

GILMORE KEAN, LLC

August 9, 2011

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Hosanna Mahaley
State Superintendent of Education
Office of the State
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810 First Street, N.E.
9th Floor
Washington, D.C. 20002

Re: *Petties v. District of Columbia*, D.D.C., No. 95-0148
Formal Notification of Material Breach of the Transition Plan

Dear General Nathan and Superintendent Mahaley,

I have reviewed the Defendants' Response dated August 4, 2011 to the Informal Notice of Material Breach that I submitted to the Attorney General on July 22. I have determined that Defendants have not cured the material breaches set forth in the Informal Notice of Material Breach. Pursuant to Section 8(b) of the Transition Order entered by the U.S. District Court on May 5, 2010 in *Petties v. District of Columbia*, I therefore am formally notifying you that the District of Columbia is in material breach of one or more of the performance standards set forth in the Plan for the Transition of Management and Ongoing Operations of the Division of Transportation (the "Division"). Since Defendants filed their Response with the Court, I also am filing this Formal Notification of Material Breach with the Court so that the public will be informed of this development.

Upon review of the Response, and based on my assessment of the current state of the Division, I continue to believe that, as set forth in my July 22 letter to Judge Friedman, there will be substantial operational problems in the transportation system, and thus significant violations of the *Petties* Orders, at the beginning of the new School Year and potentially continuing into the School Year. On that basis, I gave substantial consideration to an alternative approach, recommended by counsel for the Plaintiffs, of requesting that the District Court modify its Orders and authorize me to assume control immediately of the management and operation of the Division, in an attempt to upgrade the Division and improve its level of performance before the opening of school.

I have determined, however, not to pursue that approach and to proceed according to the process for declaring a material breach set forth in the Transition Order. My

decision to pursue the Transition Order process is based on my conversation with City Administrator Allen Lew on August 4. Mr. Lew stated that he understood that operational problems had been disclosed by the End of School Year assessment of the Division and assured me that Defendants are committed to curing those problems and bringing the Division into compliance with the Court's Orders. Mr. Lew further stated that he would take the lead within the District government in that effort. In particular, Mr. Lew informed me that if I had concerns about the steps being taken or not being taken to upgrade the performance of the Division, or concerns about the inability of the Division to obtain cooperation from other District agencies necessary to bring the Division into compliance, I should contact him directly and that he would assess the situation and decide how to proceed to overcome those obstacles.

Mr. Lew is an accomplished manager of government programs and has earned a reputation for competence and efficiency in the resolution of difficult problems within the District government. Based on Mr. Lew's commitments, I have concluded that the best approach available to try to cure the existing material breaches as promptly as possible is to follow the cure process set forth in the Transition Order. That process will be subject to the overall direction of the City Administrator, with enhanced oversight during this period by the Supervising Court Master and Gilmore Kean. Accordingly, I have decided not to request that the Court immediately return the Division of Transportation to the control of a Transportation Administrator.

Pursuant to Section 8(c) of the Transition Order, now that a Formal Notification of Material Breach has been issued, Defendants have 30 business days to cure the material breaches of the performance standards identified in my July 22 notification. Upon the running of that period, I will determine whether Defendants have cured the material breach and, if they have not, decide how to proceed pursuant to the provisions of Section 8(c).

During the cure period, I will continue to monitor carefully the operation of the Division of Transportation and its compliance with the requirements of the *Petties* Orders and the Transition Plan during the critical period encompassing the opening of the 2011/2012 School Year. I look forward to working cooperatively with Mr. Lew and Defendants during this period to assist the District of Columbia in its efforts to cure the material breaches and to have the Division operate in a compliant manner at the opening of the School Year. I will work with the District through the provision of advice and information obtained through my oversight of the Division's operations, and in other respects in which Defendants suggest that I may be able to help their compliance efforts. During this period, I will continue to give due consideration to the Plaintiffs' views regarding the state of the Division's operations.

The Determination of Material Breach

In the Response and in my meeting with Mr. Lew, Defendants have not asserted that they are in compliance with the Transition Plan. Defendants also have not challenged my finding that the Division was out of compliance with on-time arrival requirements of the *Petties* Orders throughout the 2010/2011 School Year and that there were substantial problems with routing throughout the year. Similarly, Defendants have not challenged my finding that the Division was not complying with the brake inspection requirement for buses and was not acting with sufficient urgency to repair and conduct preventive maintenance on the bus fleet prior to my detecting those problems and escalating them to the highest levels of the District government. Defendants freely admit to management deficiencies leading to almost 100% turnover among the Division's top managerial positions. Defendants' Response notes that a new manager with a strong performance record has been hired for the Division, but this does not amount to compliance in and of itself. This new manager obviously faces a learning curve and there is no guarantee he will be able to work effectively from the start with the District's unique bureaucracy.

