

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NIKITA PETTIES, et al.,)
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Plaintiffs,)
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v.)
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DISTRICT OF COLUMBIA, et al.,)
))
Defendants.)

Civil Action No. 95-0148 (PLF)

**REPORT OF THE SUPERVISING COURT MASTER CONCERNING DEFENDANTS’
COMPLIANCE WITH THE COURT’S ORDERS AND RECOMMENDATION THAT
THE TRANSITION ORDER OF MAY 10, 2010 BE PERMITTED TO EXPIRE**

Pursuant to the Court’s Order of November 14, 2011, David Gilmore, Supervising Court Master, submits this Report concerning Defendants’ operation of the Division of Transportation (the “Division”) and Recommendation concerning further actions that should be taken and further orders that should be entered.

The Division operated in compliance with the requirements of the Transition Order¹ at the end of the 2011-2012 School Year. The data compiled by Gilmore Kean, LLC show that while the Defendants have not yet achieved consistent compliance with the 94% On-Time Arrival Standard during the first six weeks of the 2012-2013 School Year, the Division’s performance is trending steadily towards compliance and is nearing that level. (Attachment A) The Division is upgrading its overall level of performance in a manner consistent with the

¹ Order Establishing Procedures for Transition of the Division of Transportation Back to Control of the District of Columbia (Dkt. No. 1786), as amended, entered May 5, 2010.

improvements that occurred in prior years, as the problems inevitably encountered at the start of a School Year have been addressed and resolved.

Based on these findings, I recommend that the Court permit the Transition Order to expire by its terms on October 31, 2012, without further action by the Court. The Division currently is in compliance or in substantial compliance with all the requirements of the Transition Order except the vital On-Time Arrival Standard. In my experience, there is every reason to believe that the current trend towards satisfaction of this requirement will continue. I believe that the Division will be able to obtain consistent compliance with the On-Time Arrival Standard in this School Year, as long as the Defendants maintain the level of financial support and provide the management resources necessary to run the Division in a proper manner. I therefore conclude that there no longer is any basis for keeping the Transition Order in effect.

There are three principal bases for my recommendation:

- The Defendants achieved compliance with the On-Time Arrival Standard at the end of the last School Year and are approaching compliance with that Standard in this School Year.
- The Defendants' effort to obtain compliance with the Transition Order has been led by City Administrator Allan Lew, an experienced, hands-on manager in whom I have full confidence. Under Mr. Lew's leadership, the Defendants have finally committed the financial resources and hired the experienced managers necessary to operate the system for transportation of special needs students in compliance with the performance criteria established by the Court's Orders.
- The Director of Transportation, Ryan Solchenberger, is a competent, experienced manager who understands the operational problems that the Division faces. He has been able to obtain the necessary resources and taken effective steps to develop and implement plans to address the problems the Division faces and to operate it in a compliant manner.

In making this Recommendation, I must note that I have a degree of concern that the Defendants have not fully addressed all issues related to student safety, as discussed at greater

length below. On balance, however, I do not believe that these concerns are of sufficient importance to warrant delaying the return of control over the transportation system to the Defendants. Moreover, in reaching this conclusion, I have relied substantially on Defendants' voluntary commitment, communicated to me by Mr. Lew, that the District of Columbia will take a series of steps after the Transition Order has expired to address these concerns. Those steps include:

- For a period of one year after the Transition Order expires, the Division will publish, in an appropriate forum accessible by the Internet, statistics concerning the On-Time arrival performance of the Division, as calculated under the two metrics that have been applied during the Demonstration Project to measure Defendants' compliance with the On-Time Arrival Standard.
- For a period of one year, the Division also will publish the number of vehicles for which PMI (Preventative Maintenance Inspection) –A and PMI–B safety inspections have been performed and the number of Department of Motor Vehicles inspections that have been completed.
- The Defendants will make certain that all alternative vehicles used to transport special needs children will have swing out stop signs as well as digital signage to warn drivers that the vehicle is carrying students.
- As previously promised, the Defendants will promulgate the regulations necessary to assure that traffic that passes these alternative vehicles when they are stopped and Caution signals are displayed will be subject to the same penalties as traffic that passes a yellow school bus under similar circumstances.

The final steps necessary to address these concerns will occur after the transportation system is no longer subject to the Court's jurisdiction. The successful resolution of these issues therefore will depend upon the Defendants' keeping their commitments to resolve them.

In sum, based on the Gilmore Kean analysis and my findings, I believe that the time has come to return control of the transportation system to the District of Columbia, and I therefore recommend that the Transition Order be allowed to expire on October 31, 2012. Unless the Division is to become a permanent ward of the Court, the return of control to the Defendants

must occur at some point. In my judgment, based on my nine years' involvement with the Division, this is the moment to terminate judicial control. Little would be gained from this point forward through the current mechanism of continuing Court oversight of the operations of the Division through the Supervising Court Master.

