

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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NIKITA PETTIES, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 95-0148 (PLF)
)	
DISTRICT OF COLUMBIA, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the report and recommendation of the Supervising Court Master (“SCM”) in which he recommends (1) that the Transition Period, currently set to conclude on November 14, 2011, be extended until October 31, 2012; and (2) that the defendants be ordered to provide certain information to him and to plaintiffs’ counsel during the extended Transition Period.

The plaintiffs agree with the SCM’s recommendations. The defendants agree that the Transition Period should be extended, but believe that extending it until April 30, 2012 should be sufficient to satisfy the concerns expressed by the SCM. The defendants do not object to providing the information described by the SCM to the SCM and to plaintiffs’ counsel. Upon consideration of the SCM’s report and recommendation, the parties’ responses and the SCM’s reply, the relevant legal authorities, and the entire record in this case, the Court will extend the Transition Period until October 31, 2012 or until further Order of this Court, and will order the defendants to provide certain information to the SCM and to plaintiffs’ counsel.¹

¹ The papers reviewed in connection with this matter include: the SCM’s informal notification of material breach of the Transition Plan [Dkt. No. 1920]; the statement of

I. BACKGROUND

In 2003, the parties determined that it was in the best interests of District of Columbia students with disabilities if an independent Transportation Administrator were “appointed to manage, supervise and assume responsibility for the operations of [District of Columbia Public School’s] Transportation services.” Dkt. No. 1118 at 2. Thus, by Consent Order on June 25, 2003, the Court appointed David Gilmore to serve as the Transportation Administrator in this case. See id. at 2-3. Mr. Gilmore served this Court in that capacity until May 5, 2010. See Dkt. No. 1786 at 7.

On May 5, 2010, upon the recommendation of the Transportation Administrator, the Court issued an Order Establishing Procedures for Transition of the Division of Transportation Back to Control of the District of Columbia. See Dkt. No. 1786 at 1 (“Transition Order”). As stated in that Transition Order, the Transportation Administrator advised the Court that the Division of Transportation was “consistently providing safe, timely, and appropriate transportation services to eligible District of Columbia special education students[.]” Dkt.

defendants with respect to the filing of the SCM [Dkt. No. 1921]; the defendants’ notice of filing [Dkt. No. 1924]; the SCM’s formal notification of material breach of the Transition Plan [Dkt. No. 1926]; the plaintiffs’ response to the SCM’s filing of formal notification of material breach of the Transition Plan [Dkt. No. 1927]; the defendants’ objection to the SCM’s declaration of material breach and notice of filing of response to the formal notification of material breach [Dkt. No. 1937]; the SCM’s further report and recommendation concerning the transition of the Division of Transportation back to the control of defendants [Dkt. No. 1940]; the plaintiffs’ response to the SCM’s further report and recommendation concerning the transition of the Division of Transportation back to the control of defendants [Dkt. No. 1941]; the defendants’ notice of filing of response to the SCM’s further report and recommendation [Dkt. No. 1942]; the SCM’s reply to the responses to his further report and recommendation concerning the transition of the Department of Transportation back to defendants’ control [Dkt. No. 1943]; the defendants’ objection to the proposed one-year extension of the transition period, request for order ending the transition period on April 30, 2012, and submission of the report for October 2011 [Dkt. No. 1949].

No. 1786 at 1. The Transportation Administrator therefore concluded that it was

appropriate to initiate a process of transition of the Division of Transportation back to the management of the District of Columbia, under a set of safeguards to assure the continued provision of safe, timely, and appropriate transportation services during a transition period in which the District of Columbia will resume day-to-day responsibility for the operation of the transportation program[.]

Id. at 1-2.

Under the Transition Order, the Court established the position of a Supervising Court Master (“SCM”)

to supervise the efforts of the District of Columbia to assume management and operation of the Division of Transportation, pursuant to criteria set forth in the Transition Plan, and to resume control of the management and operations of the Division of Transportation if the District of Columbia is in material breach of the substantive criteria that are to be met during the transition period[.]

