

WAWF fields	Data to enter
Issue By Department of Defense Activity Address Code (DODAAC)	DODAAC of activity that issued the contract.
Admin DODAAC	DODAAC of activity that administers the contract.
Inspect By DODAAC (if applicable)	N/A—leave blank.
Ship To Code	DODAAC of the Ship To activity.
Acceptor at Other DODAAC	Refer to Issue By DODAAC: If Issue By is SPM1, use SP1001. If Issue By is SPM4, use SP4001. If Issue By is SPM5, use SP5001. If Issue By is SPM7, use SP7001.
PAY DODAAC	DODAAC of the activity that pays the contract.
Attachment	Attach customer delivery documentation. ¹ (Attachments created in any Microsoft Office Product or in PDF format are acceptable.)

¹ Contractors are required to attach TPD complying with subparagraphs (a) and (b) of this clause to their WAWF document. To add attachments, enter contract information and then click on 'Create Document.' Then click on the 'Misc Info' tab. Attachment specific buttons will appear on the right side of the page. Select document to attach and click 'Open.' Then click 'Continue.' Your attachment will appear in the dropdown box. Click on the 'Header' tab to return to your original document and click 'Submit.'

(d) *Responsibility for supplies.* (1) Title to the supplies passes to the Government after delivery to the point of first receipt by the Government and subsequent acceptance.

(2) Notwithstanding any other provision of the contract, order, or blanket purchase agreement, the Contractor shall:

(i) Assume all responsibility and risk of loss for supplies not received at destination, damaged in transit, or not conforming to purchase requirements; and

(ii) Replace, repair, or correct those supplies promptly at the Contractor's expense, if instructed to do so by the Contracting Officer within 180 days from the date title to the supplies vests in the Government.

End of Clause

Dated: May 7, 2008.

Patricia L. Toppings,
OSD Federal Register Liaison Officer.
Department of Defense.

[FR Doc. E8-11124 Filed 5-16-08; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 605

[Docket No. FTA-2008-0015]

Notice of Proposed Policy Statement on FTA's School Bus Operations Regulations

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Proposed policy statement; request for comments.

SUMMARY: Through this notice, the Federal Transit Administration (FTA) proposes to revise its policy with respect to "tripper service" and "school bus operations" under 49 CFR Part 605. FTA seeks comment on this notice from interested parties. After consideration of the comments, FTA will issue a second **Federal Register** notice responding to

comments received and noting any changes made to the policy statement as a result of comments received.

DATES: FTA must receive all comments by June 18, 2008. FTA will consider late filed comments to the extent practicable.

ADDRESSES: To ensure your comments are not entered more than once into the Docket, please identify your submissions with the following Docket No. FTA-2008-0015. Please make your submissions by only one of the following means:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Fax:* 1-202-493-2251.

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

- *Hand Delivery:* The West Building of the U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: You must include the agency name (Federal Transit Administration) and the Docket number (FTA-2008-0015) at the beginning of your comment. You should include two copies of your comment if you submit it by mail. If you wish to receive confirmation that FTA received your comment, you must include a self-addressed stamped postcard. Note that FTA will post all comments that it receives, including any personal information provided therein, without change to <http://www.regulations.gov>.

Due to security procedures in effect since October 2001 regarding mail deliveries, mail received through the U.S. Postal Service may be subject to delays. A party that submits a comment responsive to this notice should consider using an express mail firm to

ensure the prompt filing of any submissions not filed electronically or by hand.

FOR FURTHER INFORMATION CONTACT:

Linda Lasley, Assistant Chief Counsel, Legislation and Regulations Division, Office of Chief Counsel, Federal Transit Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., 5th Floor—East Building, Washington, DC 20590. E-mail: Linda.Lasley@dot.gov. Telephone: (202) 366-1674.

SUPPLEMENTARY INFORMATION:

Background

Introduction

FTA issues this Notice of Policy Statement and Request for Comments to provide guidance in the context of the recent decision of the United States District Court for the Western District of New York in *Rochester-Genesee Regional Transportation Authority v. Hynes-Cherin*.¹ The Court's decision in *Rochester-Genesee Regional Transportation Authority* set aside FTA's interpretation of its school bus operations regulations under 49 CFR Part 605.² In the proposed policy set forth below, FTA clarifies its guidance regarding FTA's interpretation of its school bus operations regulations. FTA intends to construe the term "tripper service" to include only existing routes with modified fare collection or subsidy systems, frequency of service, and *de minimis* route deviations from existing route paths in the immediate vicinity of schools to stops located at or in close proximity to the schools. Consistent with that construction, FTA would interpret the definition of "school bus operations" in 49 CFR 605.3(b) to include service that a reasonable person would conclude primarily was designed

¹ No. 07-CV-6378L 1 (W.D.N.Y. Jan. 24, 2008).