While I am willing to recommend that the Transition Order be permitted to lapse, I want to emphasize to the Court and the parties that I believe the Division's ability to continue in compliance is fragile. The performance of the transportation system could deteriorate rapidly if the financial support or management resources currently being provided by the District of Columbia are reduced after the Transition Order has been vacated. The Court, the public, and the Defendants must understand that the District of Columbia will have to continue to devote substantial resources and high-level supervisory attention to the operation of the Division in the future in order to assure that it will continue to be able to deliver the same quality of transportation services as it is delivering today.

Background

On November 14, 2011, the Court entered an Order providing that:

[T]he 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 further orders entered;

[Dkt. No. 1952 at 8]. Over the last six months, the principal question presented in my analysis has been whether the Defendants have been in compliance with the On-Time Arrival Standard incorporated in the Transition Order, which requires that 94% of the special needs students who

receive transportation must arrive at school within a window of 10-30 minutes prior to the opening bell. The Plaintiffs also have raised concerns with the relative safety of the multipurpose vehicles -- vans -- that the Defendants have used and may hereafter use to transport some students to school, compared to the safety of traditional yellow school buses. The Defendants generally have been in compliance or substantial compliance with the other substantive performance requirements incorporated in the Transition Order.

On April 11, 2012, after discussions with the parties, I authorized the Defendants to conduct a Demonstration Project that would allow them to determine whether they could achieve compliance with the On-Time Arrival Standard by allowing students to arrive within 5-10 minutes and 5-35 minutes (the “shoulder periods”) of the opening bell. The data compiled by the Division and previously submitted to the Court by the Defendants showed that for the final three plus months of the 2011-2012 School Year, the Division achieved on average a 94% degree of compliance with the Standard within the 10-30 minute window and 97% compliance within the expanded 5-35 minute window. *See* Ex. B to Defendants’ Motion To Vacate Orders Relating to Student Transportation 13-14 [Dkt. No. 2006-3].

Based on these statistics, as part of a broader Motion to vacate all Court Orders relating to the Transportation side of the *Petties* litigation, on June 21, 2012 the Defendants submitted a Motion for immediate termination of the Transition Order prior to its scheduled October 31, 2012 expiration. In meetings that I facilitated, the Plaintiffs repeatedly had stated to the Defendants that they would not consent to the termination of the Transition Order based on end of School Year statistics, because they anticipated that there would be a substantial falloff in the Division’s performance at the start of the new School Year, as there had been in prior years including those in which I served as Transportation Administrator. The Plaintiffs insisted that

the Court's decision concerning the Transition Order should be resolved on schedule on October 31st, based on the statistics for the first few weeks of the new School Year. They argued that these data would reveal whether the Defendants had been able to regain consistent compliance with the 94% On-Time Arrival Standard within a reasonable period, and thus would provide a more reliable basis for the Court's determination as to whether the Transition Order should be allowed to lapse.²

Gilmore Kean has compiled the attached Chart that summarizes the Division's performance under the On-Time Arrival Standard for the first six weeks of the 2012-2013 School Year. That chart demonstrates that compliance with the On-Time Arrival Standard fell off sharply in the initial days of the new School Year. By the last week of September, the transportation system's average performance for the week exceeded 90%, as measured under both the original Standard and under the expanded version of the Standard to include the shoulder periods.

Discussion

1. The Defendants' Compliance with the Transition Order.

As set forth in my prior submissions to the Court, by spring 2012 the Division had attained compliance or substantial compliance with all requirements established by the

² Plaintiffs have never filed an Opposition to the Motion To Vacate. Before making that submission, they first sought discovery from the Defendants concerning several aspects of the Division's performance. The Court deferred the filing date of their Opposition pending resolution of the discovery dispute, which still is unresolved. Accordingly, the Motion to Vacate Orders Relating to Transportation is not yet ripe for resolution. Thus, the question whether the Transition Order should be allowed to lapse or other orders should be entered will be addressed under the terms of the Court's Order of November 14, 2011.

Transition Order except for the On-Time Arrival Standard. My analysis of the Division's operations at the beginning of the current School Year shows that it remains in compliance with those provisions. This achievement is the result of the hard work and high level of commitment that the Division's workforce has manifested over the years to carrying out the mission of transporting special needs students to schools in a safe and timely manner.

At the end of the last School Year, the Division achieved compliance with the On-Time Arrival Standard without the necessity of relying on the additional flexibility provided by the Demonstration Project. As set forth in prior submissions to the Court, the Plaintiffs objected to the Defendants' motion for early termination of the Transition Order at the end of the last School Year precisely because deterioration in performance at the beginning of the new School Year was predictable. The parties recognized that the critical question would be how quickly the transportation system would recover from the anticipated slow start and whether it would be able to achieve sustained compliance with the On-Time Arrival Standard in this School Year.