Dkt. No. 1786 at 2. The Court appointed Mr. Gilmore as the SCM. Id. at 7.

Under the Transition Order, the Court established a Transition Period that was set to conclude on October 1, 2010. See id. ¶ 1. Furthermore, the Transition Order provides that “[a]bsent the [SCM’s] finding of any material breach of a performance standard by the [d]efendants or any objections of the [p]laintiffs that are sustained by the Court, at the end of the transition period, the Consent Order of June 25, 2003 regarding transportation services for D.C. Public Schools shall stand as vacated as of October 1, 2010.” Id. ¶ 10.

On September 21, 2010, the Court granted the defendants’ partial consent motion to extend the Transition Period until December 1, 2010. See Minute Order, Sept. 21, 2010. On November 24, 2010, on the parties’ joint motion, the Court further extended the Transition

Period until April 30, 2011. See Dkt. No. 1848 at 1. On April 27, 2011, on the SCM's recommendation and without objection from the defendants, the Court further extended the Transition Period until October 31, 2011. See Dkt. No. 1896 at 1; see also Dkt. No. 1895 at 1 (“Defendants will not oppose the SCM's recommendation to extend the transition period to October 31, 2011.”). And on October 31, 2011, the date that the Transition Period was set to conclude, the Court further extended the Transition Period until November 14, 2011, in order to provide the defendants the opportunity to clarify their position on whether the Transition Period should be further extended by this Court. See Dkt. No. 1946 at 1.

II. SUPERVISING COURT MASTER REPORT AND RECOMMENDATION

On July 22, 2011, under Paragraph 8(a) of the Transition Order, the SCM informally notified the Court and the parties that the defendants “are in material breach of their obligations in Petties.” Dkt. No. 1920 at 1. Then, on August 9, 2011, under Paragraph 8(b) of the Transition Order, the SCM formally notified the Court and the parties that “the District of Columbia is in material breach of one or more of the performances standards set forth in the Plan for the Transition of Management and Ongoing Operations of the Division of Transportation.” Dkt. No. 1926 at 1; see also Dkt. No. 1940 at 1. Because the SCM determined that the defendants were making good faith efforts to cure those breaches, however, the SCM decided not to exercise his authority under Paragraph 8(c) of the Transition Order to assume control of the management and operation of the Division of Transportation. See Dkt. No. 1926 at 1-2; see Dkt. No. 1940 at 1-2. Instead, the SCM concluded that it was “appropriate to provide defendants with

more time to cure the Division's operational problems and to seek to come into compliance with the Court's Orders." Dkt. No. 1940 at 2.

In view of that conclusion, the SCM recommended that the Transition Period be extended until October 31, 2012, at which time "the Court should make a further determination how to proceed based on an assessment of the Division's compliance with the Court's Orders after the start of the 2012/2013 School Year." Dkt. No. 1940 at 2. In making this recommendation, the SCM noted

that if during the course of this year [the defendants] can demonstrate to [him] that they have come into durable compliance with the Court's Orders and that they will be able to remain in compliance at the beginning of the 2012/2013 School Year, [he] will submit [his] analysis of their performance to the Court and recommend that the Transition Order be terminated at an earlier date.

Id. The SCM also recommended that the Court "specifically address the required flow of information about the Division to [p]laintiffs' counsel and the [SCM] during the extended Transition Period," Dkt. No. 1943 at 3, and the SCM set forth three specific proposals to that effect. See id., Attachment 1, Proposed Order at 2.

The plaintiffs agree with the SCM's recommendations, but have "serious reservations about potentially shortening the length of the transition period." Dkt. No. 1941 at 2.

As the plaintiffs see it,

the history of this case shows that defendants cannot demonstrate durable compliance with this Court's orders without undertaking a successful opening of a new school year. The openings of school in 2010 and in 2011 were characterized by severe management and operational failures, especially with respect to bus maintenance. Moreover, defendants failed to achieve compliance with the agreed-upon transportation performance standards during the entire 2010-11 school year, and they remain out of compliance.