² *Id.* at 20.

to accommodate students and school personnel and only incidentally to serve the nonstudent general public.

FTA expects to issue expeditiously a notice of proposed rulemaking to provide clearer definitions of “tripper service” and “school bus operations,” as well as generally to update the existing school bus regulation.

Statutory and Regulatory Framework

In 1973, Congress passed the Federal-Aid Highway Act, which requires FTA to provide financial assistance to a grantee under 49 U.S.C. Chapter 53 only if the grantee agrees “not to provide schoolbus transportation that exclusively transports students and school personnel in competition with a private schoolbus operator.”³ Congress’s intent in enacting this provision was to prevent unfair competition between federally funded public transportation systems and private school bus operators.⁴

In 1976, the Urban Mass Transportation Administration, now FTA, codified regulations under 49 CFR Part 605 which implemented the above statutory provision.⁵ Under 49 CFR 605.14, FTA may not provide financial assistance to a grantee “unless the applicant and the Administrator shall have first entered into a written agreement that the applicant will not engage in school bus operations exclusively for the transportation of students and school personnel in competition with private school bus operators.”⁶ The regulation defines “school bus operations” as “transportation by bus exclusively for school students, personnel and equipment * * *.”⁷

The regulation exempts “tripper service” from the prohibition against school bus operations.⁸ “Tripper service” is “regularly scheduled mass transportation service which is open to the public, and which is designed or modified to accommodate the needs of school students and personnel, using various fare collections or subsidy systems.”⁹

Rochester-Genesee Regional Transportation Authority v. Hynes-Cherin

On January 24, 2008, the United States District Court for the Western District of New York issued a decision in *Rochester-Genesee Regional Transportation Authority* which set aside FTA’s interpretation of its school bus operations regulations under 49 CFR part 605.¹⁰ The Court allowed the Rochester-Genesee Regional Transportation Authority (RGRTA) to restructure its public transportation operation through the addition of 240 new express school bus routes proposed to serve the Rochester City School District (RCSD) and its students.¹¹

In its decision, the Court narrowly interpreted the word “exclusively” in FTA’s definition of “school bus operations” and concluded that, because a member of the general public could, hypothetically, board a bus along one of RGRTA’s proposed new 240 express routes, RGRTA’s service would not “exclusively” transport students. The Court therefore concluded that RGRTA’s proposed express bus service did not constitute impermissible school bus operations.¹²

FTA believes that, following the Court’s broad interpretation of “tripper service,” a grantee could conclude that it would be permitted to restructure its public transportation operation dramatically to accommodate the needs of a local school district and its students, thereby displacing private school bus operators and their employees, provided the system keeps the service technically open to the public.¹³

Prior FTA Policy

Trippler Service

Under its tripper service definition, FTA originally allowed grantees to accommodate students only with respect to “different fare collections and subsidy systems.” However, through administrative decisions over the years, FTA broadened its interpretation of its tripper service definition to allow grantees to make accommodations beyond subsidies and fare collection systems. Specifically, FTA began to allow its grantees to make minor modifications to its route paths and frequency of service. As FTA stated in one matter concerning the Erie Metropolitan Transit Authority:

¹⁰ See *Rochester-Genesee Reg’l Transp. Auth., No. 07-CV-6378L* 1.

¹¹ *Id.* at 20–36.

¹² *Id.* at 20–24.

¹³ *Id.* at 24–36.

Read narrowly, “modification of regularly scheduled mass transportation service to accommodate the needs of school students and personnel” means using different fare collections and subsidy systems. In practice, “modification of mass transportation service” has been broadened to include minor modifications in route or frequency of scheduling to accommodate the extra passengers that may be expected to use particular routes at particular times of day.¹⁴

For example, in *Travelways, Inc. v. Broome County Department of Transportation*, FTA stated that, “A familiar type of modification would be where the route deviates from its regular path and makes a loop to a school returning back to the point of deviation to complete the path unaltered.”¹⁵ FTA reaffirmed this particular interpretation of tripper service in its October 12, 2007, RGRTA determination by permitting RGRTA to operate four loop-like route extensions, each only several blocks in length, to accommodate the needs of school students.¹⁶

FTA has not, however, allowed a grantee such as RGRTA to restructure its public transportation operation solely to accommodate the needs of school students—such a modification would be a major modification. Thus, in its October 12, 2007 letter to RGRTA, FTA rejected RGRTA’s proposed addition of 240 new routes because it would have constituted a major overhaul of RGRTA’s public transportation system solely to accommodate the needs of school students.¹⁷

In addition to minor modifications to route paths, FTA previously has allowed grantees to modify route schedules and the frequency of service. For example, in *Travelways*, FTA stated, “Other common modifications include operating the service only during school months, on school days, and during school and opening and closing periods.”¹⁸

Jurisprudence in United States courts has broadened the scope of FTA’s tripper service definition to include essentially any modification. In *United States ex rel. Lamers v. City of Green Bay*, the Seventh Circuit stated (arguably in dicta), “[T]he City may completely redesign its transit system to

¹⁴ See *In re Erie Metropolitan Transit Authority* 1, 4 (1989).

