposal whose stated purpose is to prevent educational organizations from deliberately circumventing the special rule by using “third-party staffing agencies.” Private school transportation companies are certainly not “third-party staffing agencies” in the general understanding of that term and they provide schools much more than just the drivers. If, indeed, Treasury and IRS did intend to so extend the special rule to private school transportation companies, this decision is based on a fundamental misunderstanding of the industry.

Industry Background

The school bus industry is comprised of 480,000 school buses transporting 26 million students in both rural and urban communities across the country. Of these school buses, private school bus contractors represent one third of the nation’s fleet. Yellow school buses have evolved into a US icon over the 20th century for good reason. They transport over half the country’s student population, providing an estimated 10 billion student trips each year. School buses are designed to be safer than passenger vehicles in avoiding crashes⁴ and preventing

³ *Id.*

⁴ U.S. Department of Transportation.

injury and they are the safest mode of transportation for transporting children to and from school.⁵

Private contractor bus fleets are, on average, newer than district fleets due to the utilization of industry lifecycle replacement schedules for their vehicles. Contrary to these practices, many school district fleets are replaced subject to a number of obstacles, including budget constraints, Board of Education approval, and/or voter approval. Accordingly, it is exceedingly more difficult for school districts to maintain a replacement schedule during difficult economic times. Additionally, although most states set minimum training standards and curricula, the practices employed by private contractors often exceed these minimum standards, while many cash-strapped school districts do only the bare minimum required by statute.

School districts provide transportation for students depending on varying criteria determined at the state level. The duration of school districts' contracts with school bus operators is usually three to five years. These contracts typically specify either fixed or annually-indexed pricing, meaning that private operators bear cost risks.

School district funding for their contracts with school bus operators is provided by state and local sources. Ten percent of school district funding is federally subsidized, while 44% of funding is from state sources, and 46% is locally funded. Approximately two thirds of local funding is generated through property taxes. The average annual expenditure per student is \$10,700, ranging from \$6,400 in Utah to \$19,400 in New York. At least 30 states are still providing less funding per student than they did before the recession. Additionally, school district funding suffered due to the recession as the slump in housing prices snowballed into a reduction in revenue from property taxes.

Currently, of the \$527 billion spent by US school districts each year, four percent is related to transportation. Because of its relative low cost to school districts, transportation is an area that can be targeted for efficiency gains in order to, instead, dedicate funding to schools' educational mission. Because over 50% of students rely on school buses to commute to and from school, school transportation is critical to students' overall success.

School bus transportation companies are dependent on their ability to renew and secure new contract wins on profitable terms. This dependency ensures their commitment to safety, innovative technology, and efforts to keep their costs competitive. School districts have been relying on outside school bus transportation companies for over 50 years because of these unique capabilities.

Outsourcing transportation services to private bus companies allows districts to concentrate their attention and finances on schools, relieving the overburdened districts from the expense and administrative responsibilities involved in providing their own student

⁵ American School Bus Council.

transportation. Because private school bus companies specialize in student transportation and are able to produce innovative technology and purchase equipment in bulk, districts throughout the United States that use privatized transportation operations save millions of dollars each year. These savings enable school districts to focus on their primary mission of educating our youth by preventing teacher layoffs and enhancing educational programs. Due to economies of scale, opportunity costs, and operational efficiencies, private school bus companies operate less expensively than district-run operations. When school districts opt to retain ownership of buses, for example, the school districts are often responsible for the maintenance and repair, after-market equipment, insurance, and incidental use of the buses.

School districts consider contracting student transportation services to private companies for numerous reasons, including the following:

1. The recognition that the classroom is a better place for their focus instead of driving or managing routes;
2. Private companies have greater access to transportation resources and knowledge as it is their expertise;
3. Operating an in-district transportation fleet is not in the best financial interest of taxpayers;
4. Insufficient funds for upgrades and/or repairs to aging bus fleets;
5. District replacement schedules that render school districts unable to upgrade to buses that would meet new equipment, safety, or environmental innovations;
6. Cost increases that have outpaced funding;
7. System inefficiencies that have resulted in overextended resources and scheduling difficulties;
8. Federal, state, or administrative changes and additional responsibilities, such as redistricting, addition of inter-district magnet schools, or parental choice prerogatives, that challenge the district's system; and
9. The presentation of administrative difficulties that would require an inordinate share of administrators' time and attention.

Over the past fifty years, many school districts have realized that outsourcing student transportation can provide solutions to the above challenges. Private contractors have one focus – providing students with transportation at the highest levels of safety and reliability while maintaining efficiency and minimizing costs. In the same way that school districts have cultivated expertise regarding the best manner in which to educate students, private school bus

companies have similarly developed expertise in providing safe, cost-effective, reliable transportation to those students. In addition to these benefits, private contractors usually own and maintain facilities in the districts in which they operate, meaning that they pay significant property and school taxes, or rent the districts' existing property, thereby providing added revenue to the district.

