February 17, 2009

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 2008-0044

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 Rulemaking (NPRM) concerning School Bus Operations, published November 18, 2008, at 73 FR 68375.

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. It’s 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 Definition of “School Bus Operations” Ignores Federal Transit Law

In this NPRM, FTA has restated the gist of its September 16, 2008 policy statement. That policy statement and this NPRM would effectively re-write the long standing statutory provisions on school service, the legislative history that accompanied those provisions, and its own long-standing interpretations of that language.

The proposed definition would substitute the term “primarily” for the legislative term “exclusively.” 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” (emphasis added). While “primarily” is defined as chiefly, principally, or mainly, it is clearly not the same as “exclusively.” While FTA has relied on common law history to defend its use of a “reasonable person” standard, it ignores the common definitions of everyday words. FTA’s claim to be
supporting Congressional intent is likewise flawed. The Conference Report discussing this specific word choice is clear:

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))

Had Congress intended some other definition for the term “exclusive,” it would have noted as much in the thirty five years since House Conference report 93-410 was issued. Courts, including the court in Rochester-Genesee Regional Transportation Authority v. Hynes-Cherin, have reviewed the legislative and regulatory history of this very issue and uniformly found as much.

FTA’s claim that it’s proposed “reasonable person” standard (accompanied by a non-exhaustive list of ten factors that might be considered in accessing whether a service is “primarily” for students) is somehow objective flies in the face of reason. The proposed change to this “reasonable person” standard is not only contrary to established law and policy, it is dangerously ambiguous.

We also note that FTA proposes to eliminate the term “tripper service” from analysis of student transportation, despite having attempted to redefine that term just three months prior to issuing this NPRM. Whether FTA characterizes service as the proposed exemption in draft section 605.12 of the regulation or as tripper service, the same analysis must be applied. The long history of decisions, interpreting not only this regulation but the underlying statutory authority as well, cannot be ignored. 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 Proposed Exemptions Exceed FTA’s Authority

FTA’s proposal to treat fact patterns exempt from regulation through the terms of the underlying statute as mere exceptions, and proposal to allow itself to exercise discretionary authority over use of those exceptions, is well beyond any authority granted by Congress. The report language quoted above makes this clear – “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.” Clearly, the regulation cannot include what the statute unambiguously excludes.

FTA further misinterprets non-use of existing exemptions. While noting the infrequent use of existing exemption authority, FTA ignores the fact that exemptions have not been sought because desired services could all be provided under the tripper service model. Transit agencies do not seek to operate exclusive school bus services and have not. All tripper service is open to the public and meets the statutory and long-existing regulatory standards without reference to an exemption.

FTA’s Proposal Inappropriately Shifts Burdens to Transit Agencies

FTA’s proposal inappropriately shifts several burdens to transit agencies. In its “petition for exception” format, FTA has presumed the transit agency must prove proposed service will be “adequate, safe, and [provided] at a reasonable rate.” In fact, pursuant to the enabling statute, this is a standard FTA must apply to private providers available when a public agency seeks to provide exclusive service. It is not applicable to the public agency at all.

Additionally, FTA seeks to saddle transit agencies with the burden of establishing a negative – that “non private operator having a place of business in the … geographic service area can provide” the service. Compounding this issue is the fact that the standard for proving this negative is completely subjective – the “satisfaction of the Chief Counsel” – and unworkable.

FTA’s Proposed Review Standards are Inconsistent

FTA’s proposal to overrule its own triennial review findings and substitute a complaint finding for those results is patently unreasonable. When FTA affirmatively finds, through its triennial review process, that a grantee has complied with its responsibilities under the regulation, there is no basis for overturning that finding. The fact that FTA “may not have all the
pertinent facts” at the time of the triennial review relates solely to FTA’s shortcomings in the review process and should not form the basis for later punishing its grantees.

**FTA’s Proposed Grandfathering Provision is Hollow**

While recognizing the disruptive potential for schools that would accompany any immediate change to practices, FTA has eliminated almost all value in its grandfathering provision by making it unavailable to virtually every transit agency and school district that relies on public transportation services. No grandfathering provision should depend on payments made during any transition period.

**FTA’s Rulemaking Analysis is Fatally Flawed**

Even if the proposed action were within FTA’s discretion, the declaration that this is not a significant rulemaking is patently false. A simple review of publicly reported calculations in Washington, DC ($15-20M in additional costs per year) makes it clear that FTA has not sufficiently studied the matter and does not understand the implications of its proposal. Implementation of the proposed rule would disrupt transportation plans for thousands of students, saddle school districts with transportation costs far beyond their ability to pay, and ensure the most vulnerable students are left behind. Clearly, this would amount to a material adverse impact on the education sector, contrary to FTA’s assertions. This proposal is an unfunded mandate in excess of the statutory minimum of $120.7M and will clearly cost more than that amount to implement. The remaining option would be to abandon students with no other viable means of going to classes.
We urge FTA to rescind this NPRM in its entirety, revoke the associated policy statement dated September 16, 2008, and return to the statutory and regulatory standards found by the various regional administrators and courts cited above. Each of our organizations is ready and willing to assist FTA in any additional fact finding deemed necessary. For more information, please contact Jim LaRusch, APTA’s Chief Counsel at (202) 496-4808 or email jlarusch@apta.com; Reginald M. Felton, NSBA’s Director of Federal Relations at (703) 838-6782 or email rfelton@nsba.org; Bruce Hunter, AASA’s Associate Executive Director, Public Policy at (703) 875-0738 or email bhunter@aasa.org; Jeffrey A. Simering, CGCS’s Director of Legislative Services at (202) 393-2427 or email jsimering@cgcs.org; Amanda Karhuse, NASSP’s Director of Government Relations at (703) 860-7241 or email karhusea@principals.org.

Sincerely,

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