¹⁵ *Travelways, Inc. v. Broome County Dep’t of Transp.* 1, 7 (1985) (allowing a grantee to run a bus to a point and express to a school from that point if the grantee ran a second bus along the regular route path from the point at which the first bus expressed to the school).

¹⁶ Letter from Federal Transit Administration to Rochester-Genesee Regional Transportation Authority at 6 (Oct. 12, 2007).

¹⁷ *Id.* at 2–6.

¹⁸ *Travelways* at 7.

³ Federal Aid Highway Act of 1973, Pub. L. 93–87, section 164(b), 87 Stat. 250, 281–82 (1973) (codified as amended at 49 U.S.C. 5323(f) (2006)).

⁴ *Chicago Transit Auth. v. Adams*, 607 F.2d 1284, 1292–93 (7th Cir. 1979) (citing H.R. Rep. No. 93–410, at 87 (1973) (Conf. Rep.); S. Rep. No. 93–355, at 87 (1973) (Conf. Rep.)).

⁵ See Codification of Charter Bus Operations Regulations, 41 FR 14,122 (Apr. 1, 1976).

⁶ 49 CFR 605.14 (2007).

⁷ 49 CFR 605.3(b).

⁸ 49 CFR 605.13.

⁹ 49 CFR 605.3(b).

accommodate school children as long as all routes are accessible to the public and the public is kept informed of route changes.”¹⁹ Citing *Lamers*, the Court in *Rochester-Genesee Regional Transportation Authority* allowed RGRTA to restructure its public transportation system by adding 240 new routes to accommodate the needs of RCSD and its students.²⁰

“Exclusive” School Bus Operations

FTA has had little prior formal policy regarding “exclusive” school bus operations under 49 CFR Part 605. In 1982, FTA attempted to clarify the meaning of “exclusive” school bus service through a rulemaking.²¹ However, in 1990, FTA withdrew the rulemaking because it believed that the regulations were “functioning adequately.”²²

In school bus adjudications, parties did not directly address the issue of “exclusive” school bus operations until *United Food and Commercial Workers District Union Local One v. Rochester-Genesee Regional Transportation Authority*.²³ In resolving that issue, FTA examined the Federal-Aid Highway Act of 1973, and finding that the language of the Act’s school bus provision was ambiguous, FTA looked to the legislative history of Act for some guidance.

In an early version of the Federal-Aid Highway Act, Congress did not use the word “exclusively” in the school bus provision, but rather, focused the language of the Act on preventing unfair competition between federally funded grantees and private school bus operators. That language is as follows:

[N]o financial assistance is to be provided to an applicant which engages, directly or indirectly in transporting school children and personnel to and from school and school authorized functions or which proposes to expand present routes, schedules, or facilities for that purpose *in competition with or supplementary to service criteria provided by a private transportation company* or other person so engaged in so transporting such children and personnel.²⁴

After the bill passed the House and the Senate, the conference modified the above provision in an effort to further protect private school bus operators

from unfair competition with federally funded grantees, but the conferees still did not use the word “exclusively.” The conferees used the following language:

[N]o federal financial assistance is to be provided under those provisions of law for the purchase of buses to any applicant who has not first entered into an agreement with the Secretary of Transportation that *the applicant will not engage in school bus operations in competition with private school bus operators*.²⁵

As evinced by the above language, Congress intended to prevent unfair competition between federally funded grantees and private school bus operators. Therefore, in *District Union Local One*, FTA concluded that it would defeat the purpose of the Federal-Aid Highway Act and eviscerate 49 U.S.C. 5323(f) if it accepted a grantee’s argument that its service was technically nonexclusive and open to the public, but where: (1) The grantee had designed the service specifically for students, without regard to demand from the nonstudent public; (2) the vast majority of passengers were students; and (3) as a result, the routes would displace the private school bus industry and its workers.²⁶ In efforts to prevent the unfair competition which Congress sought to prevent, FTA rejected RGRTA’s arguments and prohibited RGRTA from providing its “exclusive” school bus service. FTA utilized this same policy and analysis when it struck down RGRTA’s proposed service in its October 12, 2007 letter²⁷ and again in *Laidlaw Transit, Inc. v. Rochester-Genesee Regional Transportation Authority*.²⁸