Id. at 2.

The defendants maintain that they are not in material breach of their obligations in this case. Dkt. No. 1942 at 1. Although they admit that “work remains to be done,” *id.*, Attachment 1 at 1, and expressly acknowledge “some limited noncompliance” with the Transition Order, Dkt. No. 1937 at 4, the defendants assert that they are “compliant with thirty one (31) of the thirty four (34) performance standards, and [are] in *substantial compliance* with the remaining three standards.” Dkt. No. 1949 at 1 (emphasis added).

The defendants contend that “perfection is not required to avoid material breach,” Dkt. No. 1937 at 4, a proposition with which the Court agrees. According to defendants, “the question here is whether, on the record before the Court, [d]efendants are serving the Transition Order’s primary purpose, with sufficient systemic improvement to justify the continued operation of the” Division of Transportation by the Office of the State Superintendent of Education. *Id.* The defendants contend that the answer to that question is “unequivocally yes.” *Id.*

Nevertheless, the defendants agree that the Transition Period should be extended. See Dkt. No. 1949 at 1. They object to the SCM’s proposed one-year extension; instead, they request that the Court “issue an order extending the transition period [to] on or before April 30, 2012.” *Id.* at 2. According to the defendants, “[t]he April 30, 2012 date . . . takes account of the successful opening this fall and also takes performance virtually to the end of the current school year. This extension should provide more than enough information on which to return the control and management of the transportation system to the District.” *Id.* As for the SCM’s recommendation that the defendants be ordered to provide certain information to the SCM and to plaintiffs’ counsel, the defendants did not interpose any objection.

The Court sees no need to resolve the defendants' objection to the SCM's declaration of material breach, because the SCM has decided not to pursue the process for assuming control of the management and operation of the Division of Transportation, and all parties agree that the Transition Period should be extended. The only pressing question before the Court is whether the Transition Period should be extended until April 30, 2012, as the defendants recommend, or until October 31, 2012, as the SCM and the plaintiffs recommend.

The Court agrees with the recommendation of the SCM and the plaintiffs that the Transition Period should be extended, at least presumptively, until October 31, 2012. Under this approach, however, the defendants have the right to come before the Court at any time if they believe that actual, objective performances measures demonstrate that they are in substantial compliance with the Court's Orders and that the Transition Period therefore should be ended sooner. See Dkt. No. 1943 at 1, 3. The Court also agrees with the SCM's unopposed recommendation regarding the required flow of information from the defendants to the SCM and to the plaintiffs' counsel.

III. CONCLUSION

Based on the report and recommendation of the Supervising Court Master [Dkt. Nos. 1940, 1943] concerning the operations of the Division of Transportation under the management and operation of the defendants and his recommendations about next steps that should be taken to assure compliance and facilitate the transition process, and in view of the responses of the plaintiffs and the defendants, it is hereby

ORDERED that Paragraph 1 of the Transition Order of May 5, 2010 is further amended to provide that the Transition Period shall be extended until October 31, 2012 or until further Order of this Court; it is

FURTHER ORDERED that after the start of the 2012–2013 School Year, the Supervising Court Master shall conduct a comprehensive analysis of the management and operations of the Division of Transportation and shall submit to the Court and the parties no later than October 11, 2012, a report and recommendation that sets forth his analysis of the extent to which the Division is in compliance with the Orders of this Court and his recommendations as to what further actions should be taken and what furthers orders entered; and it is

FURTHER ORDERED that during the Transition Period:

1. Defendants shall provide plaintiffs' counsel with adequate and current information concerning efforts to provide transportation services to special needs students in accordance with the Court's Orders.
2. Defendants shall provide the Supervising Court Master with copies of all the KPMG work products and interim reports that they have been provided to date, as well as earlier drafts of the Needs Assessment Report.
3. Defendants shall promptly provide the Supervising Court Master with any work product and reports that KPMG will provide in the future.

SO ORDERED.

DATE: November 14, 2011

/s/
PAUL L. FRIEDMAN
United States District Judge