Defendants' Response identifies several areas in which accelerated efforts have recently been undertaken to improve the level of performance prior to the start of the School Year. I appreciate the District's effort to move in the right direction once Gilmore Kean brought these problems to its attention. However, by Gilmore Kean's analysis Defendants remain in non-compliance in 15 of the 34 areas specified by the Transition Plan (44%). The areas of non-compliance include the most important compliance objectives, such as on-time arrival, ride-times, training, equipment (car seats, boosters, vehicles), maintenance of vehicles, maintenance of a 10% spare fleet, hiring, vendor management, and vehicle inspections. In addition, OSSE's data continue to be flawed and inconsistent, even in the material presented to me. The unreliability of the data substantially complicates attempts both to manage the transportation system and to make reliable assessments of the Division's performance.

Defendants' Response suggests in numerous places that the District has "plans" to come into compliance in the many areas of non-compliance. For the most part, these "plans" are an announcement of Defendants' intention to develop a plan which, if carried out successfully, would lead to compliance at some time in the future. These assertions of intent do not constitute a substantive "plan" in any meaningful sense, especially in the critical sense of identifying elements of a specific work plan that a manager in the field could implement in organizing the daily activities of the Division. In many respects, the "plans" contain inaccurate statements of past performance and rely on flawed assumptions concerning future performance. The "plans" thus do not address the real issues and the underlying failures that Gilmore Kean continues to observe.¹

For these reasons, after review of Defendants' Response, I have concluded that

¹ Defendants' plans also rely on other District agencies to ensure success. Yet with the exception of the Department of Public Works, these other agencies have themselves created or contributed to issues that have hindered effective operation of the Division. I do not believe that their performance will in each case improve, at least without personal intervention by the City Administrator. In any event the expectations and corresponding performance requirements for these agencies are not fully laid out in Defendants' plans.

the District is in material breach of the Transition Plan in many respects. The critical areas of non-compliance are in the availability of a safe and adequately sized bus fleet and in the efficient routing of buses to serve students without incurring the excessive ride times and early pickups that were chronic during the 2010/2011 School Year.

To assist Defendants in determining how best to utilize their resources during the cure period, I offer the following non-exclusive list of areas in which the District is in non-compliance.

Brake inspections. According to Defendants' plan, brake inspections will not be completed until September 15, nearly one month after the opening of school. It goes without saying that no bus with an out-of-date inspection should be used to transport children or staff.

Preventive maintenance. Defendants' plan also calls for this effort to be completed by September 15, well after the start of school. Defendants' plan also fails to articulate a long-term solution for fleet management. Defendants' Response notes that a number of Department of Public Works mechanics are on loan to the Division (without saying how long these loans will last) and that some new mechanics are being hired. The Response also indicates that each terminal manager will be responsible for the portion of the fleet assigned to him or her. However, there is no indication as to how the fleet as a whole will be managed in the future. It is unclear whether OSSE plans to bring the majority of maintenance services in-house or if it intends to continue to outsource to vendors. To ensure that it is operating a safe and reliable fleet, the Division needs an experienced fleet manager who is accountable for monitoring and making decisions regarding maintenance.

Bus personnel training. There is no plan for compliance. Defendants' Response states that they will develop a plan for training by September 15. This training for bus drivers and attendants is supposed to have been completed before the buses start transporting students.

On-time compliance. Defendants have not presented a plan by which they would come into compliance with this crucial requirement, which they failed to meet during any part of the last School Year. This issue is inextricably linked to the problems with the management of the routing function that are largely ignored in Defendants' Response. OSSE has not specified objective steps that will be taken to improve the management of the routing function and bring it into compliance, other than to promise that routing personnel and management will meet on a regular basis. The issue of increased student ride time is treated only as a traffic problem. Yet after review I have concluded that many of the routes have been structured in such a way that they would exceed ride time standards regardless of traffic. The Response also acknowledges issues with student data that the Routing Department has not corrected, including the accuracy of records regarding one-to-one aides and car seats. Without appropriate oversight and management of the routing function, the system could be crippled.

Fleet inspection data. The data provided cover only 229 vehicles in the fleet. Of these, many of the inspection dates have already expired, including many from 2010.

These data contradict statements in the OSSE Report and fail to show that the current fleet is up-to-date on DC DMV inspections requirements. As I also noted in my letter, there are buses that apparently have not had the required DC inspection but that are not included on the list provided by OSSE. Given the problems with these data, OSSE should have provided actual DMV records for all the buses.

Availability of bus fleet. The assumptions concerning fleet requirements are flawed, and projections of future progress and fleet availability are unrealistic given the Division's prior experience and data Gilmore Kean has obtained from the vendors themselves. For example, the Compliance Status Report (Exhibit 4), indicates that five mechanics are needed, but OSSE has reported that only three are assigned. 281 buses currently are reported out of service, and 677 buses are needed to run the projected bus routes. The gap is substantial, and in my judgment cannot be closed in the eight business days that remain before the opening of school.

Fleet Acquisition. OSSE's plan to procure additional vehicles for the fleet is incomplete, and its credibility is doubtful, given the problems that Gilmore Kean has observed over the last seven years with the vendors and the District's substandard procurement process, which has imposed long delays in securing necessary approvals.

