



June 18, 2008

U.S. Department of Transportation  
Docket Operations  
West Building Ground Floor  
Room W12-140  
1200 New Jersey Avenue, SE  
Washington, DC 20590

RE: Federal Transit Administration Docket Number 2008-0015

Dear Docket Clerk:

On behalf of the member organizations of the American Public Transportation Association (APTA), the National School Boards Association (NSBA), the American Association of School Administrators (AASA), the Council of the Great City Schools (CGCS), and the National Association of Secondary School Principals (NASSP), we write to provide comment and express our serious concerns over the Federal Transit Administration's (FTA) Notice of Proposed Policy Statement on School Bus Operations Regulations (Notice), published May 19, 2008, at 73 FR 28790. We respond below to the issues we have identified in the notice.

***About APTA***

APTA is a non-profit international trade association of more than 1,500 public and private member organizations, including transit systems; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation. More than ninety percent of Americans who use public transportation are served by APTA member transit systems.

### ***About NSBA***

The National School Boards Association is a not-for-profit Federation of state associations of school boards across the United States. Its mission is to foster excellence and equity in public education through school board leadership. NSBA achieves that mission by representing the school board perspective before federal government agencies and with national organizations that affect education, and by providing vital information and services to state associations of school boards and local school boards throughout the nation.

### ***About AASA***

Founded in 1965, AASA is a non-profit professional association for more than 13,000 local school system leaders. AASA's mission is to support and develop effective school system leaders who are dedicated to the highest quality public education for all children.

### ***About CGCS***

The Council of the Great City Schools, the coalition of the nation's 66 largest central city school districts, works to improve student achievement, management, and operations in urban public school systems across the country. The organization's members operate some of the nation's largest public transit systems serving millions of urban students each day.

### ***About NASSP***

In existence since 1916, NASSP is the preeminent organization of and national voice for middle level and high school principals, assistant principals, and aspiring school leaders from across the United States and more than 45 countries around the world. The mission of NASSP is to promote excellence in school leadership.

## **The Proposed Policy Statement Ignores the Federal Transit Act**

The proposed policy statement is far more than the mere clarification discussed in the Notice. In fact, the proposal would significantly depart from the clear language of 49 USC 5323(f). The statutory limitation on public transportation agencies providing services to students only applies to "schoolbus transportation that exclusively transports students and school personnel in competition with a private schoolbus operator." FTA's proposal to redefine the term 'exclusive' and depart from the common meaning of the word flies in the face of the clear meaning of the statute. FTA's claim that this language is "ambiguous" and resorts to a tortured analysis of legislative history, substituting the absence of a word from committee reports for the presence of the word in the statute itself, amounts to a revision of the statute itself and is far beyond FTA's authority. In fact, that same legislative history makes clear that the word "exclusive" is not ambiguous and was intended by Congress to mean precisely what it says. That Conference Report states:

This subsection (i.e. the prohibition against providing school bus service) is not applicable to the transportation of school children along with other passengers by

regularly scheduled bus service at either full or reduced fares. (House Conf. Rept. No. 93-410 at 87 (1973))

The statutory term "exclusive" is clear, unambiguous, and has been examined in detail by the court in *Rochester-Genesee Regional Transportation Authority v. Hynes-Cherin*. In fact, it is FTA's highly subjective proposed definition of exclusivity that is ambiguous.

Moreover, FTA's proposal is directly contrary to its long history of decisions interpreting this very regulation. FTA has repeatedly approved routes specifically designed to accommodate schools as permissible "tripper service." Some of these opinions include:

Larmers Bus Lines, Inc. v Green Bay Transit System, March 3, 1982 - In this decision, the FTA Regional Administrator, Brigid Hynes-Cherin, found that:

- "As noted in 49 CFR §605.3, the transit operator is permitted to specifically design routes to accommodate the needs of students as long as these routes are open to the public and are part of Green Bay's regularly-scheduled service."
- "To be considered regularly-scheduled it is sufficient if tripper runs operated only while school is in session, a practice followed in Green Bay."
- ... [T]he extended service on the summer school route was operated regularly during the times when school was in session. Further, the service is extended at hours calculated to coincide with school opening and closing times. Both of these are legitimate modifications.

Travelways, Inc. v. Broome County Department of Transportation, December 4, 1985 - In this decision, the FTA Regional Administrator, Douglas G. Gold, found that:

- "The transit operator is permitted by the regulation to specifically designed routes to accommodate the needs of students so long as these routes are open to the public and are part of [the transit operator's] regularly-scheduled service."
- "Other common [permissible] modifications included operating the service only during school months, on school days, and during school opening and closing periods."
- "Broome County's modifications include running a bus to a point, part way along its published route and expressing to school from that point and beginning a second, empty, bus at the point of express and running a part way along the rest of the route. UMTA finds that these modifications are consistent with the regulations."
- "In order to satisfy the criterion of 'open to the public,' it is only necessary that the buses be available to the general public; the volume or level of public (non-school) use is not controlling."