The data recently compiled by Gilmore Kean show that the Division's rate of compliance with the On-Time Arrival Standard fell significantly at the opening of the 2012-2013 School Year. In my experience, such a drop off is inevitable given the difficulties in first obtaining accurate information from D.C. Public Schools ("DCPS") about the home addresses of the students entitled to transportation and in then developing an effective routing system for the vehicles to pick up and deliver the students to school in compliance with the governing criteria. The data also show that after experiencing this problem, the Division is trending back towards compliance with the On-Time Arrival Standard within a reasonable period of time.

Based on these statistics and my experience in running the Division, I have concluded that the time period within which the recovery has occurred and that the Defendants have again neared compliance with the On-Time Arrival Standard is reasonable. The trend of the last few weeks persuades me that the Division will shortly attain approximately the same degree of compliance with that Standard as it obtained at the end of the last School Year. I believe that the District will be able to reach that Standard and maintain compliance with the On-Time Arrival Standard for the rest of the School Year. Mr. Lew has assured me that for one year after the Transition Order lapses, the Division will continue to publish information about its On-Time Arrival performance as measured by the metrics that were applied during the Demonstration Project, which will allow parents of special needs children to have current information about the Division's performance after it is no longer subject to Court supervision. Accordingly, I am prepared to recommend that the Court permit the Transition Order to lapse.

2. Continuing Concerns about Student Safety.

As noted above, I have three concerns over the adequacy of the measures taken by the Defendants to protect student safety.

First, in dealing with the existing fleet of vehicles, the safety inspections are not yet where they need to be, especially with respect to inspection of tires and undercarriages. For example, the Division was notified on August 1 that Gilmore Kean's fleet expert had noticed severely worn tires on seven buses. That number increased to 67 on August 9, but Gilmore Kean was not provided with a detailed response from the Division until September 17. In addition, our fleet expert determined that the Division had ceased inspecting front suspension and steering components as part of its routine safety inspections. When he questioned this development, our

fleet expert was informed that the Division lacked the proper jacks or lifts to perform the inspections. Gilmore Kean has been assured that these inspections are now being conducted by vendors. As of this date, however, this development has not been consistently documented.

The issue of safety inspections is not covered by the Transition Order. The Division thus technically remains in compliance with that Order notwithstanding these inspection issues. Mr. Lew has assured me that the Division will address this concern and that for a period of one year after the Transition Order expires, the Division will publish the number of vehicles for which the PMI-A and PMI-B safety inspections have been performed and for which the D.C. Department of Motor Vehicles inspection has been completed.

Second, the Division is in the process of transitioning to a fleet in which some students will be transported by multi-purpose vehicles – vans – rather than by traditional yellow school buses. During the discussions concerning the Demonstration Project, there were extensive conversations between the parties concerning the safety advantages that could result from equipping the alternative vehicles with swing out Stop signs as well as digital signage to warn drivers that a van is carrying students.

Third, as set forth in the document I sent the parties memorializing their agreement on the terms of the Demonstration Project and the conditions under which I would authorize the use of vans, the Defendants agreed to modify the District of Columbia Municipal Regulations to provide that the traffic safety laws applicable to school buses, including the provision making it an offense to pass a school bus when its lights are flashing, will apply to the multipurpose

vehicles that the Defendants will use.³ The Defendants have not yet modified the traffic laws to incorporate these protections.

Mr. Lew has assured me that the Defendants will equip all the alternative vehicles used to transport special needs children with swing out Stop signs and the digital signage necessary to alert other drivers that the vehicles are transporting school students. He also has assured me that the District will revise its traffic safety regulations, as promised, to assure that traffic which passes these alternative vehicles when they are stopped and Caution signals are displayed will be subject to the same penalties as traffic that passes a yellow school bus under similar circumstances.

An element of faith is involved in accepting these assurances, since the steps necessary to finally address these concerns will occur after the Transition Order is vacated and the transportation system is no longer subject to the Court's jurisdiction. I am confident that Mr. Lew will assure that the Defendants will keep the commitments they have made to me to address these safety issues. I am prepared to accept these assurances, and I do not believe that these concerns are of sufficient magnitude to justify delaying the return of control over the transportation system to the Defendants.

3. Concluding Observations.

In making this Recommendation, I wish to share with the Court several observations that I have developed over the course of my service for the Court, first as Transportation Administrator and then as Supervising Court Master.

³ See Ex. C to Defendants' Motion To Vacate Orders Relating to Student Transportation [Dkt. No. 2006-4] at 4.