Air Conditioning. Air conditioning on the buses is a continuing problem that OSSE has not adequately addressed. Many buses were without air conditioning as the last School Year ended and the problem worsened over the summer school period during an extended heat wave. OSSE has stated that air conditioning is not a priority, and Gilmore Kean's review confirmed that no action has been taken to correct the problem systematically. It is apparent that in this area OSSE has not demonstrated appropriate concern with the safety or comfort of the special needs children who are being transported or the Division employees who transport them.

Issues That Are of Specific Concern

From my experience in operating the Division, I want to call to your attention three areas that I believe present special risks of implementation problems, and thus possible violations of the *Petties* Orders, in the period surrounding the opening of school.

Routing. OSSE notes that as of the July 25 deadline it established for receipt of the names of students whose IEPs require transportation, DC Public Schools had provided the names of only 3,114 students requiring transportation at the beginning of the School Year, 569 fewer than at the beginning of the 2010/2011 School Year. (OSSE staff has informed Gilmore Kean that OSSE has not performed any quality control checks on these names for outdated addresses, school assignments, etc.). OSSE has utilized this number as a justification for its estimate of a significantly reduced route count for the 2011/2012 School Year, and therefore a correspondingly reduced need for buses. OSSE claims that, according to the lists submitted by DCPS, it will need for only 637 buses on August 22 and only 677 buses by September 7.

In my experience, OSSE's reliance on such a large decrease in the number of students requiring transportation in this School Year may put Defendants in a precarious

position if, as frequently happened in the past, DCPS submits a large number of names of additional students who require transportation in the days just before and just after the School Year begins. While OSSE correctly notes that student counts and therefore route counts tend to rise over the year, I believe that it has underestimated the potential for a significant influx of students during the first week of school, let alone during the whole year.

For example, during the final year of my tenure as Transportation Administrator, the Division processed approximately 7,400 changes to student information during the year, which necessitated substantial changes in student routing and a corresponding requirement for additional buses to run the additional routes. Some of these modifications involved changes in student addresses, but a large number consisted of new students who were added to the system. In fact, during the first week of that School Year alone, DCPS added 452 students, despite the existence of a Division of Transportation deadline similar to that imposed by OSSE this year. Because each bus route transports 5.5 students on average, the new names submitted in the first week of school alone imposed a need for an additional 80 buses.

It is possible that this year will not see such a dramatic increase. However, I believe that it is unduly optimistic to assume DCPS has in fact given OSSE the names of all students whose IEPs require transportation or for the Division to base operating plans on the assumption that the increased need for buses will be one-half of what was experienced last year. My concern is heightened by the fact that, according to information OSSE provided Gilmore Kean, despite the July 25 deadline DCPS delivered several dozen new names to OSSE on August 2. I would not be surprised if this trend were to continue, and I am concerned that the Division is not prepared.

Creation of a Parallel Bus Transportation System. On July 25, the State Superintendent advised Gilmore Kean that OSSE had reached an agreement with DCPS under which students eligible for transportation whose names had not been entered in the Division of Transportation data base for routing by the close of that day would be transported by DCPS for some unspecified period of time when school opens on August 22. On July 27, I wrote Chancellor Henderson that regardless of which agency of the District government may transport students, all provisions of the *Petties* Orders apply to their transportation. On August 1, in response to my request to the Chancellor for information concerning its plans for how this parallel transportation system will comply with the *Petties* Orders, the Chancellor informed me by e-mail that “DCPS is not asking for this to count as transportation provided under *Petties* or in conformance with the *Petties* order.” A subsequent e-mail by DCPS’ General Counsel, Robert Utiger, outlines certain minimal steps for compliance but left many issues unanswered.

The obligation to comply with the *Petties* Orders applies to all agencies of the District government that transport children. Compliance with the *Petties* Orders is not a matter of convenience or feasibility, but a requirement of Court Order. I will review carefully the operation of this parallel fleet that is being created in the weeks prior to the opening of the School Year, to make certain that the transportation service it provides special needs students complies with all Court Orders and the Transition Plan.

Possible Lack of Focus on Preventive Maintenance. As we informed City Administrator Lew at our August 4 meeting, Gilmore Kean understands that the Division is focusing its compliance efforts on having the requisite number of buses available to transport students at the beginning of the School Year. Information Gilmore Kean has obtained suggests that in its effort to meet this goal, the Division has substantially deemphasized preventive maintenance. The decision to defer preventive maintenance could have severely adverse consequences for the aged bus fleet. Accordingly, we urge Defendants to emphasize with the Division the necessity for conducting preventive maintenance in compliance with the schedules set forth in my July 22 letter, so that the level of problems experienced with the bus fleet does not increase once the School Year begins and the buses begin to run routes.

I close by repeating the statement that I made earlier. I look forward to working with Defendants during the cure period in their efforts to try to improve the quality of the transportation system and to come into compliance with the Court's Orders.

Sincerely,

A handwritten signature in black ink, appearing to read "David Gilmore", with a long, sweeping underline.

David Gilmore
Supervising Court Master