To the Extent the Proposal Intends to Encompass Full-Service School Transportation Companies, it Mischaracterizes the School Transportation Industry.

Treasury and IRS have based their proposal on having been "made aware that some educational organizations are attempting to avoid application of these rules by, for example, using a third-party staffing agency for certain individuals providing services." However, it is entirely unclear whether, in proposing these amendments, Treasury and the IRS intended to include private bus companies that provide comprehensive services to school districts within the meaning of a "third party staffing agency." It surely could not have been their intent given the fact that school districts have been contracting with school bus companies long before the passage of the ACA – with good reason. The districts they service have relied on such companies for decades because they deliver a unique, all-inclusive service. However, the broad and vague wording of the proposal could seemingly encompass school transportation companies within its scope.

The essential purpose of the proposed amendments to the regulations under § 4980H is to prevent educational organizations from intentionally circumventing the special rule by subcontracting out work that had previously been provided by their own employees. For this reason, if the proposal's intent is intended to include all bus drivers and bus companies, it would exhibit a fundamental misunderstanding of the way school districts and school bus operators have been conducting business for over half a century. Despite the stated reasons for the proposed amendments, Treasury and the IRS have not demonstrated that the private school bus transportation industry has changed as a result of ACA and its implementing regulations. In fact, the private school bus transportation model long pre-dated the ACA and continues to this day, contradicting the suggestion that the business model used across the industry was a reaction to the ACA employer responsibility. Two years ago, Treasury and the IRS could find no "compelling reason" to extend the educational organization special rule to school bus drivers. The landscape for private school bus transportation that warranted such a conclusion in 2014 remains the same today. NSTA can only speculate as to the reasons behind the reversal in the agencies' position, yet these reasons by Treasury and IRS because these reasons remain unsupported.

Unlike typical staffing agencies, the vast majority of private school bus companies provide not only a workforce, but an entire ground-up infrastructure to school districts. This comprehensive framework allows school districts to focus on their true priority – education – while relying on school bus companies that specialize in providing safe, efficient, cost effective practices to transport students to and from school. By contracting with private school bus

companies, school districts garner the benefits of turnkey operations, where the school districts themselves bear no responsibilities for purchasing or maintaining equipment, training drivers, planning bus routes, and the numerous other services private companies provide them. Regardless of size, certain functions are common among all private school bus transportation providers, including drivers, driver training, support staff, human resources, school bus technicians, janitorial services, cafeteria workers, dispatchers, routing, and safety measures.

To the degree that Treasury and IRS did intend to include private school bus companies in the proposal, the implication that school districts are engaging in a scheme to evade the ACA by contracting with private school bus companies appears to be based upon little more than assumptions and suppositions, especially given that the entire industry relied upon these business practices for decades before the ACA was even introduced. If Treasury and the IRS did so intend, their arbitrary and capricious suggestion that school districts began contracting with school bus operators in reaction to the ACA is contradicted by the reality that the entire school bus industry has been providing comprehensive services to school districts for decades. Treasury and the IRS have in no way validated any claims that the industry has begun to engage in certain practices solely in order to circumvent the ACA, rather than simply continuing decades-old practices. In fact, NSTA observations are quite to the contrary.

Indeed, only less than two years ago, Treasury and the IRS confirmed that commenters “did not identify a compelling reason to extend the employment break period rule to employers that are not educational organizations” and declined to extend the employment break period rule beyond educational organizations. Neither Treasury nor the IRS has identified any apparent change since 2014 that would warrant an expansion of the special rule applicable to educational organizations.

The Vague and Unclear Language of the Arbitrary and Capricious Proposal and the Manner it was Presented Do Not Afford Stakeholders a Meaningful Opportunity to Respond.

The proposed amendments could have a significant impact on an entire industry, as well as the students it serves. However, the introduction of the proposed change was not made in as transparent, thorough or clear manner as a change of this import merits. The proposal to expand the special rule beyond educational organizations was presented amidst a 31-page guidance document on various ACA issues in the form of Questions and Answers. The proposal could easily have been overlooked by many stakeholders. Even those that did become aware of the proposal contained in Q&A 15 were left without clear direction as to its meaning or the justification for the change.

In Q&A 15, Treasury and the IRS vaguely allude to having been “made aware” that “some educational organizations” are attempting to avoid application of these special rules by using third party staffing agencies for certain individuals providing services to the organizations. However, Treasury and IRS fail to direct the public to the particular information upon which

their conjecture and new guidance allegedly relies. Treasury and the IRS contend that, in direct response to the special rule affecting educational organizations, such organizations have now begun to outsource certain responsibilities to staffing agencies in an attempt to circumvent the rule and treat some or all of these individuals as failing to be full-time employees or as new employees after a break in service of less than 26 weeks.