First, I wish to thank the Court for its steadfast support in the multi-year mission to bring the transportation system back into compliance with governing laws. In all my interactions with Judge Friedman, his concern for the well-being of the children has always been paramount, and he never wavered in his commitment to making certain that special needs students would have the opportunity to pursue their education. Part of the reason why this remedial effort has been so protracted was the Court's insistence that the Defendants' level of performance must satisfy the standards established by law. With the commitment to compliance demonstrated by the City Administrator, the District of Columbia has now achieved and maintained standards of performance that satisfy the Court's requirements.

Second, I want to recognize the contributions of the drivers, attendants, and other employees of the Division. The Division has a unique working environment that functions only because of the intense commitment of some very special people. The work of the Division is a highly labor intensive process. Buses do not drive themselves, and children do not take care of themselves on the buses. If the workers are not committed to the mission of bringing special needs students to school so that they may learn, the system simply will not work. Compliance with the Court's Orders could not have been attained without the dedication that many hundreds of men and women in the Division have demonstrated toward getting the job done. It also is important to understand that the workers are represented by unions and that good labor relations are essential to the continuing success of the Division. I am honored that the Court chose me to work with this very special group of people and to have had the opportunity to share their mission of working for the good of the children each day.

The end of the transportation side of the *Petties* litigation could have come some years earlier if prior Administrations had been willing to provide the organizational and managerial

support and the budget necessary to develop and maintain a compliant transportation system. Rather than resisting the Division's efforts to obtain the necessary resources, the current Administration has demonstrated a greater commitment to coming into compliance with the law and the Court's Orders. It has provided the financial resources necessary to hire qualified managers, purchase new vehicles, and take the multiple additional steps necessary to achieve the goal of compliance.

As I have previously informed the Court, in my judgment the only reliable means of reducing the cost of a compliant student transportation system is to bring better special education services into the local D.C. Public Schools ("DCPS"), so that there is no need to transport special needs students to other schools that charge the District for their education. Successive Administrations and successive Chancellors have paid lip service to this approach, but no progress has been achieved. The Defendants do police how the other schools treat the children who are transported to their doors, but they have never addressed the demand side of the equation. The Division now runs essentially the same number of bus routes as it did when I was appointed Transportation Administrator. I would be very surprised if the cost of student tuition at these other schools has decreased in the nine years since I was appointed, and I know that the cost of transportation has not.

As I have informed Defendants on many occasions, I do not believe that the Division of Transportation fits well within the Office of the State Superintendent of Education ("OSSE"). I think that it would operate in a more efficient manner if it were returned to the supervision of the DCPS or if it reported directly to the City Administrator. The mission of OSSE is high-level policy formulation and review of the performance of the schools subject to its jurisdiction. Its other functions bear little relationship to the steps that are necessary for the successful operation

of the Division: the management of a large blue collar, unionized workforce, and the procurement, routing, operation and maintenance of a substantial mechanical fleet. By contrast, management of DCPS is similar to that of the Division, in that it involves the organization and running of a large workforce and the operation and maintenance of a large, diversified physical infrastructure. Moreover, DCPS enjoys statutory exemptions from the District of Columbia personnel and procurement rules. Experience shows that these exemptions offer significant advantages in the effort to run a compliant transportation system, but they are not available when the system reports to the head of OSSE. In the final analysis, however, determining the proper supervisor for the Division within the District government is a policy decision for the Mayor and the District Council, not for the Court.

Finally, on a personal level, I want to recognize the great contributions that Patrick Kean, Leslie Dews, Keith Pettigrew, and Benjamin Gilmore have made to the successful rehabilitation of the Division and to establishing the foundation for future compliance. I was appointed as Transportation Administrator, but Gilmore Kean was always recognized as the administrative entity with responsibility for management of the Division. It was a privilege to lead this highly qualified and committed team.

I also wish to recognize the contributions of the advocates for the parties in this matter. Robert Utiger, now General Counsel of DCPS, demonstrated the tenacity and steadfastness of a former Marine in his representation of the Defendants. He also recognized the situations in which cooperation with the Transportation Administrator was in his client's best interest. Through his exercise of sound judgment, Mr. Utiger made a difficult situation less contentious and contributed significantly to the success of the collective mission of furthering the interests of special needs students. I also wish to recognize Kelly Bagby, the original attorney for the

Plaintiffs on the transportation aspect of the case, for her important service as an aggressive and effective advocate for this class of children and for their best interests.

Finally, I wish to thank my attorneys at Venable LLP – Kenneth Slaughter, John Cooney, and Brian Hudson – for their constant support and many contributions to the success of my work.

Conclusion

For the reasons set forth above, I recommend that the Court permit the Transition Order to expire on October 31, 2012, without further order of the Court.

Respectfully submitted,

/s/ David Gilmore

David Gilmore
Supervising Court Master

October 11, 2012