Larmers Bus Lines, Inc. v City of Green Bay, Wisconsin, January 13, 1995 – In this decision, the FTA Regional Administrator, Joel P. Ettinger, found that:

- Even though the facts showed that there was little or no non-student use of the service, the service could be considered “tripper service.” The FTA regional administrator stated:

"In order to satisfy this [non-exclusive] requirement it is only necessary that the buses be available to the general public. The volume or level of public use is not controlling. However, it is necessary to ascertain from the operating circumstances whether or not the service is, in fact, opened to public, i.e. could members of the public use the tripper service if they so desired?"

- "As stated in 49 CFR Part 605.3, [the federal grantee] is permitted to design special routes to accommodate the needs of students as long as the routes are open to the public and are part of Green Bay's regularly-scheduled service. The special service operated regularly during the times when school was in session. Further, the routes were extended at hours calculated to coincide with school opening and closing times. Both of these activities are legitimate modifications."
- Service that operated only on school hours during the time of year that school was in session could be considered “tripper service.”

Contrary to FTA’s assertion, court decisions, such as in *United States ex rel. Larmers v. City of Green Bay*, have not expanded the regulatory definitions but have merely echoed the administrative decisions issued by FTA itself.

### **The Proposal is Inappropriate as a Policy Statement**

Even if the proposed action were within FTA’s discretion, it would be inappropriate to effect the change through a policy statement, without reference to economic impact or other requirements of the full regulatory process. After more than 30 years of application, FTA seeks to rewrite regulatory definitions that have guided transit agencies and school administrators without analysis, directly contrary to the requirements of the *Administrative Procedure Act*, 5 USC 551, et seq. or the *Unfunded Mandates Reform Act*, 2 USC 1501, et seq. To ignore the massive impact on school districts across the nation and the public transit agencies many of them rely on would be both inappropriate and irresponsible. The proposed policy changes would add unplanned costs to local school districts budgets and disrupt schedules for high schools and some middle schools based on planned bus schedules so late in the summer that school districts would be hard pressed to make alternative transportation plans. Further there is no evidence presented in the proposed policy regarding the effect on the quality of transportation for students which should be the foremost consideration in the policy.

Moreover, FTA has already made clear its intent to make these same changes to the regulation itself in a future Notice of Proposed Rulemaking to be issued “expeditiously.” Clearly,

issuing a final policy statement prior to the NPRM effectively forecloses the value of public comment during the formal rulemaking process and renders the process a nullity.

FTA cannot use a policy statement to sidestep the administrative requirements of a rulemaking or to predetermine the result of a rulemaking although this proposed policy statement effectively does both.

### **The Impacts of the Proposed Policy are Extreme**

While FTA's failure to analyze the economic and societal impacts of this proposed action and unreasonably short response time to this proposal limit the transit and educational communities' opportunity to compile a full accounting of the impacts, it is clear that it will have devastating effects. One transit agency reports the change would affect some 40 percent of its routes, another reports over 80 percent of its supplemental service trips would be impacted, many schools report this proposal would result in a complete disruption of service, and in at least one case, an entire state system would suffer.

The proposed policy changes would add unplanned costs to local school districts budgets and disrupt schedules for high schools and some middle schools based on planned bus schedules so late in the summer that school districts would be hard pressed to make alternative transportation plans. Students unable to find substitute transportation would be left without a means of getting to and from school, especially among our most vulnerable student populations that are entirely dependent on public transportation.

We urge FTA to rescind the proposed policy statement in its entirety. Each of our organizations is ready and willing to assist FTA in the careful fact finding and research required before considering such a drastic policy change. For more information, please contact Jim LaRusch, APTA's Chief Counsel at (202) 496-4808 or email [jlarsch@apta.com](mailto:jlarsch@apta.com); Deborah Rigsby, NSBA's Director of Federal Legislation at (703) 838-6202 or email [drigsby@nsba.org](mailto:drigsby@nsba.org); Bruce Hunter, AASA's Associate Executive Director, Public Policy at (703) 875-0738 or email [bhunter@aasa.org](mailto:bhunter@aasa.org); Jeffrey A. Simering, CGCS's Director of Legislative Services at (202) 393-2427 or email [jsimering@cgcs.org](mailto:jsimering@cgcs.org); Amanda Karhuse, NASSP's Director of Government Relations at (703) 860-7241 or email [karhusea@principals.org](mailto:karhusea@principals.org).

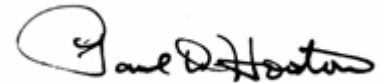
Sincerely,



William W. Millar  
President  
APTA



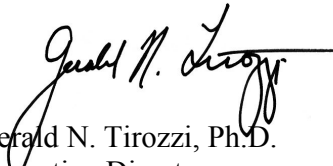
Barbara Bolas  
President  
NSBA



Dr. Paul D. Houston  
Executive Director  
AASA



Michael Casserly  
Executive Director  
CGCS



Gerald N. Tirozzi, Ph.D.  
Executive Director  
NASSP