The Court in *Rochester-Genesee Regional Transportation Authority*, however, applied a narrower, more restrictive analysis when it interpreted the word “exclusively” in the context of “school bus operations.” Notwithstanding the fact that RGRTA designed its 240 express school bus routes exclusively for the benefit of RCSD and its students, without regard for demand from the nonstudent public, the Court held that, because a member

of the general public could board a bus along one of RGRTA’s proposed 240 routes, RGRTA’s proposed service was not “exclusive” and therefore did not constitute impermissible “school bus operations.”²⁹

Proposed FTA Policy

Purpose of Proposed FTA Policy

In the proposed policy set forth below, FTA clarifies its guidance regarding FTA’s interpretation of its school bus operations regulations under 49 CFR Part 605 in light of the Court’s decision in *Rochester-Genesee Regional Transportation Authority*. FTA respects the Court’s decision in the Western District of New York. However, FTA finds that the Court’s decision is problematic because, if applied elsewhere in the United States, it could obstruct FTA’s ability to execute and implement Congress’ school bus prohibition and Congress’ express intent regarding that prohibition. Therefore, FTA issues this Notice of Policy Statement and Request for Comment to clarify the status of FTA’s guidance regarding its interpretation of its school bus operations regulations under 49 CFR part 605, and to resolve, for jurisdictions outside of the Western District of New York, conflicting issues between FTA’s school bus operations policy and the Court’s decision in *Rochester-Genesee Regional Transportation Authority*.

In addition, FTA intends to issue expeditiously a notice of proposed rulemaking to provide clearer definitions of “tripper service” and “school bus operations” as well as generally to update the existing school bus regulation.

Trippler Service

With respect to a grantee’s regularly scheduled public transportation service, FTA narrowly would interpret the definition of “tripper service” under 49 CFR 605.3(b) to allow a grantee to (1) utilize “various fare collections or subsidy systems,” (2) modify the frequency of service, and (3) make de minimus route deviations from existing route paths in the immediate vicinity of schools to stops located at or in close proximity to the schools. For example, a grantee would be permitted to provide more frequent service on an existing route to accommodate increased student ridership before and after school. FTA would allow a grantee to alter existing route paths to accommodate the needs of school students by making truly de minimus route deviations from existing

¹⁹ *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1019 (7th Cir. 1999).

²⁰ *Rochester-Genesee Reg’l Transp. Auth.*, No. 07–CV–6378L at 30.

²¹ Advance Notice of Proposed Rulemaking, 47 FR 44,795, 44,803–04 (Oct. 12, 1982).

²² Notice of Proposed Rulemaking: Withdrawal, 55 FR 334 (Jan. 4, 1990).

²³ FTA School Bus Docket Number 2006–02 1 (2007).

²⁴ S. Rep. No. 93–355, at 86 (1973) (emphasis added).

²⁵ S. Rep. No. 93–355, at 87 (emphasis added).

²⁶ *District Union Local One*, FTA School Bus Docket Number 2006–02 at 10–11 (holding the Rochester-Genesee Regional Transportation Authority’s (RGRTA) school bus service was designed and modified “exclusively” for the Rochester City School District and its students because students constituted a significant proportion of passengers on the school bus routes and RGRTA designed the routes without regard to demand from the nonstudent public).

²⁷ See Letter from Federal Transit Administration to Rochester-Genesee Regional Transportation Authority at 3–4 (Oct. 12, 2007).

²⁸ See *Laidlaw Transit, Inc. v. Rochester-Genesee Reg’l Transp. Auth.*, FTA School Bus Docket Number 2007–01 1, 4 (2007).

²⁹ *Rochester-Genesee Reg’l Transp. Auth.*, No. 07–CV–6378L at 20–24.

route paths to drop off and pickup students at stops located on school grounds or in close proximity to the schools. FTA believes that its proposed policy regarding its interpretation of the definition of “tripper service” is consistent with both the statutory language and the language of 49 CFR 605.3(b). The policy permits only the type of design or modification accommodations that FTA historically has allowed.

“Exclusive” School Bus Operations

To effectuate the intent of Congress when it enacted its school bus operations prohibition now codified at 49 U.S.C. 5323(f), FTA narrowly would interpret the definition of “school bus operations” under 49 CFR 605.3(b) to encompass any service that a reasonable person would conclude primarily was designed to accommodate students and school personnel, and only incidentally to serve the nonstudent general public. FTA believes that returning to this interpretation of the definition of

“school bus operations” is consistent with the legislative history on the issue and would allow FTA to effectively implement the express intent of Congress, which is, to prevent unfair competition between federally funded grantees and private school bus operators.

Issued in Washington, DC, on this 14th day of May 2008.

James S. Simpson,

Administrator.

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