However, the guidance fails to specify the number or type of educational organizations it suspects of skirting the ACA or the source of the information, thereby preventing the public from effectively challenging such information before the agencies issue their proposed final rules. Such conclusory statements are strongly refuted by the historical business practices employed by private school bus agencies and NSTA's own observations, and demonstrate that Treasury and the IRS have failed to do their due diligence with respect to recommending these baseless amendments.

Enacting the offhand guidance buried in the Q&As without any rigorous analysis or debate or any advance notice to the companies it could potentially affect would inject chaos into an already complicated analysis. The proposal fails to define the phrases "primarily" performing services, a "meaningful opportunity to provide services during the entire calendar year" or "third-party staffing agency." These vague terms interject uncertainty and confusion in the look-back method. It remains entirely unclear how Treasury and the IRS will determine to which employees the special rule will apply, leaving employers subject to significant penalties without the benefit of clear explanations of the meaning of such terms.

In addition, the proposal as constructed leaves several questions unanswered. All of these questions have a significant impact and effect upon the school transportation industry if this guidance is to proceed and we respectfully ask that clear and definitive answers be provided to these important questions:

- When would this proposal, if enacted, become effective? And how would this proposal be applied to current contracts, which are applicable in many cases for as many as 3-5 years?
- How is the term "meaningful offer of services" defined? What are the implications of the number of hours an employee must work and the type of job the employee must be afforded?
- Many of our employees prefer their seasonal work and are therefore not interested in year-round employment. How would this proposal affect those employees? Given that the school bus driver shortage is already acute, we fear this proposal would make the shortage untenable and are gravely concerned with its impact.
- When these seasonal employees are not working would they still be eligible for unemployment? If so, it is worth noting that many employers are paying higher

unemployment premiums. In addition, the employees would then be receiving unemployment benefits as well as health insurance benefits despite the fact that these employees are, on average, working less than 30 hours per week. This does not seem equitable.

The Proposal Would Result in Enormous Costs to Private School Bus Companies, Which Would Be Passed on to School Districts and Taxpayers, and Ultimately Harm Students.

School districts' first priority is, and should be, educating its students. However, private school bus companies focus their efforts on ensuring the safety of the students it transports to and from school each day.

The industry's safety record can be attributed to four foundational elements:

1. The industry's infrastructure is comprised of dedicated group of professionals, including manufacturers, suppliers, and contractors, whose sole focus is on the communities, parents, and students they serve.
2. School bus drivers are specially trained, regulated, and monitored.
3. School buses are specifically designed to protect occupants against crashes and incidents on the road. The industry itself has continuously advanced both construction and safety by promoting regulations and legislation based on public concern. School buses are considerably safer than any other mode of transportation for students, as they are designed specifically to avoid crashes and prevent injury. Furthermore, they include crush standards that are not applicable to other types of vehicles.
4. Routing software is intended to reduce: (a) the distance students must walk to and from bus stops; (b) the number of streets students must cross to do so; and (c) the amount of time students – especially those with special needs – must spend on the bus each day.

School districts utilize transportation contractors because of their unique ability to provide a safe, reliable and cost-efficient method of transporting students to and from school. However, the numerous high-quality technologically advanced services these companies provide to school districts are costly, and the provision of health coverage to additional employees would require these costs to increase considerably. The significant cost to the contractors in the form of additional health coverage eligibility for their employees would necessitate passing along these costs to their customers, the school districts. Passing along costs to the school districts and, ultimately, taxpayers, would be the only way for these companies to continue operating at the high level of quality the public has come to expect.

If these proposed amendments are finalized, these school districts, all of which are already operating within limited, fixed budgets, would be required to allocate a significant additional amount to the provision of safe, reliable transportation for their students, thereby detracting from funding that should, instead, be focused on education. Therefore, it is the communities in which the school districts are located that would bear the financial brunt of the proposal. The increased cost of school transportation stemming from the proposal would, in turn, be passed along to taxpayers in the form of higher property taxes.

Conclusion

It is unclear if Treasury and IRS intended to include school transportation companies within its proposal. If not, the vaguely worded proposal could be seen to extend far beyond its intended target. If, on the other hand, Treasury and IRS did intend to include such companies in its proposal, it would reflect a fundamental misunderstanding of the industry. With student safety and education at the forefront of importance and public awareness, ensuring that students have a safe, reliable, cost-effective method of transportation to and from school is critical. However, this proposal imposes enormous and unwarranted costs and burdens on the contractors who are critical to safeguarding the needs of the students they transport and the school districts and communities they serve. It is the customers of the school transportation industry, the schools, their communities and their students who will pay the ultimate price of the proposal. For all of the reasons discussed above, the NSTA urges Treasury and the IRS to withdraw their proposal. NSTA also respectfully requests a meeting in order to fully discuss both NSTA's concerns, as well as the concerns of Treasury and the IRS.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronna Sable Weber", is placed over a light gray rectangular background.

Ronna Sable Weber
Executive Director